

**From Principles to Rules and from
Musar to Halakhah:
The Hafetz Hayim's Rulings on
Libel and Gossip**

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I would like to open this article with a nice little story that was related to me by the late Prof. Israel Ta-Shma.¹ He himself questioned the credibility of this story, but even if it never actually took place, I think that it can teach us something about the pioneer rulings of Rabbi Israel

* My work on the subject of this article began with courses that I taught on the Hafetz Hayim at Beit Morasha (2002-3) and the Hebrew University (2003-4). I further developed ideas relating to this topic in a lecture that I delivered at the 14th World Congress of Jewish Studies, 2005, on "Jewish Law and Religious Ethics – Toward an Abstract Research Model." The comments of Profs. Avi Sagi, Yedidiah Stern and other colleagues on that lecture helped crystallize some of the ideas relating to this research. I am grateful to my students in these courses and to all those who helped, as well, to crystallize the ideas on the subject. I am also grateful to Profs. Leib Moscovitz, Moshe Halbertal and Arye Edrei for their helpful comments on a draft of this article.

1 The late Professor Ta-Shma did not remember the exact details of what he had heard, and I am not certain that I recall all that he recounted. The essential points, however, are etched in my memory. Unfortunately, I only met Professor Ta-Shma a few times, and only two of those were long meetings – one in 1995 and one in 2003. This story was shared in the latter meeting. Both conversations were fascinating intellectual experiences in which Professor Ta-Shma demonstrated astute insights into halakhic research and recounted anecdotes and historical details that were no less fascinating. Although I summarized some of our discussions in writing, this story was not included. I am, therefore, relying solely on my memory.

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Meir ha-Cohen (1839-1933), known as the Hafetz Hayim, on the laws of *lashon ha-ra* (libel; lit. “evil tongue”) and *rekhilut* (gossip).² This is how the story goes:

In the year 1873, when the Hafetz Hayim finished writing his book *Hafetz Hayim* on libel and gossip, he wished to publish it with rabbinical endorsements, as was customary. Since he also wanted to distribute the book among the *Hasidim*, he wished to get an

- 2 Rabbi Israel Meir ha-Cohen (Kagan), *Hafetz Hayim* (Jerusalem, 1999); references will be made to this widespread edition. This book, by which its author is known, has already become a classic, as reflected in the large number of commentaries, addenda, and abridgments that it has engendered. Some of these works have been published with the original text of the *Hafetz Hayim*. I will mention a few of these works that have impacted on my research and that I refer to in this work: M. Kaufman, *Netivot Hayim al Sefer Hafetz Hayim* (Bnei Brak, 2005); B. Cohen, *Helkat Binyamin al Sefer Hafetz Hayim* (New York, 2004); S. Rosner, *Ali Be'er u-Mekor ha-Be'er al Sefer Hafetz Hayim* (Jerusalem, 2005); H. Levi, *Marpe Lashon* (Rekhasim, 1991). Above them all, the DBS software, which includes the *Hafetz Hayim* in its database, was of tremendous help to me.

Additional evidence of the importance of the book is the number of critical comments written on it, including: S. Z. Kook, “He’arot le-Sefer Hafetz Hayim,” included in his son’s book: A. Y. Kook, *Mitzvat Re’ayah* (Jerusalem, 1985), 100-103 (some of his comments are among the most insightful and persuasive that I have seen on the *Hafetz Hayim*); A. Y. Kook, *Mitzvat ha-Re’ayah* (Jerusalem, 1985), 97-98; S. A. Wertheimer, *She’elat Shelomo* (Jerusalem, 1932), vol. 1, Section 58, p. 52; S. B. Werner, “He’arot ve-Iyunim be-Sefer Hafetz Hayim,” in *Volume in Memory of Shmuel Baruch Werner zt”l*, ed. Y. Buxbaum (Jerusalem, 1996), 109-10; O. Hadaya, *Shelom Avdo* (Jerusalem, 1996), 222-33; Y. Hutner, “He’arot ve-Hagahot Al Sefer Hafetz Hayim,” in *Volume in Memory of Maran ha-Pahad Yitzhak zt”l* (Jerusalem, 1984), 329-36; R. Grozovsky, “He’arot be-Limmud Sefer Hafetz Hayim,” *Kol ha-Torah* 55 (Tishrei, 2004); see also there the comments of H. Sacks (the grandson of the Hafetz Hayim), S. H. Lafaire and M. M. Maggid, 58-68; S. Z. Auerbach, “He’ara be-Inyan Lashon ha-Ra,” in *Derekh Aliyah*, ed. D. Z. Eliach (Jerusalem, 1976), following the endorsements (no page numbers). In addition, many comments appear in periodicals, such as: *Shofar ha-Hafetz Hayim*, *Areshet Sefateinu*, and *Marpe Lashon*. Of particular note is M. Samsonovitch, “Kuntres Min ha-Mayim Meshitihu,” *Marpe Lashon* 3 (1984): 33-97. Special thanks to Avi Katz who referred me to some of these critiques.

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endorsement from one of the prominent Hasidic masters of the time. He therefore sent an emissary to the Rebbe of Alexander,³ as well as to a few prominent rabbis, to give them a copy of the new book and ask for their endorsements. The emissary reached the Polish rebbe, and requested his endorsement.

“What is the book about?” – asked the rebbe.

“About the laws of libel” – he replied.

“And why do we need a book on the laws of libel?” – the rebbe continued.

Embarrassed by the strange question, the emissary answered plainly: “The book teaches that one may not hurt his neighbor even by speech.”

To this the rebbe responded: “To hurt one’s neighbor one does not need a tongue or speech; it’s enough just to make an ‘eh!’” – and he made a slight dismissive gesture with his hand.

Seeing that the rebbe refused to give him the desired endorsement, the emissary continued on to the other personalities, all of whom complied willingly. When he came back to the Hafetz Hayim, the emissary reported that all the referees gave him their endorsements, except for the Rebbe of Alexander. “The Rebbe of Alexander? – ‘eh!’” – the Hafetz Hayim responded, and made a slight dismissive gesture with his hand...

The emissary told him about his meeting with the rebbe and the content of their conversation. Hearing that, the Hafetz Hayim hurried to add an article to the book, stating that “there is no difference between one who speaks libel about another person ex-

3 Professor Ta-Shma was not certain at all as to whether the rebbe in the story was the Rebbe of Alexander, but remembered that it was a Polish rebbe. In fact, it could not have been the Rebbe of Alexander. The first Rebbe of Alexander, R. Feivel of Gritza, died in 1848. His son R. Yehiel, who succeeded him, only began to serve in 1878. The interim rebbe, Hanoach Henich of Alexander, who was not in the direct line of the dynasty but held the title of Rebbe of Alexander, died in 1870. Thus, in the year that the *Hafetz Hayim* was published, 1873, there was no Rebbe of Alexander. Nevertheless, I have recounted the story here as I heard it.

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plicitly and one who does it by intimation; in any case it is considered libel.”⁴

The story is light and simple, and we should not attribute too much to it, particularly when we do not know its original source and the degree of its historical credibility. Nevertheless, I would like to suggest a somewhat creative interpretation of its message, that may help us understand the Hafetz Hayim’s influential enterprise in the field of libel laws. This enterprise is virtually the peak of a process in which libel was transformed from a *principle*-based domain into a *rule*-based discipline, in the Dworkinian sense of these terms. When the Rebbe of Alexander insinuated that there is no need for a book that articulates the laws of libel, he meant that it would be better to leave this topic in the realm of principles – in this case the principle that “one may not hurt his neighbor even by speech.” In the example that he gave, he wanted to intimate that one cannot cover all of the possible cases of libel in rules, and that the formulation of the norms in the form of rules would, therefore, needlessly diminish the force of the principle. The Hafetz Hayim’s response represents the opposite tendency: he thought that the norms for libel should definitely be formulated as all-inclusive rules. Therefore, when he was confronted by a case that the existing rules did not cover, he sought to articulate it, too.

As I will clarify later on, the traditional rule-centered genre in Jewish tradition is *halakhah*, while the principle-centered one is known as *musar*. The Hafetz Hayim’s literary enterprise in this branch should therefore be considered as the **halakhization of *musar***,⁵ or, if we allow

4 *Hafetz Hayim*, Part. 1, 1:8. In n. 13 there, he points out that the same applies to the wink of an eye. According to Professor Ta-Shma’s recollection, the said section was added at the end of the book, since it came to the Hafetz Hayim’s attention after the book was practically completed. The fact that it appears at the end of the first part, and that the Hafetz Hayim refers to its location in other places in the book, seem to indicate that it was not a last minute addition, and strengthens the doubts regarding the credibility of this story.

5 A few have already pointed to the fact that the halakhization of *musar* is

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ourselves a less accurate term, a **legalization of ethics**.⁶ In the following sections, I will analyze this process. I will not discuss the Hafetz Hayim's motivations for the halakhization of the prohibition against libel,⁷ but will focus on the normative essence of the process itself. First I will introduce the theoretical framework for the examination of the relationship between halakhic literature and *musar* literature. I will then demonstrate that the prohibition against libel had usually been considered a branch of *musar*, and that it was the Hafetz Hayim who transformed it into a branch of *halakhah*. After having analyzed the methods used to implement this transformation and its consequences, I will try to evaluate its degree of success.

the path of the Hafetz Hayim. See: Z. Kaplan, "Israel Meir ha-Cohen," in *The Hebrew Encyclopedia*, 21:196 (Hebrew); J. D. Epstein, *Mitzvot ha-Musar* (New York, 1973), 11, 15; idem, *Mitzvot ha-Bayit* (New York, 1975), 1:427, (quoting S. Schwab); M. Dadon, "The Prohibitions against Libel according to the Hafetz Hayim and according to Israeli Law," *Hemda'at* 3 (2001): 32; N. Rottenberg, "Guarding One's Tongue: Between *Halakhah* and *Musar* in the Writings of the Hafetz Hayim," in *Hogim ba-Parasha*, ed. N. Rottenberg (Hebrew; Tel Aviv, 2005), 325-36; M. M. Yoshor, *The Chafetz Chaim – the Life and Works of Rabbi Yisrael Meir Kagan of Radin* (New York, 1984), 1:185,190-92.

- 6 I will later (below, text related to nn. 37-40) clarify that I have reservations about the characterization of *musar* literature as "ethics."
- 7 The motivation of the Hafetz Hayim to implement a halakhization of *musar* still requires research. In the introduction to his book, he himself writes that the transgression of this prohibition is the primary cause of the extension of the exile, the degradation of the Jews by the non-Jews, and the divisiveness among the Jews, and that it in general prevents them from receiving divine blessings (*Hafetz Hayim*, Introduction, 9-12). These comments, however, could have been made about other commandments as well, and could have been written by other personalities in different periods of history. The Hafetz Hayim's son, Rabbi Leib, writes that a particularly ugly struggle over a rabbinical post that took place in his home town of Radin provoked the Hafetz Hayim to deal with this issue. See A. L. ha-Cohen, "Kitzur Toledot Hayav" in *Kol Kitvei he-Hafetz Hayim ha-Shalem (Complete Writings of the Hafetz Hayim)* (Jerusalem, 1990), 3:12. Another biographer of the Hafetz Hayim, D. Katz, views the Hafetz Hayim's work as part of the *Musar* Movement, and sees his sensitivity to libel as a continuation of the approach

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1. Theoretical Framework: *Halakhah* and *Musar* – Rules and Principles, Morality of Duty and Morality of Aspiration

Previously, I characterized *halakhah* as rule-centered and *musar* as principle-centered. The rule/principle distinction is one of Ronald Dworkin's most influential models, and even if it was created in reference to the world of modern law, it is no less applicable to the normative systems of Jewish tradition. However, in order to apply them to the latter, we must explain and refine them slightly.

of Rabbi Yisrael Salanter, which derived from his “*musar* method.” See Katz, *Tenu'at ha-Musar* (Jerusalem, 1996), 4:19-20; L. Eckman claims that the Hafetz Hayim's focus on libel reflects his personality and “pietistic concern,” as well as his struggle against informers in the Jewish community. See L. S. Eckman, *Revered by All – The Life and Works of Israel Meir Kagan – Hafetz Hayim (1838-1933)* (New York, 1974), 183-86. In a personal conversation with me, Prof. Shaul Stampfer suggested that the Hafetz Hayim was more bothered by the petty gossip that was rampant in the Jewish community in those days. Another explanation that Stampfer raised was that the Hafetz Hayim was reacting to the criticism of the *Maskilim* by demonstrating that Jewish law is sensitive to interpersonal issues, an idea that is found in some of his other writings. Yeshayahu Steinberger, also in a personal conversation, noted that the book appeared at a time when there was a noticeable development in communications, which facilitated a much easier and more effective spread of information, and naturally increased the potential for libel. We might add another possible explanation: in the Hafetz Hayim's writings, the prohibition of libel is closely related to the “prohibition against conflicts” (*issur mahaloket*) (see: *Shemirat ha-Lashon, Sha'ar ha-Zekhirah*, 16-17). These prohibitions may be understood as parts of his attempts to promote unity within the Eastern European Orthodox community, and to exclude the non-observant Jews from it (see: *Mishnah Brurah* 1:5, and *Be'ur Halakhah* there). All of these explanations are partial and undeveloped, and some certainly are questionable and subject to criticism. For a detailed clarification on this issue, systematic historical research on the topic is required. Such research is not among the goals of this article, which aims to analyze the normative nature of the Hafetz Hayim's project.

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In his definition of rules, Dworkin seems to follow in the footsteps of the positivists, while for principles he offers a definition of his own.⁸ Nevertheless, he does not define the concept of a principle in its own right, but elucidates its precise essence as a contrast to rules. Dworkin defines the concept as follows:

I call a “principle” a standard that is to be observed not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.⁹

The values that Dworkin mentions here are values of humanistic-autonomous morality, because he deals with modern legal systems. In contrast, in a religious system that is not necessarily committed to such values, we will be able to find other values, such as holiness, purity, piety and the like.¹⁰ We should therefore expand the scope of the term

8 I did not find in Dworkin’s writings any well-formed definition for this concept, but the definition utilized here arises from Hart’s discussion of the issue, which in this matter seems to have been adopted by Dworkin with certain reservations that are not relevant at this point. See H. L. A. Hart, *The Concept of Law* (Oxford, 1961), 8-13, 48-58; and R. Dworkin, *Taking Rights Seriously* (Cambridge, 1978), 17-22.

9 Dworkin, *ibid.*, 22.

10 My own use of the term “moral” and “morality” hereinafter will always refer to morality as a system of humanistic/universal/autonomous/“natural” norms. Of course, I am aware of the problematic nature of these generalized distinctions between humanistic/universal/autonomous/“natural” and religious/particularistic/heteronomous/“revealed,” particularly in our time, when the intellectual trend is to challenge the boundaries between them. However, I utilize them here not in order to characterize them for their own sake, but to emphasize that the problem under discussion is not one of conflict between *halakhah* and *musar*, i.e. a religious and particularistic normative system versus one that is predominantly humanistic and universal. Rather, the issue at hand is the relationship between two normative systems within the religious particularistic tradition. Many works have been dedicated to the conflict between religion and ethics (in the former sense). For example, see: E. Goldman, *Expositions and Inquiries – Jewish Thought in Past and Present* (Hebrew; Jerusalem, 1997), 265-305; A.

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“principles” to any values that the normative system views as desirable, beyond the satisfaction of material needs. Indeed, Dworkin himself hints that the distinction between the two types of standards is less about their content (humanistic-moral or religious), than “a logical distinction”:

Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.¹¹

Principles, on the other hand, work in a different manner:

A principle like “no man may profit from his own wrong” [...] states a reason that argues in one direction, but does not necessitate a particular decision. If a man has or is about to receive something as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction – a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive.¹²

The distinction between rules and principles has a significant implication:

Principles have a dimension that rules do not – the dimension of weight, or importance. When principles intersect [...], one who must

Sagi, *Judaism: Between Religion and Morality* (Hebrew; Tel Aviv, 1998); M. Halbertal, *Interpretative Revolutions in the Making* (Hebrew; Jerusalem, 1997), 15-41. Later on I will dwell further on this distinction.

¹¹ Dworkin, (*supra*, n. 8), 24.

¹² *Ibid.*, 26.

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resolve the conflict has to take into account the relative weight of each. [...] Rules do not have this dimension. [...] If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid and which must be abandoned or recast must be made by appealing to considerations beyond the rules themselves.¹³

The example that Dworkin gave, “no man may profit from his own wrong”, can definitely be classified as derivative of a more basic and abstract principle – such as justice, for instance. Dworkin, nevertheless, views it as a principle because a principle apparently need not be a basic concept. Some principles are indeed basic and abstract, while others are on a lower level of abstraction and still fall into the category of principles. This is one of the issues which Dworkin disputes at length with Joseph Raz, who claims that the difference between rules and principles is a difference in their levels of abstraction. Dworkin further argues that there is no ontic difference whatsoever between rules and principles. Rather, the difference is in the ways we apply each of them. The very same standard – for example, the prohibition to lie – can be conceived as a principle, i.e., as a value that one should aspire to realize but may sometimes balance with other values, or as a rule, i.e., an act which is always seen as an offense.¹⁴

In view of this notion, we are now able to phrase the rule/principle distinction in another manner: rules are standards that determine the normative status of concrete actions, while principles determine goals that the actions are supposed to achieve.¹⁵ A person cannot perform two conflicting actions, but he can undertake different goals that may be found in conflict in particular circumstances, and nevertheless not forego

13 Ibid., 26-27.

14 Ibid., 72-73, 78.

15 In this formulation, principles become similar to a third concept that Dworkin calls “policies.” We will not address “policies” here, but suffice it to say that principles are set and constant in the legal system, while policies are situational social goals that are transient. See Dworkin, *supra*, n. 8, p. 22. This distinction, however, is not a “logical” one.

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any of them. These goals may be more abstract (such as “justice”) or less abstract (such as that “no man may profit from his own wrong”).

This understanding brings Dworkin’s distinction close to a distinction made by another famous philosopher of law, Lon Fuller. Following a line of preceding philosophers, Fuller distinguished between “morality of duty” and “morality of aspiration.” The morality of aspiration is “the morality of the Good Life, of excellence, of the fullest realization of human powers.”¹⁶ It shows man the ideal goal that he ought to achieve, and the closer he approaches it, the better. In contrast, he describes the morality of duty as follows:

Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark.[...] It speaks in terms of ‘thou shalt not’ and, less frequently, of ‘thou shalt’. It does not condemn men for failing to embrace the opportunities for the fullest realization of their powers.¹⁷

Indeed, even if this distinction relates to a different theoretical plane than that of Dworkin’s, practically there is a great deal of overlap between the two: the morality of aspiration is a morality of goals, and in this respect it is a morality of principles. The morality of duty, on the other hand, is a morality of concrete actions, and therefore of rules.

However, Fuller’s terminology might be somewhat misleading, and in need of refinement. The contrast between “duty” and “aspiration” may imply that the “morality of aspiration” is not obligatory. This characterization is not accurate, perhaps even according to Fuller himself. The morality of aspiration does not obligate a person to achieve the goal fully, but it does obligate him to aspire toward it. It neither

16 L. L. Fuller, *The Morality of Law* (New Haven and London, 1969), 5.

17 *Ibid.*, 5-6.

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demands nor expects that he reach the top of the ladder of human virtue, but it does demand and expect of him to begin climbing it and achieve the best that he can. We are not referring here to a duty to commit a concrete action, but we *are* talking about a duty to aspire. Indeed, the duty to aspire is weaker than the duty to act or not act in a particular manner, as one can fulfill it even by a minimal deed or perhaps even by mere intention. Nevertheless, it is still a duty.

Dworkin related to principles primarily within the context of their functioning in a legal system, which is a rule-centered system, and his observations are thus applicable to the parallel Jewish system – the *halakhah*. But there are also principle-centered systems – characterized in Western rational thought as morality, and characterized in the Jewish tradition as *musar*. In classical Jewish literature there is only minimal reference, if at all, to the distinction between *musar* and *halakhah*, but in more recent generations we find trends that are similar to those I have suggested here. Thus, for instance, when Rabbi Aharon Lichtenstein formulated the distinction between the two, he convincingly adopted Fuller’s model,¹⁸ and identified the *halakhah* as a “morality of duty” and *musar* as a “morality of aspiration.” Apart from “duties to aspire” Rabbi Lichtenstein included in the category of *musar* norms which are not binding at all, such as *lifnim mi-shurat ha-din* (going beyond the letter of the law),¹⁹ and others may add *middat hasidut* (pietistic virtue) and similar categories.²⁰ These norms, needless to say, are also closer to

18 A. Lichtenstein, “Does Jewish Law Recognize an Ethic Independent of Halakhah?” in *Modern Jewish Ethics: Theory and Practice*, ed. M. Fox (Columbus, 1975), 62-88. Lichtenstein’s position has been disputed by several scholars, including, among others, Eugene Borowitz, David Novak and Marvin Fox. A summary of the disputing positions and references to their articles can be found in S. Magid, “Ethics Differentiated from the Law,” in *Blackwell Companion to Religious Ethics*, ed. W. Schweiker (Malden, 2005), 177-79.

19 Since these norms are not binding, Lichtenstein tends to see them as derived from autonomous morality. As mentioned above, I do not accept this identification.

20 See A. Kirschenbaum, *Equity in Jewish Law: Halakhic Perspectives in Law:*

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principles than to rules. Yeshayahu Tishbi and Joseph Dan wrote similarly regarding the relationship between *halakhah* and *musar*: “The *halakhah* cuts to the minimum that the servant of God is required to do in order to fulfill his obligation to his Creator [...] The *musar* literature seeks not the minimum, but the maximum – the path by which man will reach the zenith of religious life, of approaching and clinging to God.”²¹

Since rules are supposed to achieve the goals manifested in the principles, we may conclude that at the core of every rule there are underlying principles. This understanding is central to Dworkin’s thought. Above all, rules give concrete expression to principles, thus enabling the observers of the law to better understand what they have to do. In addition, and no less important, rules enable them to find their way when facing contradictory principles. When there is a conflict between principles, the rule mediates when one principle should prevail and in what circumstances the other should be followed. It also determines the concrete characteristics that the action should exhibit. Rules, therefore, often represent the legislator’s view of the proper balance between various principles. This is why a conflict between rules is an untenable logical problem, while a conflict between principles is a tolerable condition, which is resolved through compromise. This is also the reason why rules cannot ascend to the lofty and abstract level of goals, but must remain “down to earth,” on the practical level. The legal system is based on principles, but they have to be articulated in the form of rules. The principles remain present, in the depths of the rules, but are primarily referred to only when the rules do not supply a

Formalism and Flexibility in Jewish Civil Law (New York, 1991), 46-53; idem, *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (New York, 1991), 59-136; M. Golding, ed., *Jewish Law and Legal Theory* (Dartmouth Publishing, 1993), 131-264. The literature about this subject is vast, and these references represent only a small selection.

- 21 I. Tishbi and J. Dan, “*Musar* Literature and its History,” in *Mivhar Sifrut ha-Musar*, ed. I. Tishbi and J. Dan (Jerusalem, 1971), 23. Later on, the authors write that *musar* demands the norms of “going beyond the letter of the law,” but in light of the ensuing analysis, this is too sweeping a generalization.

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sufficient answer to the legal question at hand. Even then, the role of the judge, or the interpreter, is to reach a new balance of principles which already renders a new rule. The legal system is therefore inclined to be phrased in rules, or, in Stanley Fish's words: "The law wishes to have a formal existence."²²

The same state of affairs exists in the world of *halakhah*. The literature of halakhic research is full of examples in which the rabbis turned to principles – such as "paths of peace" or "thou shalt do the right and the good" – but it is quite clear that they did not remain in the sphere of principles but formed well-defined rules out of them, such as the prohibition against preventing Gentiles from gathering crops that have been left in the field for the poor, the regulation to call up individuals in a particular order for the reading of the Torah (a priest, followed by a levite, etc.),²³ or the law requiring a person selling a field to offer it first to the owner of the adjoining field.²⁴ These are not cases of turning a vague rule into a clear one, as we find in the development of the laws of Sabbath for instance, but cases of shifting from one type of standard (principle) to another (rule). This interpretive endeavor was carried on as well by the halakhic authorities of the later generations, in the various fields of *halakhah*. They, too, focused mainly on the rules, and only made reference to the underlying principles in cases of lacunae or other interpretive difficulties.

The rule-centered nature of the *halakhah* explains the character of its theoretical discourse. The halakhic theoretical discourse, often considered legalistic and reflecting technical and pedantic scholasticism,²⁵ is

22 S. Fish, "The Law Wishes to Have a Formal Existence," in *The Stanley Fish Reader*, ed. A. Veeseer (Malden, Mass. & Oxford, UK, 1999), 165.

23 These two examples are from mGit 5:8; see there (5:8-9) a series of other examples of laws enacted for "paths of peace."

24 bB.M. 108a; there the law is derived from "thou shalt do the right and the good."

25 On this point, see: Y. Lorberbaum, "Reflections on the Halakhic Status of Aggadah," *Diné Israel* 24 (2007): 40-46.

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not conducive to the analysis of principles, which is generally more philosophical. Furthermore, a great deal of the halakhic discussion is about discovering and resolving contradictions. As we have already noted, the elimination of contradictions arises mainly with regard to rules. The rule-centered nature of the halakhic text is reflected, therefore, not only in its bottom-line norms, but also in the nature of the intellectual discourse that it engenders.

What, then, is the nature of the *musar* literature? Shmuel Verses defined it as “a diverse popular literary enterprise that provides instruction for the life of the individual and the community.”²⁶ This, however, is quite a general definition that may also fit the genre of popular halakhic literature. Joseph Dan defined it as “a broad collection of literary genres, whose main purpose is to transmit ethical-religious values of behavior by means of a unique literature, sometimes with set aesthetic features.”²⁷ He did not, however, specify what exactly those literary means and aesthetic features are. In their excellent introduction to the anthology *Sifrut ha-Musar ve-Toldoteha*, Dan and Tishbi write that *musar* literature is characterized by two purposes – first, “teaching the path that a person should follow in his religious and social life in order to achieve a high religious level, more than the minimum standards set by halakhic literature,” and secondly, “giving ethical-religious instruction through literary genres that are designed to draw the hearts of the readers to the content and provide literary enjoyment through its special style, particularly the use of literary stylistic features.”²⁸

26 S. Verses, “Studies in the Musar Literature of the Jews of Spain from the Beginning of the 13th Century until the End of the 15th Century” (Hebrew; unpublished PhD diss., Hebrew University of Jerusalem, 1947), 6. For other characterizations, see A. Bar-Levav, “Magic in the Musar Literature” (Hebrew), *Tarbiz* 92 (2003): 389-414; idem, “Story, Ritual and Metaphor: The Recollection of the Day of Death as a Spiritual Exercise and the Concept of Inner Struggle in *Musar* Literature,” in *Shalom u-Milhamah ba-Tarbut ha-Yehudit*, ed. Avriel Bar-Levav (Hebrew; Jerusalem, 2006), 145-46.

27 J. Dan, *Sifrut ha-Musar ve-ha-Drush* (Jerusalem, 1975), 3.

28 Tishbi and Dan, *supra*, n. 21, p. 11.

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All of these definitions may be helpful, but, in order to understand the nature of this literature, which developed in the Middle Ages, we have to go back to the world of the talmudic sages. In their literature, we find the distinction between *halakhah* and *aggadah*. The definition of these terms is also difficult, and a scholarly debate over this question has recently erupted anew.²⁹ We may say that *aggadah* can to a large degree be defined as a “residuary discipline” of the *halakhah*. In other words, *aggadah* consists of all that is not considered as *halakhah* in rabbinic literature.³⁰ Refusing the common philosophical distinction between *is* and *ought*, or between descriptive and normative propositions, aggadic literature includes both types. Of the descriptive statements, relatively few deal with metaphysical or other theological matters, while most are primarily tales about biblical and rabbinic figures. The normative statements of the *aggadah* are instructions of various types, beginning with advice and recommendations for proper religious conduct,³¹ passing to the valuation of different behavioral characteristics,³² and ending with statements expressing the principles and values of the halakhic system,³³ and sometimes their interrelation-

29 B. Lifshitz, “‘Aggadah’ and Its Role in the History of Oral Law,” *Shenaton ha-Mishpat ha-Ivri* 22 (2001-2003): 233-328; idem, “‘Aggadah’ versus ‘Haggadah’: Towards a More Precise Understanding of the Distinction,” *Diné Israel* 24 (2007): 11-28; Y. Fraenkel, “Aggadah in the Talmudic Literature: Return to Tried and Tested Principles,” *Netu'im* 11-12 (2004): 63-80; B. Lifshitz, “For the Early Principles We are Unhappy,” *Netu'im* 11-12 (2004): 81-94.

30 On this definition and its source, see: Y. Fraenkel, *Midrash ve-Aggadah* (Tel Aviv, 1997), 20-22; Lifshitz, *Midrash va-Aggadah* (Tel Aviv, 1997), 235-38; H. Mack, *The Aggadic Midrash Literature* (Hebrew; Tel Aviv, 1989), 9-11.

31 For example: “Make your house a meeting house for the sages” (mAvot 1:4); “Make your house open wide, and make the poor as members of your house” (mAvot 1:5).

32 For example: “There are four temperaments among men: easy to provoke and easy to appease – his loss is canceled by his gain; hard to provoke and hard to appease – his gain is canceled by his loss; hard to provoke and easy to appease – he is a saintly man; easy to provoke and hard to appease – he is a wicked man” (mAvot 5:11).

33 For example, there are a large number of aggadic sayings that laud the

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ship.³⁴ The connection between these types of statements is not as coincidental as it may seem. The world of the Sages is heavily normative, and even the tales are usually designed to demonstrate some moral lesson. Since this lesson is not phrased in rules referring to concrete actions – it finds its place together with other sayings of the same sort.

The Middle Ages brought with it a split in the subject matter of the *aggadah*. Presumably following the Greek distinction between *Physis* and *Nomos*, that later brought about the is/ought or descriptive/normative distinction, Jewish literature in the Gaonic period began to adopt a differentiation between theological works, that dealt mainly with descriptive questions, i.e., the questions of belief, and *musar* literature, that focused mainly on the normative questions, i.e., the questions of 'virtues' or character traits (*middot*).³⁵ Among those virtues we find: pride and modesty, shame and insolence, love and hatred,

value of Torah study, which is a halakhic concept, such as: "He who does not increase [his Torah learning] decreases it; he who refuses to learn [Torah] deserves death" (mAvot 1:13); "The entire world is not equal to the value of one word of Torah; [...] Even all of the commandments of the Torah are not equal to the value of one word of Torah." (yPe'ah 1:1). For a discussion of aggadic literature as, among other things, an expression of the principles that govern the halakhic system (in the Dworkinian sense of principles and rules), see Lorberbaum, *supra*, n. 26, pp. 58-60; Suzanne L. Stone, "On the Interplay of Rules, 'Cases' and Concepts in Rabbinical Legal Literature: Another Look at the Aggadot on Honi the Circle-Drawer," *Diné Israel* 24 (2007): 128-29.

- 34 For example: "Great is the study of Torah combined with worldly pursuits [...] All Torah study that is not joined with work will cease in the end and leads to sin" (mAvot 2:2); "Anyone who has Torah study but not fear of heaven is like a treasurer who has been given the inner keys, but not the outer keys. How does that help him?" (bShabb 31a-b); "Any Torah scholar who does not have wisdom – a carcass is better than him" (Lev. Rab. 1:15).
- 35 On the strong connection between *musar* literature and *aggadah*, see: Tishbi and Dan, *supra*, n. 21, pp. 15-17; Dan (*supra*, n. 27), pp. 6-7; idem, *Jewish Mysticism and Jewish Ethics* (Seattle and London, 1986), 3-8; S. D. Breslauer, *Contemporary Jewish Ethics* (Westport and London, 1995), 10. On the emergence of *musar* literature as a distinctive genre in the Gaonic period, see Dan (*supra*, n. 27), pp. 8-13.

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mercy and cruelty (to cite the first eight chapters of the *musar* book *Orhot Tzaddikim*); the fear of God, the love of God, penitence, holiness and modesty (to cite the first five 'gates' of *Reshit Hokhma*); and caution, diligence, cleanliness, abstinence, purity and piety (to quote the topics of the first chapters of *Mesillat Yesharim*). These 'virtues' are religious values that the *musar* books explain, and advise how to attain them. According to the broad definition that I proposed earlier for "principles," we can certainly characterize them as such, since the main concern of the author is these goals, and the concrete actions that should be taken to attain them are only accessories for them. Unlike the legal system, in which these rules are at the center (as I suggested above), in the *musar* system they only serve as illustrations, designed to manifest those principles, exemplify them and help to understand them – and as such they come along with other means of illustration, like the tales of the Bible and the Sages.³⁶ This system is therefore principle-centered, not rule-centered. From then on we consequently witness three main genres in Jewish tradition: *halakhah*, as a rule-centered normative literature; *musar*, as a principle-centered normative literature; and theology, focusing on the descriptive discussions.

Some translate the term "*musar*" as "ethics," and call *musar* literature "Jewish ethics." This translation, even if convenient, may be misleading, and we must be aware of its weaknesses. *Musar* is not "ethics" in the same sense that we talk about professional ethics, because the latter is very often rule-centered. On the other hand, it is not the same ethic we talk about in philosophy, because *musar* does not deal solely with autonomous or universal-humanistic values,³⁷ but also with particular-religious ones, often heteronomous, whose meaning is drawn from the

³⁶ Dan, *supra*, n. 28, pp. 10, 13.

³⁷ I would like to clarify that in the term "morality," I understand a system of norms whose contents are extracted from the human mind, and in particular from "practical reason" (see above, n. 10). This sense is contrasted to broader senses of morality that are sometimes suggested in current literature. Indeed, I adopt an approach that sharpens the distinction between the two systems (religion and humanistic morality), but this distinction does not necessitate

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particular context of Jewish tradition, such as penitence, holiness and purity.³⁸ In fact, the term “*musar*” is ambiguous because it has a dual meaning in Hebrew. It is important to distinguish between the two meanings in order to maintain a systematic discourse on the subject. On the one hand, there is the philosophical concept designating “morality” as the body of universal-humanistic norms. On the other hand, there is the traditional Jewish concept of principle-centered literature, some of it universal-humanistic and much of it particularistic-religious.³⁹ As Tishbi and Dan wrote, *musar* literature, as biblical and aggadic literature, “did not make a fundamental and consistent distinction between religious commandments and individual and social ethics.”⁴⁰ It may thus be

the position holding that the contents of religious norms are essentially contradictory to those of morality. See A. Sagi and D. Statman, *Religion and Morality* (Amsterdam, 1995), 119-64. It is enough for me to maintain that these two systems are characterized by their turning to two different truth-sources (revelation or human reason), even if the contents of their norms often overlap. It is noteworthy that this sense of the term “morality” is the one that is commonly used in classical philosophy, even without stating it explicitly, whereas the very discourse of this literature is a discourse of analyzing normative questions by human, rational tools. See W. Schweiker, “On Religious Ethics,” in *Blackwell Companion to Religious Ethics*, ed. W. Schweiker (Malden, 2005), 1-2; R. W. Lovin, “Moral Theories,” in *Blackwell Companion to Religious Ethics*, 19-20. Actually, even the contemporary approaches that argue for a strong dependency of morality in religion (an approach usually linked with Patterson Brown; and see Sagi and Statman, *Religion and Morality*, 27-28) talk, at the end of the day, about morality in the humanistic sense, that takes religion as an anchor for its justification and validity rather than as a source of normative contents.

38 Needless to say, the same duality is also true for the *halakhah*: one finds in it norms that may be also found in humanistic-universal systems side by side with many norms of particular-religious and heteronomous nature.

39 *Musar* in the first sense, the universal one, is always pronounced with the last syllable accentuated, as in the Modern Hebrew accent that adopted the Sepharadi accentuation, while *musar* in the second sense, the particular-Jewish one, is often pronounced with the first syllable accentuated, following the traditional Ashkenazi accentuation that prevails in the Orthodox yeshivah world.

40 Tishbi and Dan, *supra*, n. 21, 13. The authors add and clarify: “*Musar*

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appropriate to classify *musar* as “religious ethics,” thus emphasizing that it is a system of norms that belongs to the particular-religious tradition and its values.

There are at least two more widespread misunderstandings regarding *musar*, which necessitate clarification. First, since *musar* discusses character traits, it is sometimes conceived as dealing with man’s “heart,” or inner world. This is correct only to a very limited degree, because the main concern of *musar* literature is man’s practical conduct. Insofar as it refers to matters of the heart, it is in order to have them internalized into one’s personality and thus eventually come to action. Second, *musar* principles are often conceived simply as recommendations that are not binding unless embodied in rules of *halakhah*. As I have already intimated above, this is true for only some of the principles of *musar*, such as modesty and expeditiousness, but not for others, such as the fear and love of God, or penitence, that were counted by most of the authorities who enumerated the precepts as outright Torah precepts. Some of the *musar* writers, such as Bahya, objected to the fact that these norms were conceived of as non-binding, and emphasized their obligatory status in various ways.

literature, in all of its variations and all of its components, has always been a classically religious literature in both its inward-oriented [=particularistic] nature and in its goals. Although one can find works of *musar* that focus on only one of its aspects, this is a literary distinction and not an ideological – principled one. There is no secular *musar*, although at the beginning of its history in the Middle Ages there was apparently some attempt to create one. As a result, the history of *musar* literature is an organic part of the history of religious thought and life, and can only be understood within that context” (13-14). I am aware that there are other definitions of “Jewish ethics,” which view it as a response to the question of “What does Judaism, whether in the guise of *halakhah* or any other format, teach us about ethics, in the sense of universal morality?” See M. Kellner, “The Structure of Jewish Ethics,” *Contemporary Jewish Ethics and Morality*, ed. E. N. Dorff and L. E. Newman (New York and Oxford, 1995), 13. It is important for me to stress that this definition and similar ones that appear frequently in popular scholarly literature, although they may be helpful in other contexts, will not be employed here. See also *supra*, nn. 11, 38.

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The non-binding image of these precepts is a direct result of the fact that they are principles that are difficult to translate into rules of concrete action. Even when the *musar* writers endeavored to exemplify them by such rules, they did not pretend that these rules were exhaustive. Here, too, we can utilize Dworkin's language: since principles are not formulated in an "all-or-nothing" fashion as are rules, but rather as a long ladder of many stages, one can climb it stage by stage, and its full attainment remains an "ideal in infinity." This, however, does not exempt man from "the duty to aspire" to attain them. This is especially correct for those virtues that are considered as Torah precepts, like the ones I mentioned above. If a person does not achieve a high degree of the love of God, for instance, he will not be judged as a sinner. However, a person who sees himself as altogether uncommitted to this principle will definitely be considered a sinner, at least because his stance expresses a disbelief in the very validity and binding nature of the Torah that enacted these principles as precepts.

We can summarize that *musar* includes two types of norms: binding norms to which one has the "duty to aspire," and merely recommended norms, that are often presented as "pietistic virtue" (*middat hasidut*), or the like. Whereas both are "weak" in comparison to halakhic norms, the boundary between them is sometimes blurred. Rabbi Menahem Treivitch, a 19th century *musar* author, rightly said about the authors of classical *musar* that they did not state "which [norm] is a biblical precept and which is a rabbinical one [...], which is legally binding and which is but a pietistic virtue."⁴¹

Among those who "contributed" to the blurring of the differentiation between religious law and religious ethics, or *halakhah* and *musar*, was Maimonides, who in his great halakhic code, the *Mishneh Torah*, referred to all of the sections as "laws" even though some of them do not deal with laws in the accepted sense.⁴² But he, too,

41 M. Treivitch, *Orah Meisharim* (Jerusalem, 1969), Introduction (unnumbered pages).

42 Maimonides referred to all of the sections of the *Mishneh Torah* as 'halakhot'

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dedicated to the norms of *musar* a distinct section of the *Mishneh Torah* – *Hilkhot De'ot* (“the laws of virtues”),⁴³ and added *musar* norms and theological assertions at the end of some halakhic sections of this work. This structure shows that he was cognizant of the uniqueness of the *musar* sections, a uniqueness that he wished to preserve. Among other writers, the distinction between the two spheres was preserved more sharply, as they dedicated different books to *halakhah* and to *musar*.

Indeed, even if the Jewish thinkers of all generations gave little attention to the theoretical question of the distinction between *halakhah* and *musar*,⁴⁴ the living Jewish tradition knew very well how to distinguish between them. Even without being equipped with analytical conceptual tools, every bookseller of religious literature knows that the *Mishneh Torah*, the *Tur* and the *Shulhan Arukh* should be placed in the section of halakhic books, while *Hovot ha-Levavot*, *Sha'arei Teshuvah*, *Orhot Tzaddikim*, *Mesillat Yesharim* and the like should be placed in the collection of *musar* books. If at times uncertainties arise, it does not undermine the distinction, as the existence of the grey area does not negate the black and the white. This distinction was created throughout the generations by a healthy intuition, but it seems that the test I proposed above – principle-centered vs. rule-centered literature – can reflect *ex post facto* the premise underlying it.

(laws), whether dealing with rules, principles or even theological dogmas, which he conceived as duties imposed on the mind. This fact alone may teach us that the word ‘*halakhot*’ in Maimonides should not be taken in its plain sense, but as referring to binding norms of all types: rules as well as principles, *halakhah* as well as *musar*.

43 These laws expectedly emphasize principles, but also enumerate rules as illustrations. The fact that Maimonides placed *Hilkhot De'ot* as the second section of laws in his book, between the theological section *Hilkhot Yesodei ha-Torah* and regular halakhic sections, shows that he was aware of the special character of these laws, and of the special status of *musar* as a more principled normative area. See also Dan (*supra*, n. 27), 108.

44 I emphasize that I refer here to *musar* in the sense of religious ethics and not in the sense of universal/autonomous morality, for which there are elaborate discussions and fruitful distinctions already among Jewish thinkers in the Middle Ages and even in talmudic literature.

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The tool that Dworkin equipped us with – the distinction between rules and principles – is therefore useful in the Jewish context no less than it is in the secular legal context. Besides the fact that it helps us to analyze different categories of norms in the *halakhah* (which parallels the legal system), it also helps us to analyze and compare two types of normative systems – *halakhah* and *musar* – and to identify their ways of thinking more accurately. We will now broaden our use of this tool to help us analyze the interrelationship between these two systems by examining our test case: the prohibition against libel.

2. Libel before the Hafetz Hayim: A Branch of *Musar*

In rabbinic literature, the prohibition against libel developed as an integral part of the area of *musar*. Indeed, the prohibition “Thou shalt not go as a talebearer among thy people” (Lev 19:16)⁴⁵ was clearly considered a binding norm, but apparently it was conceived throughout the generations as a “duty to aspire,” and not as a duty that can be articulated in concrete actions.

In the Mishnah we find the term *lashon ha-ra* only once⁴⁶ – and that one is in an aggadic context. The term *motzi shem ra* (sullyng a person’s reputation) appears several times, and in halakhic contexts, but only in the sense of ascribing improper sexual behavior to a woman.⁴⁷ In this, the language of the Sages clearly follows the language of the Torah (Deut 22:14, 19), and this is indeed the limited sense that the term had in their world, in contrast to the broader sense that Maimonides and his followers (including the Hafetz Hayim) attached to it. The latter con-

45 A few Jewish religious authorities distinguish between the prohibitions of libel and gossip and only learn the latter from the verse cited. According to many other authorities, however, the verse includes both prohibitions. I have not dealt with this question. For a discussion of this issue, see Kaufman (*supra*, n. 2), 279-82.

46 mArak 3:5.

47 mShev 10:2; mSotah 3:5; mGit 4:7; mSan 1:1; mBek 8:7; mArak 3:1, 5.

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ceived it as referring to any untrue libel. The term *rakhil* (gossip, talebearing), too, appears in the Mishnah only once,⁴⁸ in the sense of revealing a secret, and the context there seems halakhic, yet it is not decisive.

The Sages of the Talmud mention these terms more frequently, but generally these references are short and offhanded. The short length is not in itself evidence of the non-halakhic nature of the prohibition, but it is clear that it was not developed using the standard tools of halakhic discourse. The only place where the talmudic sages deal with this topic at length, in bArakhin 15b-16a, we find both halakhic and aggadic sayings integrated, with the latter in clear majority (and it is noteworthy that the two main halakhic sayings are permits!). Here, too the halakhic sayings are not attacked and defended, as is familiar to us in the halakhic texts of the Talmud. This fact strengthens the aggadic character of the text, and gives the impression that even the halakhic sayings are not real rules, but rather coincidental examples of the principle. Apart from these, there are several sayings throughout the Talmud indicating that the Sages allowed one to berate and degrade another person in certain mitigating circumstances, which we will discuss in greater detail in section 4. This demonstrates the fact that they did not conceive the prohibition against libel as categorical.

The Sages give us no reasons as to why they decided to develop a certain prohibition as a branch of the *halakhah* and another norm as a branch of the *aggadah*. The verse “Thou shalt not go as a talebearer among thy people” is phrased in normative language that is not much different than “Observe the Sabbath day to keep it holy,” but the latter was nevertheless transformed by the Sages into a “meager biblical text with plenty of laws,” while the former remained a “meager biblical text and meager laws.” Somehow, the intuition of the talmudic authorities taught them that this area is not appropriate for articulated rules, nor for analytical discourse.

48 mSan 3:7.

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The medieval authorities followed the same path, except for one: Rabbi Isaac al-Fasi, the Rif. This halakhic authority's major work extracted from the Talmud the gist of the legal discussion while filtering out aggadic sayings. Although his work did not include bArakhin, he cited the sayings of the Sages on libel in his rulings on bShabbat,⁴⁹ so they are included in his legal summary. The inclusion of these sayings within an outright halakhic work constitutes a clear declaration that the author sees them as part and parcel of the *halakhah*.⁵⁰

The Rif, however, was probably the last major halakhist who viewed the prohibition against libel in this way. If we rely on the conventional classification of books as halakhic or *musar*, this subject found its place in the latter. Indeed, although Maimonides included it in his halakhic code, the *Mishneh Torah*,⁵¹ and wrote extensively about its severity,⁵² it appears only in a *musar* context: first as a small part – six paragraphs – in the section of *Hilkhot De'ot*, which, as demonstrated above, is a *musar* text, and then again in a small paragraph at the end of the laws of the impurity of leprosy, the placement of which also implies its *musar*-theological character.⁵³ Both texts rely heavily on biblical tales and aggadic literature. In contrast to halakhic convention, Maimonides does not present in these sections the exceptions to the prohibition, except for one (the permission to speak libel in the presence

49 Isaac al-Fasi (Rif), bShabb pp. 13b-14a (Rif pagination).

50 Indeed, in the Rif's time (11th century), the dawn of the Jewish Middle Ages (between the periods of Geonim and Rishonim, in the traditional periodization) the *halakhah/musar* distinction had not yet been formed, and actually the *musar* literature had not yet ripened into an independent genre, as would happen in the 12th century (Dan, *supra*, n. 27, pp. 8-16, 105-66, 264). Nevertheless, the *halakhah/aggadah* distinction was well rooted since the times of the Talmud. The fact that the Rif did not classify the sayings about libel as aggadic implies that neither would he classify them as *musar*, in the later terms of distinction.

51 Maimonides, *Mishneh Torah*, *Hilkhot De'ot*, 7:1-6.

52 *Ibid.*, 1-3, 6.

53 See Rottenberg, *supra*, n. 5, 323; W. Z. Harvey, "Aggadah in Maimonides' *Mishneh Torah*," *Diné Israel* 24 (2007): 204-206.

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of three or more people),⁵⁴ but suffices with the presentation of the prohibition itself, together with words of reproach on its severity. These words of reproach, needless to say, are also in the style of the *musar* genre. All of these facts corroborate the thesis that Maimonides meant to depict libel as a principle, and not to confine it to specific rules. Although there are some hints in Maimonides' *Commentary on the Mishnah* that might indicate that he considers the prohibition of libel to be a "morality of duty," there are, in my opinion, stronger hints that he classifies it as a "morality of aspiration."⁵⁵

54 *Mishneh Torah, Hilkhot De'ot* 7:5.

55 Maimonides, *Commentary on the Mishnah*, mAvot 1:16. Maimonides refers to the prohibitions against libel and gossip in his commentary to the aggadic tractate mAvot. He discerns five types of speech: "obligatory and forbidden, despised and beloved, and permitted." Maimonides classifies libel under the category of forbidden speech, rather than under the category of despised speech, a classification that might be interpreted as viewing the prohibitions against libel and gossip as halakhic. Yet, this classification does not necessarily mean that Maimonides excluded them from the realm of *musar*, because the terms "obligatory" and "forbidden" must be read in the Maimonidean context in the same way we suggested above for the term "*halakhah*," i.e., as a binding norm of any variant – whether a "duty to act" or a "duty to aspire." In other words, the categorization of Maimonides does not sufficiently correspond to the distinction between *halakhah* and *musar* as defined above. Therefore, we may conclude that Maimonides' classification of libel and gossip as 'forbidden' speech cannot teach us anything about the classification of these prohibitions as *halakhah* or *musar* in our own model. On the other hand, Maimonides utilizes several expressions with regard to libel that would indicate that he classifies it as a "duty to aspire." One of them is the fact that a few lines later Maimonides recommends that one should desist not only from forbidden and despised speech, but also from permitted speech. He adds that if one could speak only obligatory and beloved speech, "that is the purpose" (of man). Maimonides then expands on the extent to which people transgress this prohibition, and cites a number of biblical and aggadic sources that demonstrate its severity. He concludes by justifying his expansive discourse on the subject by stating that "a person should distance himself from it (libel) as much as possible, and aim at utter silence with regard to this category of speech." This language is clearly the *musar* style of a duty of aspiration.

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In post-Maimonidean literature, where the boundary between *halakhah* and *musar* crystallizes, the classification of libel as a part of *musar* is further strengthened. The authors of the great codes of that period, the *Tur* and the *Shulhan Arukh*, did not allocate any room in their comprehensive halakhic works to the issue of libel.⁵⁶ In contrast, elaborate and systematic discussions on this subject, often in chapters dedicated solely to it, are found in R. Yonah's *Sha'arei Teshuvah*, in the anonymous *Orhot Tzaddikim*, in R. Yehiel of Rome's *Ma'alot ha-Middot*, in the Maharal's *Netivot Olam* and in R. Eliyahu de Vidas' *Reshit Hokhmah* – all outright *musar* books.⁵⁷ Libel, just like all the other

Yet, it seems to me that the strongest proof that Maimonides classified the prohibition of libel within *musar* is the apparent contradiction that he expresses within that very source. On the one hand, he defines libel as a speech of degradation, even when true, “for libel does not mean telling a lie about a person or attributing to him things he did not do, [... but] condemning him even for things he actually did” (*Commentary on the Mishnah*, mAvot 1:16; he also emphasizes this point in *Hilkhot De'ot* 7:2). On the other hand, only a few lines earlier, in enumerating the actions of beloved speech, he mentions among them “to condemn the wicked for their demerits, so that their deeds and their image be despised by men, and they shun them [the wicked] and not follow in their ways” (*Commentary on the Mishnah*, mAvot 1:16). Though the two assertions appear to be a contradiction (as Dworkin taught us), the need to reconcile them only arises when we perceive the norms as “all or nothing” rules. Conversely, things are much simpler if we perceive those norms as principles, i.e., there is a principle of not condemning another person even for something condemnable, and there is a principle of condemning the wicked, and there are suitable balances between them in the changing circumstances of life. This normative line is, of course, most suitable to the realm of *musar* as a principle-centered discipline – and thus it corroborates the conjecture that Maimonides considered libel to be part of it.

56 For more support for the claim that Joseph Caro did not view libel as part of *halakhah*, but rather as part of *musar*, see text cited in n. 253 below. For analysis of R. Caro's position, see B. Z. Rosenfeld, “Mekoman Shel Hilkhot De'ot be-Shulhan Arukh,” *Shanah be-Shanah* (2001): 129-43; and n. 264 below.

57 Even before Maimonides, we find the topic dealt with in separate volumes such as *Kad ha-Kemah* of Rabbenu Bahya, which is a work of *musar*.

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subjects covered in these books, is treated in the spirit of *musar* literature: the emphasis is on principles, while rules serve only as illustrations, and they are accompanied by citations of non-halakhic sources, such as the Bible and *aggadah*.

There is also a linguistic indicator, not terribly significant but interesting nonetheless, that the talmudic Sages and the medieval rabbis did not perceive libel as a halakhic prohibition. There is a halakhic category – *mumar le-davar ehad* (a “habitual sinner with regard to one matter”) – that relates to a person who repeatedly violates one particular prohibition. There are clear halakhic sanctions that are imposed on individuals who fall into that category, among them the loss of legal credibility in religious spheres that relate to his transgression.⁵⁸ This category is utilized only with regard to violations of *halakhah*, and not with regard to violations of *musar*, even when defined as a duty of aspiration. Thus, for example, we find “habitual sinners” with regard to idolatry, desecration of the Sabbath, failure to perform circumcision, and the like, but we never hear of the term “habitual sinner” with regard to not loving God or failing to achieve holiness. So too, we do not find in rabbinic literature the concept of a “habitual sinner with regard to libel” (*mumar le-lashon ha-ra*). As Rabbi Yosef Caro points out, a person who “is accustomed to speaking libel” is branded as a “*ba'al lashon ha-ra*” (approximately: a person of evil tongue, or libel-inclined), and not a “*mumar le-lashon ha-ra*.”⁵⁹ He even perceived the transgression of “*ba'al lashon ha-ra*” as a different kind of sin than that of one who speaks libel only once,⁶⁰ an

58 The laws of *shehitah* (ritual slaughter) are the prototype for these sanctions. See *Shulhan Arukh, Yoreh De'ah*, 2:2-5. For other implications, see *Mishnah Brurah* 39:6 and the *Be'ur Halakhah* there (the text in *Sha'arei Teshuvah* on which he relies is problematic, though, as he apparently refers to ‘*moser*’ – informer – and not to ‘*mumar*’). But see also 11:7. According to some opinions, if a *mumar* (even with regard to one matter, and a non-ideological one) is held captive, there is no duty to ransom him (*ibid.*, 251:1, and see the commentaries on that paragraph).

59 Joseph Caro, *Kesef Mishneh, Hilkhot De'ot*, 7:2.

60 *Ibid.* He interprets Maimonides as having four categories of transgression

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approach that is not typical of halakhic thinking, where the *mumar* is generally considered a more severe degree of the same sin.

This was the face of the prohibition against libel until the time of the Hafetz Hayim. Yet, for the sake of precision, we must note that the Hafetz Hayim did not initiate the halakhization of libel *ex nihilo*. He was preceded by a few important halakhists, who noticed the lack of “laws of virtues” in the *Shulhan Arukh*, and came to “fill the gap.” It was in this spirit that R. Abraham Gumbiner, known as the *Magen Avraham*, added a few *musar* subjects in his interpretation of *Shulhan Arukh, Orah Hayim* §161 (entitled “laws of [fairness in] business”), and his interpreter, R. Shmuel of Cologne, author of *Mahatzit ha-Shekel*, followed the same path. In both texts, there are only very short references, mostly repeating Maimonides’ words in *Hilkhot De’ot*. Following their model, Rabbi Shneur Zalman of Lyadi integrated those instructions in his *Shulhan Arukh ha-Rav*, where the laws of libel comprise three paragraphs.⁶¹ No doubt, these references prepared the ground for the Hafetz Hayim’s project, but were minor in scope and lacked talmudic-style analysis and discussion. Needless to say, they did not have the cultural impact that a book dedicated to a single subject can have. The book that is sometimes mentioned as the precedent to the *Hafetz Hayim*, R. Raphael of Hamburg’s *Marpe Lashon*, is a classical *musar* style book. An approach closer to that of the Hafetz Hayim is demonstrated in a forgotten *musar* book that was published only 15 years before *Hafetz Hayim*, entitled *Orhot Mesharim* by Rabbi Menahem Treivitsch.⁶² But this book, which was not at all well publicized, was probably not known to the Hafetz Hayim. In any case, it is considered a book of *musar* rather than a halakhic one.⁶³ It is

for *lashon ha-ra*: gossiping, speaking libel, speaking mendacious libel, and *ba’al lashon ha-ra* – one who habitually transgresses. See n. 253 below.

61 Shnayer Zalman of Lyadi, *Shulhan Arukh HaRav* 156:10-12.

62 M. Treivitsch, *Orhot Meisharim* (Jerusalem, 1969). Thanks to Rabbi Joseph Kamenetsky for referring me to this book.

63 See the endorsements of S. Z. Karlin and Y. Y. Kanievsky (“The Steipler”) in the front section of this book.

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possible that further research into Eastern European *musar* literature from the 18th century until the time of the Hafetz Hayim will uncover additional sources on this topic that were influential.⁶⁴ However, even if such works with an orientation similar to that of the Hafetz Hayim are found, it is clear that they did not have widespread influence.

We may therefore summarize that until the 17th century, the laws of libel were classified clearly as part of *musar*, not of *halakhah*. The only possible exception was the Rif, who lived at the end of the Gaonic period, and in this matter his influence was insignificant. From the 17th century and on, a few steps were made toward the halakhization of some *musar* norms, among them the prohibition against libel, but these were minor and did not considerably change the normative situation. The significant turning point in that direction was made by the Hafetz Hayim, who composed a “*Shulhan Arukh* of Libel and Talebearing,” as one of his contemporaries characterized it.⁶⁵ For this purpose, the Hafetz Hayim needed to develop relatively novel tools, which we will now examine.

64 The common impression from scholarly research is that *musar* literature flourished in Eastern Europe from the end of the 18th century until the middle of the 20th century only within the context of the major ideological movements of the time – hasidism, enlightenment, and the *musar* movement (Dan, *supra*, n. 27, p. 265). Although this is primarily correct, we do have remnants from this period of tens of *musar* publications written by authors who did not belong to those movements. Most of these publications, however, did not leave a lasting impression and were ultimately forgotten. It seems to me that in order to have a full understanding of Eastern European Jewish culture, fundamental research on this rich literature must be done.

65 M. M. Yoshor, *supra*, n. 5, 1:113, 185, in his own name. Yoshor (*ibid.*, 2:503) also saw the *Hafetz Hayim* as a completion of what was lacking in the *Shulhan Arukh*. Similar statements are made by others, such as Yisrael Salanter (*ibid.*, 1:185); Simcha Zissel Ziv, “the Alter of Kelm” (*ibid.*, 1:125); and Shlomo Polachek, known as the “Illuy of Meytchet” (*ibid.*, 1:193). See also n. 5 above.

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3. Libel in the Works of the Hafetz Hayim: A Branch of *Halakhah*

The Hafetz Hayim planned to write his book *Hafetz Hayim* in three parts: the first on the laws of libel, the second on the laws of gossip, and the third on the *musar* and *aggadah* aspects of the subject. Yet, the book that appeared in 1873 consisted only of the first two parts, while what was meant to be the third part was published three years later as a separate book – *Shemirat ha-Lashon*. The fact that the Hafetz Hayim knew very well that libel could also be the subject of a *musar* book accentuates even more his desire to impart a halakhic character to his book *Hafetz Hayim*. This desire is expressed in the layout of the book, which the Hafetz Hayim divided into two: the central text, entitled *Mekor ha-Hayim*, which is formulated as a collection of short rules, and an accompanying text of comments and elucidations, entitled *Be'er Mayim Hayim*. In the latter, the *Hafetz Hayim* gives references to the sources of his rulings and discusses them in a quasi-talmudic manner, raising difficulties and resolving them, in the conventional style of halakhic literature. He stated his intent clearly in the opening of his book:

And know, my brother the reader, that even for every simple matter that is found within, I have demonstrated its source in the *Be'er Mayim Hayim*, so that it will be clear to all that I did not write this book from the perspective of pietist virtue (*middat hasidut*), but from the perspective of law.⁶⁶

It is noteworthy that between the lines of this text is an important premise of the process of halakhization. It appears that the Hafetz Hayim actually recognizes only two types of norms: 'law,' which includes all the obligatory norms, and the norms of 'pietist virtue,'

66 *Hafetz Hayim*, Introduction, 15.

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which are only recommended. Norms that are obligatory, not as law but rather as 'duty to aspire,' are not known to him. Consequently, any commandment is prone to be discussed in halakhic terms. And in a parenthetical comment he adds:

And I entreat the agreeable reader that if he finds something that does not appear to him at first glance to be a requirement of law, but rather a stringency, or an expansion or abbreviation of language, he should not be quick to judge it to be in error until he has studied well the *Be'er Mayim Hayim* and all of the rules that are essential to this law. For, if he is lacking one component rule of this law, he will not completely understand the law. For I have truly studied in depth each and every paragraph in this book (in consultation with colleagues who are preeminent Torah scholars), and I have done a thorough search so that it does not contradict any talmudic source. On a number of occasions, I spent days investigating one matter, until I clarified the true law, with God's help. The reader who will heed these words and study well all of the legal rules will rightly see that every word in this book was written with legal precision.⁶⁷

Yet, halakhic style is not sufficient to label a work as 'halakhic,' nor is the citation of talmudic sayings, if they are aggadic. Above all, a halakhic work must rely on halakhic sources. A traditional halakhic authority cannot invent laws *ex nihilo*, and the identification of his sources is, therefore, of crucial importance.

Theoretically, we could expect that the Hafetz Hayim would carry out the halakhization of libel through a deduction of rules from the principles developed in the *musar* literature. Actually, *musar* offers only two or three major principles: one is the prohibition to damage another person's reputation; a second, contrasting, principle is the allowance for such damage in cases of need ('benefit'); a third, maybe derivative of the second, calls for the condemnation of the wicked.⁶⁸ Traditional rabbinic

⁶⁷ Ibid.

⁶⁸ The question of whether the stigmatization of evil people is a third principle

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literature, whether *halakhah* or *musar*, recognizes no principle of freedom of speech, and in general it is quite remote from “rights talk”⁶⁹ and its associated dilemmas, including the dilemma of the balance between free speech and the individual’s right to a good reputation. As a conservative legal authority that kept away from problems evoked by modernity, the Hafetz Hayim found no interest in these dilemmas. Rather, he focused on the two or three traditional principles and tried to strike the balance between them. Yet, in balancing between these principles, his way of thinking was not deductive. Nor did he try to develop systematic tools for such deduction, or for the balancing between principles. Such a formulation would not fit the traditional patterns of halakhic writing.

Having rejected the path of systematic deduction from the *musar* principles relating to libel, the Hafetz Hayim adopted two other paths: on the one hand, he turned to halakhic literature and extracted from it short sayings, often sayings that were stated in other contexts, and through exegesis developed them to much larger dimensions than they had in their original sense. On the other hand, he turned to *musar* literature, to the *aggadah* and even to the Bible, and constructed rules out of them. He often analyzes these sources legalistically in *Be’er Mayim Hayim* as if they were ordinary halakhic sayings. As I mentioned above, turning to the Bible and the *aggadah* as sources for principles was a common practice of *musar* literature, but was not at all common in halakhic literature as sources for rules. In the latter, the

or derivative of the second depends largely on whether we view punishment from the retributivist perspective or from the utilitarian one. In western philosophy, the former position is advocated by Kant, and the latter is advocated by Bentham. If we adopt the utilitarian perspective, then we would view the stigmatization of the evil as a means of distancing the general public from their ways, thus viewing it as a public benefit reflecting the second principle. If we adopt the perspective of retribution, we would view it as a separate principle.

69 H. H. Cohn, *Human Rights in Bible and Talmud* (Hebrew; Tel Aviv, 1988), 9.

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maxim prescribed that “one does not learn [law] from [...] *aggadah*.”⁷⁰ The Hafetz Hayim took a method that naturally belonged in *musar* literature and adapted it to his halakhic writing. Let us now examine a few examples of these two paths.

The halakhic sources utilized by the Hafetz Hayim are primarily those of the talmudic Sages. For example, when the Talmud discusses the laws of invitation to trial, it relies on the measures taken by Moses when he summoned Korah and his followers to him (Num 15:12-14). Relating to this biblical section, the Talmud asks: “How do we know that if the defendant abused the court agent, and the latter reported it [to the court], we do not consider it libel? As it is written (Num 16:14): “Will you put out the eyes of these men?”⁷¹ Rashi explains that the rule is properly derived from the verse because if the agent had not reported the defendant’s behavior to Moses, he would not have known it and consequently could not have recorded it in the Bible.⁷² From this brief and tangential source, the Hafetz Hayim learns the following laws: that libel is forbidden even when the information is true;⁷³ that gossip is forbidden even when the information is true;⁷⁴ that the Talmud’s allowance to speak libel in front of three or more people, which the Hafetz Hayim tries very hard to limit, was only said with regard to an agent of the court;⁷⁵ that it is forbidden to tell an offended party about libelous comments that were made about him, even if he is a respectable

70 yPe'ah 2:4 (for Gaonic sources, see M. Elon, *Jewish Law – History, Sources, Principles* [Philadelphia and Jerusalem, 1994], vol. 1, 95, n. 12). Certainly, there are many exceptions to this rule (ibid., 94-104). Turning to *aggadah* is a form of returning to principles when the rules do not provide sufficient answers to the question at hand.

71 bM.Q. 16a.

72 Rashi, *ad loc.* The *Sefer Me'irat Enayim* explains it differently: “If it would be considered libel, Moses our Teacher would not have written it in the Torah” (*Hoshen Mishpat* 8:24). This interpretation implies that even writing forbidden information in the Torah would be considered libel.

73 *Hafetz Hayim*, Part 1, 1, *Be'er Mayim Hayim* 1.

74 *Ibid.*, Part 2, 1 in *Be'er Mayim Hayim*.

75 *Ibid.*, Part 1, 2, *Be'er Mayim Hayim* 1-2.

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person, those who spread the libel were of lesser importance, and the one reporting it is motivated by “keenness for truth,” unless the latter is an agent of the court;⁷⁶ that the permit that appears in the Jerusalem Talmud to speak libel about quarrel-mongers, which the Hafetz Hayim also tries very hard to minimize, applies only when it has the potential to end the conflict or if it relates to an agent of the court;⁷⁷ and that it is forbidden for a person to tell about a wrong committed against him, unless it is of “benefit” (as defined by the Hafetz Hayim).⁷⁸

There are other examples of this approach in the *Hafetz Hayim*. For example, from the law that prevents a judge from revealing, following a guilty verdict, that he voted for exoneration while his colleagues were responsible for the guilty verdict,⁷⁹ the Hafetz Hayim extrapolated three laws: that it is forbidden for a public official to reveal who advocated a position that benefited a particular individual and who opposed that position;⁸⁰ that it is forbidden to spread gossip even indirectly, e.g., by revealing what another person said;⁸¹ and that it is forbidden for a person to transmit information that was already said in front of three people, if those people are not expected to spread it further.⁸² In another example, from a responsum of the Maharik forbidding a husband from accepting testimony from one witness that his wife had been unfaithful unless the credibility of the witness is beyond reproach,⁸³ the Hafetz Hayim derived various gradations of libel, some of which he deemed acceptable because of the benefit that they bring.⁸⁴

76 Ibid., Part 1, 10, *Be'er Mayim Hayim* 20.

77 Ibid., Part 1, 8, *Be'er Mayim Hayim* 17. It is interesting to note in this case that there is someone who disagrees with the Hafetz Hayim and adopts a more stringent position: S. A. Wertheimer rules that even libel that might settle a conflict is forbidden. See Wertheimer, *supra*, n. 2, p. 52.

78 *Hafetz Hayim*, Part 1, 10, *Be'er Mayim Hayim* 31.

79 bSan 29a.

80 *Hafetz Hayim*, Part 1, 2, *Be'er Mayim Hayim* 21.

81 Ibid., Part 2, 3, *Be'er Mayim Hayim* 5.

82 Ibid., Part 1, 2, *Be'er Mayim Hayim* 12.

83 Joseph of Cologne, *Responsa Maharik*, #82.

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These are only a few examples among many instances in which the Hafetz Hayim transformed tangential halakhic texts into rich sources for rulings in the area of libel.

As mentioned, the second path taken by the Hafetz Hayim was to utilize *musar* and aggadic sources, including narrative sections of the Bible, in order to derive halakhic norms.⁸⁵ Nevertheless, in general, the Hafetz Hayim was very selective in his reliance on *musar* literature. For example, he does not cite from well known *musar* works such as *Hovot ha-Levavot*, *Orhot Tzaddikim*, *Ma'alot ha-Middot*, or *Reshit Hokhmah*, even though they deal to a significant degree with the issue of libel. These he saves for his book *Shemirat ha-Lashon*. In isolated instances, he cites *musar* works of *aharonim*, such as the Maharal of Prague,⁸⁶ the Shlah (*Shnei Luhot ha-Brit*),⁸⁷ and the Vilna Gaon.⁸⁸ In contrast, he frequently quotes the various books of commandments, composed in the Middle Ages, which fall on the border between halakhic and *musar* works,⁸⁹ and also *Sefer Haredim* which “integrates issues of *halakhah* and

84 *Hafetz Hayim*, Part 2, 6, *Be'er Mayim Hayim* 12. This deduction is problematic because it is clear that testimony regarding adultery (and the associated issues of lineage) requires a higher degree of certainty than regular matters.

85 This path is well known in halakhic literature as a way to fill in normative gaps and lacunae (see n. 70 above), but note that, by turning to principles embodied in the *aggadah* in order to solve discrete “hard cases,” the *halakhah* moves in a typically Dworkinian course. On the other hand, the Hafetz Hayim takes a much more radical course as he uses this method to legalize a whole normative domain.

86 *Ibid.*, Part 1, 2 *Be'er Mayim Hayim* 1, on *Netivot Olam*.

87 *Ibid.*, Part 1, 2, 12; *Be'er Mayim Hayim* 1, 4; *ibid.*, 3, 11.

88 *Hafetz Hayim*, Part 1, 9:5, and the note there on *Iggeret ha-Gra*.

89 I primarily refer here to *Sefer ha-Yere'im* by Eliezer of Metz, *Sefer Mitzvot Gadol (Smag)* by Moshe of Coucy, which is quoted very many times by the Hafetz Hayim and is mentioned as one of his primary sources (*Hafetz Hayim*, introduction, 14), *Sefer Mitzvot Katan (Smak)* by Yitzhak of Corbeil, and *Sefer Ha-Hinnukh* by an unknown author in the 13th century (regarding the identity of the author, see I. Ta-Shma, *Knesset Mehkarim – Iyunim ba-Sifrut ha-Rabbanit bi-Ymei ha-Beinayim [Studies in Medieval Rabbinic Literature]*

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musar.”⁹⁰ Above all, he often cites the book *Sha'arei Teshuvah* by Rabbenu Yonah Gerondi. The latter work was the book that most extensively dealt with the issue of libel prior to the time of the Hafetz Hayim.⁹¹ In his introduction, the Hafetz Hayim lists *Sha'arei Teshuvah* as one of his central texts, along with Maimonides and the *Sefer Mitzvot Gadol*.⁹² He was aware of the problematic nature of relying on a work of this nature as a source for halakhic rulings, and therefore added the following in a footnote:

The reader should not wonder about the fact that in this book, which is entirely based on halakhic sources, I refer several times to

[Jerusalem, 2004], vol. 2, pp. 196-201). Hayim Tchernovitz (“Rav Tza’ir”) and Menahem Elon classify these works as halakhic literature (H. Tchernovitz, *Toledot ha-Posekim* (New York, 1937), vol. 2, pp. 76-77; Elon, *supra*, n. 70, vol. 3, p. 1259). Since he does not refer to them in his book on *musar* and *derash* (*supra*, n. 27), J. Dan also apparently views them as halakhic works. At the same time, Rav Tza’ir notes that these books also contain clear signs of *musar* and aggadic literature which are typically not used directly for halakhic rulings (regarding *Sefer ha-Yere'im*, see *Toledot ha-Posekim*, 85-86; regarding *Sefer Mitzvot Gadol*, see *ibid.*, 89; regarding *Sefer Mitzvot Katan*, see *ibid.*, 95; regarding *Sefer ha-Hinnukh*, see *ibid.*, 98-100). Even though these works are often included in halakhic discussions, I prefer to view them as works that integrate *halakhah* and *musar*. D. Epstein presented a similar position in *Mitzvot ha-Musar* (New York, 1972), 32. He uses these works to prove his theory that the two domains are connected.

90 See Dan, *supra*, n. 27, p. 209.

91 B. Septimus already posited the noticeable sensitivity of Rabbenu Yonah to this subject in his “Piety and Power in Thirteenth Century Catalonia,” in *Studies in Medieval Jewish History and Literature*, ed. Isadore Twersky (Cambridge, Mass., 1979), 202-203. Rabbenu Yonah’s central place in the development of “rabbinical” *musar* literature was noted by J. Dan, “The Socio-Ideological Background of the Formation of the Traditional Musar Literature in the 13th Century,” *Shlomo Pines Jubilee Volume*, ed. Moshe Idel (Hebrew; Jerusalem, 1988), 1:250-52.

92 *Hafetz Hayim*, Introduction, p. 14. The reference to Maimonides is to *Hilkhot De'ot*, which we indicated above (n. 43) cannot be classified as *halakhah*. *Sefer Mitzvot Gadol* is categorized with the books of mitzvot, which we indicated are for the most part on the border between *musar* and *halakhah*.

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Rabbenu Yonah's *Sha'arei Teshuvah*, which belongs to the *musar* literature. For it is evident to anyone who has delved into his holy words that he was very careful not to traverse the parameters of the law. It is particularly so in the area of libel, where everything that he wrote has a source in the Talmud, as we will clarify in the book, God willing, but, being committed to brevity, he did not cite these sources, in the manner of the *rishonim* (medieval rabbis). Nevertheless, I generally relied on him alone only in places where his words imply a leniency (as I did regarding other *musar* works), but for stringencies, I almost always brought other sources, as one who examines [my book] will see inside.⁹³

It is clear from this comment that the Hafetz Hayim tried to exclude non-halakhic citations from his sources, and that *Sha'arei Teshuvah* was an exception which he was willing to accept, under certain conditions and limitations, because of its unique qualities.⁹⁴ It seems, however, that the Hafetz Hayim “viewed with grace” works that straddle the line between *halakhah* and *musar*, as well as with *musar* texts that were integrated into halakhic works (such as *Hilkhhot De'ot* in Maimonides' *Mishneh Torah*), and placed them in the domain of *halakhah*. This approach is also mentioned by the Hafetz Hayim in his introduction to a pamphlet entitled “*Kevod Shamayim*,” where he includes *Hilkhhot De'ot* of Maimonides, *Sefer Mitzvot Gadol*, and *Sefer Ha-Hinnukh* as “legal works that discuss this issue (libel) as a matter of *halakhah*.”⁹⁵ Furthermore, in referring to *musar* works, we detect a preference for

93 Ibid., Introduction, p. 15, in a footnote.

94 It seems when reading between the lines that the Hafetz Hayim was prepared to view *Sha'arei Teshuvah* as a halakhic source in every way, in spite of the fact that it is a book of *musar*, because of its author's insistence on making rulings based on talmudic sources. Apparently, his reluctance to rely on *Sha'arei Teshuvah* was primarily to satisfy the needs of his readers so that they would not be ambivalent about the halakhic authenticity of *Hafetz Hayim*.

95 I. M. Ha-Cohen, “*Kuntres Kevod Shamayim*,” in *Kol Kitvei he-Hafetz Hayim ha-Shalem* (Jerusalem, 1990), vol. 1, chapter 3, 65.

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authors who were known as halakhists, such as the Vilna Gaon, apparently based on the assumption, as with Rabbenu Yonah, that they did not “traverse the parameters of the law.”

More striking than the reliance of the Hafetz Hayim on *Sha'arei Teshuvah* is his use of biblical and aggadic texts to derive halakhic rules. The biblical character who is most appropriate for this purpose is Miriam, who, according to the Torah, suffered from leprosy because she spoke libel against her brother, Moses. The Torah commands that the incident be remembered throughout the ages in order to preserve the lesson that it teaches (Num 24:9). On this issue, the Hafetz Hayim establishes a broad exegetical principle: “It is known that we deduce [laws] from everything that was said about Miriam, as it is written: ‘Remember what the Lord your God did to Miriam.’”⁹⁶ He applies this maxim in a list of laws that he derives from the story of Miriam, including the following: that to be guilty of libel, unlike gossip, it is enough to bring others to speak libel, and it need not lead to a quarrel;⁹⁷ that a person can transgress the prohibition of libel even if he did not intend to hurt the offended party, but only meant to speak the truth, provided that he did not formally rebuke him prior;⁹⁸ that the prohibition of libel applies to relatives, as well;⁹⁹ that the prohibition of libel applies even if the offended party does not feel offended by it;¹⁰⁰ and that the prohibition of libel applies to women as well as to men.¹⁰¹

Yet, the Hafetz Hayim learns not only from the incident of Miriam, but also from countless other biblical stories, as well as from aggadic and midrashic literature. For example, the story of Doeg the Edomite, who reported to King Saul that Ahimelekh the Priest had helped David when he was fleeing from Saul (1 Sam 22), serves as an important

96 *Hafetz Hayim*, Part 1, 3, *Be'er Mayim Hayim* 11.

97 *Ibid.*, Part 1, 3, *Be'er Mayim Hayim* 6.

98 *Ibid.*, Part 1, 3, *Be'er Mayim Hayim* 11; *ibid.*, 8, *Be'er Mayim Hayim* 1.

99 *Ibid.*, Part 1, 8, *Be'er Mayim Hayim* 1.

100 *Ibid.*, Part 1, *Be'er Mayim Hayim* 2.

101 *Ibid.*, Part 2, 7, *Be'er Mayim Hayim* 1.

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source for the Hafetz Hayim. From this story he derives, among others, the following laws: that it is forbidden for a person to speak libel about another even if his friend entreats him to do so – “even if his father or teacher whom he is required to honor [...] requested that he tell something about another person [...] he may not obey them”;¹⁰² it is the obligation of a person who hears libel about another to give him the benefit of the doubt if there are arguments in both directions;¹⁰³ and that the prohibition of gossip applies even if the offended party would not feel ashamed by what was said about him.¹⁰⁴ In another example from the long list of stories, the Rabbis fault David for listening to Tziva’s denigration of his master, Mephiboshet, the son of Saul (2 Sam 9), even though it was said in front of a large number of people.¹⁰⁵ Based on this source, the Hafetz Hayim sought to limit the permission that the Rabbis gave for saying libel in front of three or more people.¹⁰⁶ The Hafetz Hayim also derived from the same source a number of laws relating to speaking libel in a situation in which the circumstances indicate that the report is true.¹⁰⁷ Similarly, from the fact that Nathan the Prophet spoke to David in a denigrating manner about Adoniyahu his son (1 Kgs 1:24-27), even though he had not previously rebuked Adoniyahu himself, the Hafetz Hayim learned that in cases where it is permissible to speak libel, one is not required to rebuke the person beforehand if the rebuke will be disregarded, and will just cause harm.¹⁰⁸ From the readiness of David to listen to the reports about his son’s behavior, and the fact that it subsequently led to a reduction of tensions in the kingdom, he learned that the permission to speak libel is

102 Ibid., Part 1, 1:5, 1:7.

103 Ibid., Part 1, 6, *Be’er Mayim Hayim* 20.

104 Ibid., Part 2, 1, *Be’er Mayim Hayim* 4.

105 bShabb 56a.

106 *Hafetz Hayim*, Part 1, 2, *Be’er Mayim Hayim* 2.

107 Ibid., Part 1, 7, *Be’er Mayim Hayim* 22, *Be’er Mayim Hayim* 26, Part 2, *Be’er Mayim Hayim* 5.

108 Ibid., Part 1, 10, *Be’er Mayim Hayim* 22.

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related to its ability to reduce controversy.¹⁰⁹ From the fact that King Yehu was punished for destroying the house of Ahab, even though he was commanded to do so, the Hafetz Hayim learned that it is forbidden to impose sanctions against a person even if it is justified (which includes a prohibition to speak libel against him even if the circumstances allow it) if he is not on a higher religious-moral level than his colleague.¹¹⁰ From the words of Isaiah, “Woe is me! for I am undone; because I am a man of unclean lips, and I dwell in the midst of a people of unclean lips” (Isa 6:5), for which he was punished according to the Midrash, the Hafetz Hayim learns that it is forbidden for a person to denigrate another, even if he is at the same time denigrating himself.¹¹¹ From the story of Gedaliah (2 Kgs 25:23-26), who refused to believe the warnings of Yohanan ben Kareah that Yishmael planned to kill him,¹¹² the Hafetz Hayim learns that even though the murder eventually took place, “he acted according to the law in that he did not accept it (the libel),” i.e., that it is forbidden to accept libelous statements even from two suitable witnesses.¹¹³ From the story of Yehudah b. Gerim, who caused the persecution of Rabbi Shimon b. Yohai by reporting his disparaging remarks about the empire to the Roman authorities,¹¹⁴ the Hafetz Hayim learned, in the footsteps of the *Kesef Mishneh*, that the prohibition of libel applies even when the perpetrator does not intend to denigrate the offended party.¹¹⁵ The Hafetz Hayim found in the same story a source for the rule that we mentioned above that it is forbidden to speak libel even in “indirect speech,” such as retelling what someone said to another person.¹¹⁶ From the fact that God did not

109 Ibid., Part 1, 5, *Be'er Mayim Hayim* 17.

110 Ibid., Part 1, 10:3.

111 Ibid., Part 1, 1 *Be'er Mayim Hayim* 15.

112 Jer 40:13-14, as interpreted in bNid 61a.

113 *Hafetz Hayim*, Part 1, 7:6.

114 bShabb 33b.

115 *Hafetz Hayim*, Part 1, 2 *Be'er Mayim Hayim* 1, 4; 1, 10; Part 2, 1 *Be'er Mayim Hayim* 1, 7. See the comments of S. Z. Kook, *supra*, n. 2, 101.

116 See n. 81 above.

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reveal to Joshua the name of the person who had caused the military defeat at Ai, but rather forced him to utilize a lottery to identify the culprit,¹¹⁷ the Hafetz Hayim concluded that even when it is permissible to speak negatively about a person because of a particular benefit, libel should be avoided if it is possible to achieve the benefit in an alternative manner.¹¹⁸ And from the talmudic story in which Rav Yehudah demonstrated to his son the definition of an evil woman by saying “like your mother,”¹¹⁹ the Hafetz Hayim learned that it is permissible to speak libel if the negative traits of the woman are well known, or if it helps in understanding the Torah.¹²⁰

I again emphasize that the previous are just a few examples among many cases in which the *Hafetz Hayim* uses biblical and aggadic sources to derive halakhic rules, the second path that I referred to above. This path, which was fruitful in the *musar* literature as a means of deriving principles, was rarely used to derive laws in the halakhic tradition. Nevertheless, in his work on the issue of libel, the Hafetz Hayim transformed it into the primary method of deriving rules, and applied the classical halakhic analytical techniques to these sources as if they were indeed legal texts.

It appears that in certain instances, the Hafetz Hayim takes norms that are explicitly or implicitly considered *middat hasidut* (pietistic virtue), and transforms them into binding norms. Rabbi Tzvi Aryeh Frummer, the Rabbi of Kozhilgov, made this point in a fascinating analysis that he communicated in a letter to Rabbi Abraham Mordecai

117 bSan 11a; *Tanna de-Vei Eliyahu*, ch. 18.

118 *Hafetz Hayim*, Part 1, 10 *Be'er Mayim Hayim* 11. S. Z. Kook, *supra*, n. 2, p. 102, comments on this that, on the contrary, God did not want to reveal the identity of the guilty party in secret, as is generally done in speaking libel, but chose a public forum so that others would “see and be afraid.”

119 bYev 63b; bSan 22a.

120 *Hafetz Hayim*, Part 1, 1 *Be'er Mayim Hayim* 13. See also n. 190 below. The Hafetz Hayim mistakenly related this story to Rabbi Hiya and Rav, apparently because the previous section of bYev related to them.

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Alter, the Rebbe of Gur (known as the *Imrei Emes*).¹²¹ He discusses the teaching of the Hafetz Hayim that it is forbidden to speak in a degrading manner about a person “even if he himself saw him from close proximity doing something that is inappropriate according to the law.” This protection of the sinner applies to cases in which the sin observed was “in the category of laws between man and God,”¹²² and that the person who committed it was “an intermediate person, as the average Jew, who usually tries not to commit sins.”¹²³ In such circumstances, the Hafetz Hayim explains, it is possible to interpret his behaviour favourably, and “even if he saw him transgress several times, he can certainly attribute it [to some special circumstance], and it is forbidden to reveal it lest he be disgraced in the eyes of his people or even in his own eyes.”

As a source for this law, the Hafetz Hayim relies on the following citation from *Sha'arei Teshuvah* of Rabbenu Yonah:¹²⁴

And know, that if a person saw his friend transgress a Torah prohibition in secret, and he revealed it in public, he himself has transgressed, for perhaps the transgressor already repented from his evil ways, is distressed in his thoughts, and the heart knows the bitterness of his soul. **And it is incorrect to reveal it**, except to a discreet rabbi who will not publicize it to others. However, he should distance himself from his friend until it is clear that he has repented from his evil ways.¹²⁵

121 Z. A. Frummer, *Shu"t Eretz Tzvi*, vol. 1 (Bnei Brak, 1990), #4 (70-71). I am grateful to Mr. S. Eilbert for bringing this text to my attention. It is noteworthy that the Imrei Emes recommended the books Hafetz Hayim and *Shemirat ha-Lashon* to his Hasidim and testified that they had “a good effect” upon him. See A. M. Alter, *Imrei Emet* (Israel, 1988), *Likkutim* (Miscellanea), 258.

122 *Hafetz Hayim*, Part 1, 5:1. Regarding one who transgresses a law between man and man, there are several distinctions. See *Hafetz Hayim*, *ad loc.*, ch. 10.

123 *Ibid.*, 5:3.

124 *Ibid.*, *Be'er Mayim Hayim* 13. The reference is to Rabbenu Yonah Gerondi, *Sha'arei Teshuvah*, Gate 3, Articles 215, 218, 219 and 220.

125 *Sha'arei Teshuvah*, Gate 3, Article 215 (emphasis mine).

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And if the transgressor is not a God-fearing person, such as one who has abrogated the yoke of the commandments and is not careful about transgressions that are recognized as such by everybody, then it is permissible to shame him by telling about his indiscretion. [...] But if he transgressed by chance, and he generally refrains from transgressing, **one should not reveal** his sin.¹²⁶

Rabbi Frummer claims that the language used by Rabbenu Yonah – “it is incorrect to reveal” and “one should not reveal” – both imply “that this is not a real prohibition, and Rabbenu Yonah is only teaching a desired pietistic virtue (*middat hasidut*).” He tries to prove his point by claiming that had Rabbenu Yonah wanted to teach that this is a real prohibition, he would have written “it is forbidden” or “one may not.” The fact that he did not refer to it as a prohibition implies that “this is not a prohibition, but an additional level of carefulness and holiness.”¹²⁷ Rabbi Frummer’s argument seems stronger in relation to the first expression (“it is incorrect to reveal”), and weaker in relation to the second (“one should not reveal”), even though he brings exegetical precedents for the latter, taken from parallel usages in earlier halakhic literature. However, it is this interpretive difficulty that manifests so strongly Rabbi Frummer’s lenient tendency, even at the price of being somewhat at odds with the text. Indeed, no less than the ruling itself, the basic tendency is important, which Rabbi Frummer states clearly: “And since many people fail in this, one ought to find them a defense.”¹²⁸ This emphasizes the difference between the interpretive approach of Rabbi Frummer, whose goal is to make the halakhic standard compatible with accepted communal practice, and that of the Hafetz Hayim, whose approach, as we will see below, is to be stringent.

126 Ibid., Gate 3, Article 219 (emphasis mine).

127 Frummer, *supra*, n. 121.

128 Ibid.

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4. The Tendency of Halakhization: Stringency

There is no question that the halakhization of the area of libel had a significant impact on its content. Essentially, the transition from principles to rules certainly contains the potential for increased stringency, but it also has the potential for increased leniency. Nevertheless, in this instance, there is an added element of the personal approach of the Hafetz Hayim, which significantly strengthened the tendency toward stringency.

When discussing criminal (or ethico-religious) norms, the transition from principles to rules is generally a movement toward greater stringency, at least in the particular domain in which it is applied. Dworkin established this idea in an almost tangential point, discussed above, that included an important example. In his dispute with Raz, Dworkin asserted that the prohibition to lie is usually perceived as a principle, but he raised the possibility that a person might adopt this prohibition as a rule. The distinction, according to Dworkin's framework, is that as a principle, the prohibition to lie remains a value that must at times be balanced with other values, while as a rule it becomes sweeping and categorical. Essentially, Dworkin describes the "halakhization" of the prohibition to lie. Even though this process might lead to greater leniency in other areas that must now be deferred when they come into conflict with this rule, it leads to greater stringency with regard to lying, which now cannot be deferred. In Fuller's framework, as well, it is clear that the morality of aspiration, although it includes a duty to aspire, poses a weaker norm than the morality of duty. Thus, in our case, the halakhization of the prohibition of libel includes *eo ipso* a tendency toward greater stringency.

Yet, there is another, somewhat softer side of this coin. Particularly because *musar* literature urges its readers to aspire to certain principles and goals, it does not have to present the limitations to these principles, nor the competing principles that may need to be balanced with them.

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An excellent example of this is *Hilkhot De'ot* of the *Mishneh Torah*, in which Maimonides includes only one limitation of the prohibition, even though he certainly was aware of many more.¹²⁹ The assumption that underlies this phenomenon is that there are so many possible situations in which there will be conflicts between principles, that it would be impossible to clarify all of them. Furthermore, it is impossible to know which principles would take precedence in every possible circumstance. Thus, it is sufficient to inform the reader of the principles, and to encourage him to strive for its fulfillment to the best of his ability. In the codification of rules, on the other hand, the potential conflicts between principles and their resolution in specific circumstances must be expressed, and, in fact, that is one of the very goals of formulating rules. Thus, a halakhic authority who writes about a particular commandment without including its limitations has not been true to his task. In fact, the Hafetz Hayim included at the end of each section of his book a chapter indicating situations in which libel or gossip is permitted.¹³⁰ Similar elaboration is spread throughout the work. From this standpoint, the halakhization of the prohibition of libel served as a catalyst for the creation of leniencies.

We see, then, that from a theoretical point of view, the halakhization process can provide openings for both stringencies and leniencies. In utilizing these terms, I do not refer to the ease or difficulty of performing the particular rule (which I will relate to later), but primarily to the exegetical perspective as it contrasts with rulings that preceded it. The terms “leniency” and “stringency” are only relevant when the authoritative text provides an opening for extrapolation, which allows for a ruling in either direction.¹³¹ In reality, the Hafetz

129 As we have seen above (n. 55), in his commentary on *mAvot* he presents a principle that may override the prohibition of libel – i.e., the principle in favor of the condemnation of the wicked. It is obvious that the balancing of these two principles generates limitations to the application of the prohibition of libel.

130 *Hafetz Hayim*, Part I, chapter 10; *ibid.*, Part II, chapter 9.

131 See my “Stringency: Five Modern Era Types,” *Diné Israel* 20-21 (2001): 127.

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Hayim utilized both options, but the dominant trend in his book is in the direction of stringency.¹³² This trend finds expression in his efforts to limit the application of a number lenient positions relating to libel in rabbinic literature. The following are several examples of such rabbinic statements that appear to express leniencies regarding the prohibition of libel:

- A. The Babylonian Talmud explains the statement of Rabbah b. Rav Huna that “anything said in front of three people is not considered libel,” based on the assumption that it will spread in any case: “Your friend has a friend, and your friend’s friend has a friend.”¹³³

- B. Rabbah stated that it is permissible to say libel in front of the offended party: “Anything said in front of the person is not considered libel.”¹³⁴ He bases this statement on the opinion of Rabbi Yosi: “I never said anything and turned around.” Rashi broadens this leniency even further, holding that to remove the statement from the category of libel, it is not necessary for the person to actually say the statement in front of the offended party, but enough that he is prepared to do so.¹³⁵

132 Dadon also acknowledges this, and assumes that the Hafetz Hayim’s stringent policy is explained by the fact that the prohibition of libel is a biblical precept, and especially by the fact that the Hafetz Hayim “thickened” it by attaching to it numerous of other prohibitions (*supra*, n. 5, 40-44).

133 bArak 16a; bB.B. 39a.

134 bArak 15b.

135 Rashi suggests two explanations, both of which extend the leniency. In one explanation, Rabbi Yosi testified about himself that he never turned around in order to see who was standing there, because he would have been prepared to make his statement even in front of the person under discussion. According to the second explanation, Rabbi Yosi never made his statement in front of the offended party, but always admitted to what he had said.

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- C. The Jerusalem Talmud cites the following statement in the name of Rabbi Yonatan: “It is permissible to speak libel about quarrel-mongers.”¹³⁶
- D. bYoma states: “One may publicize the [identity of] hypocrites in order to prevent desecration of God’s name.”¹³⁷
- E. Rav Ashi stated that “it is permitted to call a person who has acquired a bad reputation a ‘*gimmel*’ or a ‘*shin*’.” In other words, one about whom there are negative rumors¹³⁸ can be degraded and called “son of a whore” and “son of a rotten one” (or “son of a stupid whore,” or “son of a Gentile,” or “son of a slave,” according to other interpretations), which casts aspersions not only on him, but also on his mother.¹³⁹ Similarly, Rav said: “One may flog a person for negative rumors.”¹⁴⁰ Rashi explains that “a person about whom it is reported that he transgressed is given lashes.” bM.Q. records a story in which Rabbi Yehudah allowed himself to excommunicate a scholar because “bad rumors had been heard about him”.¹⁴¹ Also among the *rishonim* (medieval

136 yPe’ah 1:1.

137 bYoma 86b. The word ‘*hanefim*’ (hypocrites) can also be translated as ‘wicked’.

138 Rashi there explains that the statement refers to rumors relating to adultery, but in another place, he speaks about “bad rumors” in general (bM.Q. 17a; but see Tosafot there who explain that he is “suspected of illicit sexual behavior”). See also the commentary of Ovadiah of Bartenura on mAvot 1:13.

139 According to Rashi, in the name of the Geonim, “*gimmel*” and “*shin*” are abbreviations for “*girta*” and “*sarya*” – i.e., whore and rotten one. Yet, according to Rashi, in the name of his teachers, they are abbreviations for “*gayofa ve-shaita*”/“*shatya*” – i.e., stupid whore. According to the Rif (bM.Q. 16b in the pagination of Alfasi), the abbreviation is for “*goiya*” and “*shifha*” – i.e., Gentile and maidservant. Alfasi also refers to bSan 52a, which indicates that it is permissible to call an evil person an “evil person the son of an evil person,” even if his father was righteous.

140 bQidd 81b, based on 1 Sam 2:24.

141 bM.Q. 17a.

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rabbis), we find that it was permissible to impose sanctions based on rumors.

- F. We often find sages making demeaning comments to their fellow sages. Thus, Rabbi Yehudah ha-Nasi said about his disciple Rabbi Levi that “it appears to me that he has no brain in his skull.”¹⁴² Resh Lakish called two sages “cowherds,” and they, on their part, saw him as a “a troublesome fellow” (or “a nuisance”).¹⁴³ When Rav Kahana, previously described by Resh Lakish as “a lion,” did not ask even one critical question in Rabbi Yohanan’s lessons, the latter said: “The lion you mentioned has become a fox.”¹⁴⁴ Rava called Rafram b. Pappa “*patya ukhma*” (literally: “black pot,” but the pun alludes to ‘fool’) and castigated Rav Illish as being like “*dayanei hatzatzta*” (according to Rashbam – incompetent judges who decide the cases by dividing the sum in dispute in half).¹⁴⁵ The term “*Bavla’ei tipsha’ei*” (foolish Babylonians) appears often as a derisive label for Babylonian sages.¹⁴⁶ Indeed, we may find many more expressions of this type in rabbinic literature.¹⁴⁷

When viewing all of these statements together, one gets the strong sense that the Rabbis viewed libel as a prohibition to which quite a few limitations are attached, and consequently as a relative one. This point strengthens the assumption that they saw it as a principle that at times had to be balanced with other principles. As such, it was not necessary to formulate as rules how to resolve conflicts between libel and other

142 bYev 10a; bMenah 80b.

143 bSan 26a.

144 bB.Q. 117a.

145 bB.B. 133b.

146 bPesah 34b; bYoma 57a; bBetzah 16a; bKetub 75a; bNed 19b; bZevah 60b; bMenah 52a; bBek 25b.

147 I took almost all of the examples in this paragraph from Urbach’s illuminating – and amusing – discussion on this matter: E. E. Urbach, *The Sages: Their Concepts and Beliefs* (Jerusalem, 1979), 620-27. The medieval authorities are likewise known for their sardonic and disparaging statements.

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principles. However, in addition to expressing the normative status of this prohibition, these statements also provide a window into the cultural world of the Rabbis, a world in which rumors were considered a legitimate, and at times necessary, element of communication – i.e., that the degradation of an individual by means of rumors was considered a normal social sanction and not libel. It seems that the Rabbis allowed a certain level of offensive expression against one whose behavior was deemed inappropriate, and that the parameters that they established for themselves were only slightly higher than the standard accepted in society in general. Although the medieval commentators subsequently tended to interpret these norms in a more limited fashion, they still did not establish for themselves an unreasonable standard, as is clear in the parameters that they utilized for expressing themselves in their own internal discourse. It was not uncommon for them to exchange sharp comments in the heat of their controversies. The harsh comments of the Rabad against Maimonides and the severe remarks of Nachmanides against Rabbi Zerahiah ha-Levi are well known. Apparently, they did not view this as a violation of the prohibition of libel.

Post-talmudic rabbinic literature could have utilized these statements to derive a host of leniencies regarding the prohibition of libel. In addition, since several of these statements refer to the public interest, they might have been utilized for a modernistic interpretation promoting a doctrine similar to that of freedom of speech in modern law. Nevertheless, the post-talmudic authorities did not try to extend these openings for leniency. On the contrary, they tried to limit them. As previously stated, rabbinic literature in the Middle Ages for the most part attempted to restrict the application of these statements through interpretation. The Hafetz Hayim took this trend to an extreme and tried as much as possible to neutralize or minimize them.

In the introduction to his book, the Hafetz Hayim cites several of these statements as examples of the temptations of the *yetzer ha-ra*, i.e., that a person's evil inclination could rationalize from them that it is

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permissible to transgress the prohibition of libel.¹⁴⁸ In addition, he discusses each of the statements from rabbinic literature cited above in various places in his work. The following are summaries of these discussions as they relate to statements A-F, above:

- A. The Hafetz Hayim dedicates an entire chapter to the issue of speaking libel in the presence of three people. It is clear to him that logically, if it is prohibited to speak libel in front of one person, then it is certainly forbidden in front of many people. He surveys the opinions of the medieval authorities, who provide four different explanations of this saying. Tosafot in bB.B. explained it literally, i.e., as an unlimited permit to speak libel in the presence of three people.¹⁴⁹ Tosafot in bArakhin understood it to refer to comments that could be interpreted as libel, but that are not categorically libelous.¹⁵⁰ Rashbam explained it to mean that a person who hears libel within a group of three or more people can tell the offended party that someone spoke negatively about him, because it will eventually get back to him anyway.¹⁵¹ According to Maimonides, only after libelous comments are made in the presence of three people can one of the people spread it further, and only if “he does not intend to spread the rumor and reveal it to a greater degree.”¹⁵² The opinion of Rashi¹⁵³ is unclear: according to one understanding, he adopts a position similar to that of Rashbam, while according to another understanding, he holds that if the offended party spoke against himself in the presence of three people, he thereby showed that he relinquished his right and allowed others to transmit the information further.¹⁵⁴ A fifth, particularly lenient

148 *Hafetz Hayim*, Introduction, pp. 12-13; Negative Commandments, 14.

149 Tosafot, bB.B. 39a, “*Leit bei.*”

150 Tosafot, bArak 16a, “*Kol milta.*”

151 Rashbam, bB.B. 39a, “*De-Mit’amra be-appei telata.*”

152 *Mishneh Torah*, *Hilkhot De’ot*, 7:5.

153 Rashi, bArak 16a, “*De-Mit’amra be-appei telata.*”

154 *Hafetz Hayim*, Part 1, 2 *Be’er Mayim Hayim* 1.

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position adopted by the Maharal of Prague is not even enumerated by the Hafetz Hayim. The Maharal states: “It is only considered libel if a statement is made by one person to another individual about a party who is not present. But if it is said in front of the offended party, it is not considered libel.”¹⁵⁵ The Hafetz Hayim only relates to this position in a short footnote, in which he dismisses it completely.¹⁵⁶ In his opinion, the lenient position of Tosafot in bB.B. is not possible, and was in fact revoked by Tosafot in bArak, who refute it. On this basis, the Hafetz Hayim concludes that the “opinion which is the consensus among the halakhic authorities” is as follows: “It is forbidden to speak libel about another person, even if it is true, in front of one person, and more so in the presence of many people. The transgression is magnified corresponding to the number of people that hear it.”¹⁵⁷ In practice, he accepts the opinion of Tosafot in bArakhin,¹⁵⁸ and cites the opinion of Maimonides only as an alternative position.¹⁵⁹ Nevertheless, he does utilize the opinion of Maimonides in another place to reconcile a talmudic passage that he considers difficult.¹⁶⁰ After this entire discussion, the Hafetz Hayim adds a series of other qualifications that apply to the statement regarding speaking libel in the presence of three people, including: that the person should not add anything beyond what he heard from others;¹⁶¹ that he

155 Maharal of Prague, *Netivot Olam, Netiv Ha-Lashon*, 1, and in the appendix to ch. 7. The Hafetz Hayim claims that in the incident of Miriam, “which is known in all of the Torah” as libel, the comments were made in the presence of the offended party (Moses), at least according to Rabbi Nathan in Sifre Numbers § 100. S. Z. Kook already questioned this (*supra*, n. 2, pp. 100-101), claiming that it is impossible to learn anything from that incident since the libelous statement was false.

156 *Hafetz Hayim*, Part 1, 2 *Be'er Mayim Hayim* 1 in a note.

157 *Ibid.*, Part 1, 2:1.

158 *Ibid.*, 2.

159 *Ibid.*, 3.

160 See below, text at n. 187.

161 *Hafetz Hayim*, Part 1, 9.

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should not transmit it to someone who might embellish it;¹⁶² etc. He rightfully adds that in light of the many qualifications, “this leniency [...] has almost no place in practice.”¹⁶³

- B. The Hafetz Hayim relates in a number of places in his book to cases in which the libel is stated in front of the offended party, or that the perpetrator would be willing to say it in his presence. As we have seen, the permissive opinion of the Maharal relating to this issue is summarily dismissed by the Hafetz Hayim as erroneous.¹⁶⁴ He also gently criticizes the lenient position of Rashi (“his explanation requires explanation”),¹⁶⁵ and suggests that Rashi’s permit only applies if the comment might be understood as libelous but is not categorically libelous,¹⁶⁶ or if the comment is permissible for other reasons, such as that the person making the comment is trying to protect another person from being swindled. In the latter instance, it is permitted only if he has previously rebuked the person personally.¹⁶⁷ In any case, the Hafetz Hayim emphasizes that even if the teller “believes that he would say it in front of the offended party, or if he actually said it in his presence, it is also forbidden and considered libel. From one perspective, saying it in his presence is a greater prohibition than when it is not in his presence, for in front of him, in addition to the prohibition of libel, he takes on the qualities of insolence and impudence, which inflame controversy, and at times also lead to embarrassment.”¹⁶⁸

162 *Ibid.*, 10.

163 *Ibid.*

164 See *supra*, n. 156.

165 *Hafetz Hayim*, Part 1, 3 *Be’er Mayim Hayim* 1.

166 *Ibid.*, 2 *Be’er Mayim Hayim* 2.

167 *Ibid.*, 3 *Be’er Mayim Hayim* 1.

168 *Ibid.*, 3:1. See also 2; Part 2, 3:1, and *Be’er Mayim Hayim* on these sections.

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- C. The Hafetz Hayim dedicates a long and detailed discussion to speaking libel about people involved in a conflict.¹⁶⁹ First of all, he points out that this permit is only an alternate opinion, and hints that there is no indication that it was concluded as law. Second, he establishes that the permit applies “specifically if by doing so, he reveals to the parties involved the degree of their deceit in this matter, and they will realize that the law is not in their favor, which will lead to an end to the controversy. But if not, then there is no difference.” Third, he stipulates that the permit is only applicable if the person making the comment is personally aware of the circumstances and is thus certain that a conflict actually exists. Fourth, he requires that the person be motivated not by hatred, but by a desire to reconcile the quarrel. Fifth, he stipulates that the permit applies only if the conflict cannot be reconciled by any other means. Sixth, he requires that it be clear to the person making the comment that he is casting aspersions on the guilty party in the controversy: “If he is unable to clarify in his mind whom the law supports, it is better to be passive and not act.” In another place, the Hafetz Hayim adds that even in a situation in which it is permissible to speak libel about people involved in a controversy, it is still forbidden for a third party to listen to it and give it credence.¹⁷⁰ It is clear that after all of these qualifications, little remains of this permit.
- D. With regard to permission given to publicly disclose hypocrites, the Hafetz Hayim stipulates that the permit is only given to prevent damage. Therefore, it cannot be done if the damage has

169 Ibid., Part 1, 8:8 .

170 Ibid., 8 *Be'er Mayim Hayim* 26. The Hafetz Hayim here negates a maxim that he himself formulated: “It is not reasonable to be more stringent with the listener than with the teller” (Part 1, 7:10). If that is not enough, this maxim, on its part, is itself problematic, for the Hafetz Hayim accepts the principle elucidated by the Rabbis that “greater is the sin of the one who hears it than the one who says it” (Part 1, 6:3, 6:1).

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already occurred. Thus, for example, a person is allowed to warn his friend against entering a business relationship with a particular person under the following conditions: “They only said (bYoma 86b) that it is a commandment to publicly disclose the hypocrites in order to warn another person not to get involved with him *a priori* so as not to suffer loss, or even if he is already involved with him, and he knows the nature of the person that he is telling about, only so he will consider his words and protect himself, but not to cause him actual damage.”¹⁷¹ Similarly, the Hafetz Hayim stipulates that the permit applies only to a hypocrite who is known to habitually cheat, but not to one who might have done so only once.¹⁷²

- E. The Hafetz Hayim dedicates several long discussions to speaking libel about someone who has a bad reputation. In general, he objects to relying on rumors, and prohibits spreading them further: “If a rumor was perpetrated about someone claiming that he did or said something that is inappropriate according to the Torah, be it a severe prohibition or a lighter one, it is nevertheless prohibited to believe it in a resolute manner [...], and how much more so must he be careful, if he wishes to mention it to another person, not to spread it further and publicize it more.”¹⁷³ He explains the permit to denigrate, censure, excommunicate, or punish based on rumors in a manner consistent with his general approach, i.e., that it is only for the purpose of censuring “evil people” and excluding them from the protection of the prohibition of libel.¹⁷⁴ He therefore limits this permit by establishing a

171 Ibid., Part 2, 9, *Be'er Mayim Hayim* 17.

172 Ibid., 28.

173 Ibid., Part 1, 7:4.

174 I intend to dedicate separate research to this topic. For the time being, I will quote the Hafetz Hayim's main text on this issue: “And this entire prohibition of libel relates to a person who is by Torah law in the category of ‘your friend’, i.e., one who is with you in the observance of Torah and the commandments. However, those people whom he knows

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series of qualifications. First, the permission to speak libel about a person who is the subject of rumors does not apply to a person about whom there are isolated rumors, but only to one who is regularly the subject of rumors.¹⁷⁵ The Hafetz Hayim agrees that for this type of person, “it is permissible to conclude that he is evil and to denigrate him, even a person who does not know him well.”¹⁷⁶ Second, the permit applies only to rumors about the transgression of offenses “that are well known among all Jews to be prohibited.”¹⁷⁷ Third, one who degrades a person about whom there are rumors can only do so in his presence (“to his face”).¹⁷⁸ Fourth, even after all of these qualifications, the Hafetz

to be heretics, it is a commandment to degrade and debase them, whether in their presence or not, regarding anything that he hears about them or sees them do, as it is written, ‘Do not wrong your friend’ (Lev 25:14) and ‘You shall not be a tale-bearer among your people’ (Lev 19:16), and they are not included in these rules because they do not act in accordance with the behavior of your people. Furthermore, it is stated: ‘I hate them with utmost hatred; I count them mine enemies’ (Ps 139:21). Now, the heretic is considered one who denies the Torah and the prophecy of Israel, whether the written Torah or the Oral Law, and even if he says, ‘All of the Torah is from Heaven, except for one verse, or one *a fortiori* argument or one argument by comparison or one grammatical derivation,’ he too is in this category” (*Hafetz Hayim*, Part 1, 8:5).

175 Ibid., 7, *Be'er Mayim Hayim* 8. He arrives at this conclusion based on an analysis of Rashi’s use of the plural, reasoning that “it is impossible that all of the people of the city would always be wrong.” In the continuation of his comments, he indicates that this permit only applies to one who is assumed to act inappropriately, “which is not the case if it was heard coincidentally about a person that he did something inappropriate, but was not strengthened. In such a case, he cannot rely on it and hate him, or more so speak libel against him and degrade him, even if he heard it from many people.”

176 Ibid.

177 Ibid., 8:7.

178 Ibid., 4, *Be'er Mayim Hayim* 30. It is interesting to note that the Hafetz Hayim interpolated the word “*be-appai*” (“to his face”) into the text in such a manner that the simple reader would not know that it is not part of the source. This limitation contradicts another assertion that we saw

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Hayim adds an interesting note: “And I was very much afraid to write this law because of the libel-inclined persons who upon hearing one negative thing, will immediately assume that person to be evil and degrade him, and will justify their behavior as being based on this book. Nevertheless, I did not delete it, for as our Sages said in Bava Batra (89b) about Rabban Yohanan b. Zakkai: ‘He said it [openly – a law that the transgressors may abuse] and his source [for that] was this verse (Hos 14:10): *For the ways of the Lord are right, and the just do walk in them; but transgressors do stumble on them*.’”¹⁷⁹

F. As for the Rabbis’ sardonic words toward one another, the Hafetz Hayim passes with silence on most of them. Of the above sayings, he refers only to Rabbi Yohanan’s words, “the lion you mentioned has become a fox,” and contends that they are not problematic, “because R. Yohanan did not reveal anything unknown by his statement, for even without this, everyone had seen that Rav Kahana did not ask R. Yohanan any critical question.”¹⁸⁰ He did not generalize this interpretation into a permissive rule.

There is yet another example from which we can learn the Hafetz Hayim’s stringent tendency in the interpretation of the short halakhic texts of the Sages. We have seen that the Hafetz Hayim deduced a series of halakhic rules out of the saying in bM.Q. that an agent of the

previously regarding the prohibition of libel, which states: “On the one hand, the prohibition is greater in front of him than when he is not present,” since it adds the vices of impudence, insolence, inflaming conflicts and causing embarrassment (see the text at n. 168 above). The Hafetz Hayim does not try to reconcile this contradiction. It appears however that there, the question of speaking libel in front of the offended party arises as a possible reason for leniency, which the Hafetz Hayim wishes to reject, while here it arises as a possible reason to delimit the permit (i.e., to be stringent), which he wishes to adopt.

179 Ibid.

180 Ibid., Part 1, 5, *Be’er Mayim Hayim* 8.

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court that fell victim to the defendant's abusive conduct may tell it to the court without being guilty of libel.¹⁸¹ The common denominator between all of these rules is the exegetical premise upon which they are based, namely, that since the statement in the Talmud relates particularly to an agent of the court, the permit that was issued also relates only to agents of the court. In other words, we can assume that in other instances with similar circumstances, hurtful language would be forbidden. But this interpretive premise is not necessary at all. For the purposes of comparison, it is interesting to note that Rabbi Shlomo Zalman Kook suggested the very opposite conclusion. He claimed that the Talmud spoke specifically about an agent of the court because in that case there is a particular concern about libel, because of "the concern that he will influence the court to judge unlawfully against him." In other cases with similar circumstances, however, this type of speech would be permitted because there would be no such concern!¹⁸² The logic of both interpretive premises is one and the same, which means that the choice between them is based on the interpreter's predisposition – to be lenient or stringent. The Hafetz Hayim opted for stringency.

The Hafetz Hayim adopts a stringent stance not only regarding the few halakhic sources that appear on the topic in talmudic literature, but also with regard to relevant aggadic sources. In the opening of his book, in an attempt to prove that the prohibition of libel also relates to true statements, he quotes the following passage in bSotah: "There are four groups among whom the Divine Presence does not dwell." Subsequently, the Talmud indicates that two of the groups are "liars" and "those who speak libel." Since these two groups were listed separately, the Hafetz Hayim concludes, following Rabbenu Yonah, that libel is not necessarily false, for if it were, there would be no need to list it separately.¹⁸³ On the other hand, when another statement in bSotah dis-

181 *Supra*, n. 72.

182 S. Z. Kook, *supra*, n. 2, p. 101. See also p. 103.

183 *Hafetz Hayim*, Part 1, 1:1. It is noteworthy that in the opinion of M. Gruzman, the rabbis held that the punishment of leprosy for libel only

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tinguishes between “those who are haughty” and “those who speak libel,” the Hafetz Hayim draws no such conclusion and states that one who speaks libel also falls prey to haughtiness,¹⁸⁴ even though Rabbenu Yonah did find similar significance in the fact that they were listed separately.¹⁸⁵

The stringent tendency of the Hafetz Hayim also manifests itself in the way that he deals with the talmudic report that in the Land of Israel, it was customary to ask the bridegroom if he “found” (*matza*) or is about to “find” (*motze*), i.e., if his marriage is described by the verse “he who **found** (*matza*) a wife found goodness” (Prov 18:22), or by the verse “I **find** (*motze*) the wife more bitter than death” (Eccl 7:26).¹⁸⁶ The Hafetz Hayim was troubled by this passage, because the custom seems to give an opening for speaking libel about the wife. On its face, the talmudic passage is speaking playfully and does not refer to an intentional expression of libel. However, this understanding would be adequate for one who views the prohibition of libel as a “morality of aspiration,” but not for the Hafetz Hayim who viewed it as a “morality of duty.” He therefore explains this custom by utilizing the position of Maimonides, which he was previously not completely prepared to accept,¹⁸⁷ stating that libel already said in front of three people can be spread by one of those who heard it, as long as he does not intend to strengthen the rumor and disclose it further. “If so,” he concludes, “we can simply say that it is usual that in the case of an evil woman about whom it can be said that she is more bitter than death, that the matter

applies if the libel is false (see n. 250 below). If this claim is correct, it brings into question the interpretations of Rabbenu Yonah and the Hafetz Hayim.

184 *Hafetz Hayim*, opening chapter, Negative Commandments 5. This question was already raised by Rabbi Hadaya (*supra*, n. 2, pp. 229-30) but not sufficiently answered. A. Y. Kook (*supra*, n. 2, p. 97), too, claims that not all libel indicates haughtiness, but he bases it on his own reasoning.

185 *Sha'arei Teshuvah*, gate 3, 174.

186 bYev 8a.

187 See *supra*, n. 153.

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was certainly disclosed already in the presence of three people. Thus, a husband who subsequently talks about her wickedness without the intent of spreading it further has not transgressed the prohibition of libel.”¹⁸⁸ Here, too, the interpretation could be extended to permit any libelous statement where it could be assumed that it is already common knowledge, but the Hafetz Hayim does not do so. On the contrary, he relegates the comment to an obscure footnote and does not include it in the chapter on permits. Nor does he adopt the permit embodied in Maimonides’ opinion as a general rule, even though he based his understanding of this passage upon that opinion.

The Hafetz Hayim deals similarly with a different section of the same talmudic passage, which reports that when Rabbi Yehudah taught his son the verse “I find the wife more bitter than death,” his son asked “Like whom?” and his father responded “Like your mother.”¹⁸⁹ In this case, the Hafetz Hayim also explains that the story relates to a woman who was known to be difficult, and the statement was not for the purpose of spreading the rumor further. He adds that in this instance, the son “knew the nature of his mother, but asked ‘like whom?’ as if to ask to what extent the woman must be evil [to be in this category]. And when the father responded ‘like your mother’ it was certainly his intent to explain the verse and not to demean her. This is similar to one who achieves certain benefit by revealing the truth.”¹⁹⁰ Here too, it is clear that the explanation is forced. The Hafetz Hayim himself does not generalize from this permit, and never establishes a rule that it is permissible to utilize examples that denigrate a particular individual for purposes of demonstration in study.

The same is true for his use of *musar* books. We have seen above that the Hafetz Hayim took the liberty to decide the law on the basis of *Sha’arei Teshuvah*, even without finding its source in the talmudic lit-

188 *Hafetz Hayim*, Part 1, 1 *Be’er Mayim Hayim* 13.

189 bYev 63b; bSan 22b.

190 *Hafetz Hayim*, Part 1, 1 *Be’er Mayim Hayim* 13. See also n. 120 above.

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erature, but “only in places where his words imply a leniency.”¹⁹¹ One may understand from this that he sought to be lenient in his rulings. However, at least on one point, Rabbenu Yonah rules leniently but the Hafetz Hayim seeks to limit the scope of the leniency. The question at stake is whether a person who saw another person transgressing the *halakhah* may tell others about it. Rabbenu Yonah alludes to a distinction between transgressing laws “between man and God” and laws “between man and man.” On the latter he tends to be lenient:

On matters between man and man – such as stealing, oppression, damage, pain, embarrassment, or deceptive language – one may tell the deeds to other persons. Even if there was only one person who saw the act, he must tell them, so as to help the victim of those deeds and fight for truth.¹⁹²

The allowance seems to be sweeping, and its purposes – help for the victim and fighting for truth – do not seem to be preconditions but rather justifications for the categorical permit. The Hafetz Hayim, however, reads it differently. He preserves the distinction between “man and God” and “man and man” and comments that regarding the latter “there are many ramifications” which he articulates in the chapter on permits, but rules decisively that in case where a person refuses to lend money to another, one may not tell it to other people even though the refusal is considered a transgression.¹⁹³ Furthermore, even if the transgressor acts the same way on a regular basis, he still enjoys the protection of the prohibition against libel. The Hafetz Hayim explains that a refusal to lend money is misconceived by the public as not being a genuine transgression, and therefore we may assume that the person at stake did not refuse to do it as part of ideological disobedience but rather as a result of a mistake. He adds: “And thus we have explained in several similar instances where there is a side to permit and a side to

191 *Supra*, n. 93.

192 *Sha'arei Teshuvah*, gate 3, 221.

193 *Hafetz Hayim*, part 1, 4:1; *ibid.*, 5:1.

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prohibit, and he transgressed it in a manner that is prohibited – that even so, this does not negate his status as ‘your friend,’ and it is therefore prohibited to denounce him for this.”¹⁹⁴ It is easy to notice that in this approach, he deviated sharply from Rabbenu Yonah’s leniency. Even the discussion in the chapter on permits, to which the Hafetz Hayim refers the reader, is still very distant from the sweeping permit found in *Sha’arei Teshuvah*.

In general, it is enough to take a quick glance at the two chapters in the *Hafetz Hayim* on permits for speaking libel and for speaking gossip, to discern that the author’s approach is to create a series of stipulations that restrict their application.¹⁹⁵ For example, the permit to speak libel in order to help a person who has been harmed is qualified by seven conditions: that the person speaking saw the harm himself, and did not hear it from others; that he clarified that the incident was indeed within the category of damage; that he tried first to rebuke the perpetrator; that the libel will not increase the damage; that his intention is to be helpful, and “not God forbid to benefit from the flaw that he causes to his friend”; that there is no alternative way to rectify the situation; that the harm caused to the perpetrator not be greater than the harm that he had caused. On this the Hafetz Hayim adds the somewhat strange condition that the person who tells the libel be on a higher ethico-religious level than the person about whom he tells it.¹⁹⁶ A similar list can be found in the laws of gossip.¹⁹⁷ These conditions are practically impossible to fulfill, but the Hafetz Hayim emphasizes that “one must be very careful in this permit that none of the above details are lacking.”¹⁹⁸

The “opening chapter” of the entire work goes above and beyond these examples. In this section, the Hafetz Hayim lists all of the potential prohibitions that a person might transgress by speaking libel.

194 *Ibid.*, *Be’er Mayim Hayim*, 5.

195 See *supra*, n. 130.

196 *Hafetz Hayim*, Part 1, 10:2. See also 14.

197 *Ibid.*, Part 2, 9:2.

198 *Ibid.*, Part 1, 10:14.

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The list includes 17 negative commandments, 14 positive commandments, and 3 curses. As Mordechai Dadon pointed out, this “thickening” of the prohibition results in the fact that “there is in practice no other prohibition in the [halakhic] system that has a similar standing.”¹⁹⁹ Yet, a closer look at the list reveals quickly that some of these prohibitions are only relevant if the libel is accompanied by other conditions, such as: the motivation of hatred,²⁰⁰ revenge or a grudge;²⁰¹ inflaming a conflict;²⁰² causing damage to the income of the offended party;²⁰³ specific circumstances like speaking libel in the synagogue,²⁰⁴ about an older person,²⁰⁵ about a priest,²⁰⁶ or about an older brother;²⁰⁷ or telling lies.²⁰⁸ Another portion of the list of prohibitions could apply to any transgression, particularly with the far-reaching interpretations that the Hafetz Hayim adopted. This is the case, for example, with regard to

199 Dadon, *supra*, n. 5, p. 40.

200 *Hafetz Hayim*, opening chapter, Negative Commandments, 7. With regard to this prohibition, the Hafetz Hayim adopted a very broad interpretation to include even hatred within one’s heart. He rejects a more restricted interpretation which limits it to hatred that comes to expression in an act of violence, and ignores the fact that the latter interpretation was adopted by J. Caro (*Kesef Mishneh* on Maimonides, *Mishneh Torah, Hilkhhot De’ot* 6:5), as rightfully pointed out by O. Hadaya (*supra*, n. 2, p. 230). A. Y. Kook holds like the Hafetz Hayim that “hatred in the heart is specifically in the heart,” which leads him to a different leniency, namely that once the hatred is expressed in words, it no longer qualifies as hatred in the heart (*supra*, n. 2, p. 97).

201 *Hafetz Hayim*, opening chapter, Negative Commandments 8-9. Rabbi Avraham Yitzhak Kook rightfully points out that the Hafetz Hayim greatly broadened the scope of this prohibition, which in halakhic terms refers only to monetary matters (*supra*, n. 2, pp. 97-98).

202 *Hafetz Hayim*, opening chapter, Negative Commandments, 12.

203 *Ibid.*, Positive Commandments, 4.

204 *Ibid.*, 7.

205 *Ibid.*, 8.

206 *Ibid.*, 9.

207 *Ibid.*, 10. The same is true of the husband of his mother.

208 *Ibid.*, 13.

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the commandments of “lest you forget the Lord your God,” which is a prohibition against haughtiness,²⁰⁹ “do not profane my holy name,”²¹⁰ “fear the Lord your God,”²¹¹ “and you shall walk in his ways,”²¹² or the positive commandment of Torah study, which the Hafetz Hayim connects to the prohibition of libel because one who speaks libel could have been learning Torah at the same time.²¹³ The same is certainly true of commandments that govern interpersonal relations.

The development of a list of negative commandments, positive commandments, and curses by the Hafetz Hayim aroused the attention of many of his interpreters and critics, and many of the comments on his work relate to it. Not in vain did Rabbi Avraham Yitzhak Kook comment on a discussion relating to one of these details, that “we should not increase the number of negative commandments unnecessarily.”²¹⁴ A contemporary commentator, Rabbi Moshe Kaufman, alludes gently to this criticism, but immediately “corrects” it in defense of the Hafetz Hayim:

Now our teacher [the Hafetz Hayim] gathered together many positive and negative commandments that relate either directly or indirectly to the prohibition of libel, most of them connected to *Hilkhot De’ot* of Maimonides or issues that branch off from there. In truth, it would have been possible to take this pamphlet [the list of potential transgressions] and attach it to [each of] many com-

209 Ibid., Negative Commandments 5. In contrast to the Hafetz Hayim’s expansive approach, A. Y. Kook held that not all libel constitutes haughtiness (*supra*, n. 2, p. 97).

210 *Hafetz Hayim*, opening chapter, Negative Commandments 6. A. Y. Kook pointed out that desecration of God’s name occurs only when the transgressor perpetrates the sin without any benefit, “but one who intends to benefit is not included in this category.” This position differs from the one implied by the Hafetz Hayim (*supra*, n. 2, p. 97).

211 *Hafetz Hayim*, Positive Commandments 11.

212 Ibid., 13.

213 Ibid., 12.

214 A. Y. Kook, *supra*, n. 2, p. 97.

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mandments that are mentioned here, for the issues of virtues [*de'ot*] and of interpersonal relations is like one piece, and the violation of one commandment draws along its companion as on a thread. However, our teacher related them to the laws of libel, which is the subject of his book.²¹⁵

It is clear to the reader that the Hafetz Hayim's approach was motivated by a desire to impress upon his audience the seriousness of this transgression, and additionally to point out that an awareness of this seriousness is directly tied to the stringent definition of its parameters.

Of the two approaches available to the Hafetz Hayim in the halakhization of the prohibition of libel, he clearly chose the stringent approach. Indeed, he developed a set of extremely demanding norms that very few individuals are able to maintain. In spite of the fact that he was very much aware that many viewed the laws of libel in this light, he did not spare any attempt to convince his readers that the fulfillment of this mission is indeed not impossible. Clearly, the transition from a "morality of aspiration" to a "morality of duty" caused the maximum standard that characterizes the former to become the minimum standard characteristic of the latter.

5. Truly Halakhization? – An Evaluation of the Hafetz Hayim's Work on Libel

Let us now evaluate the work of the Hafetz Hayim in the area of libel, and examine the degree to which his process of halakhization was successful. This examination can be done on two levels: the literary-normative and the socio-cultural. The latter requires a sociological

215 M. Kaufman (*supra*, n. 2), p. 1. Kaufman also comments in a number of places relating to the positive and negative commandments that the interpretation of the Hafetz Hayim was not necessary, was too broad, or was disputed.

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analysis, which is outside the parameters of this paper. I will, therefore, focus on the former. After doing so, however, I will permit myself to make a few points regarding the latter as well.

First of all, we might ask whether the Hafetz Hayim succeeded in creating a normative branch relating to libel that is based on rules rather than on principles. It appears that he did. The Hafetz Hayim distinguished between the prohibitions of libel and gossip (although the distinction is not always sharp), organized the laws relating to each in an orderly fashion, systematically detailed the conditions under which particular acts would be considered a transgression, listed the exemptions (that primarily appear in his book in the chapters on permits), and provided a number of practical examples and their solutions. Although the book contains some contradictions and tensions, some of which I discussed previously, these exceptions prove the fact that the Hafetz Hayim succeeded in transforming the discourse on libel to the domain of rules, for contradictions, as Dworkin pointed out, are relevant only with regard to rules.

The Hafetz Hayim realized that his system of laws and cases could not exhaust the principle of the prohibition of libel, and at the end of his book he added a supplementary general guideline, phrased in the spirit of a “duty of aspiration,” stating that the principle that must govern a person’s behavior is as follows: “To be very careful about his paths, and particularly on the utterances of his lips, to not intervene in matters between man and man if he doesn’t clearly know the details of the matter in truth at the outset, and to not act out of hatred but to aim for a positive outcome, and to see to it that the consequences of his speech not cross over the parameters of the law, God forbid.”²¹⁶ Indeed, it is apparent from the context that this wording, which is formulated as a principle, is not a substitute for rules, but an attempt to cover normative lacunae, and to enable a person to function in a situation in which he does not know the law sufficiently. This use of the principle does not

216 *Hafetz Hayim*, Part 2, p. 261.

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undermine the halakhization, as the same approach is utilized in similar circumstances in rule-centered systems.

The Hafetz Hayim himself saw the test of halakhization in its connectedness to the letter of the law. As we have seen, in the introduction to his book, he states: “This book is not written from the perspective of *middat hasidut* (pietist virtue), rather from the perspective of law.”²¹⁷ So far I have shown that the Hafetz Hayim actually did not refrain from taking sources that prescribed pietistic virtues and giving them the form of ‘morality of duty’, but, in addition, Hafetz Hayim’s own language sometimes slipped over to terms of ‘morality of aspiration’. In truth, in many instances we find him posing higher standards than those of the basic requirements or recommending stringencies that are beyond the letter of the law.²¹⁸ Yet, this also does not seem to impair the legal, rule-based nature of the work, as the use of “soft stringencies” (recommendations to act in a stringent fashion), are found in texts that are clearly legal, and are particularly prevalent in the greatest halakhic work of the Hafetz Hayim, the *Mishnah Brurah*.²¹⁹

Nevertheless, in spite of it all, it seems that from particular perspectives, the book *Hafetz Hayim* did not succeed in removing the prohibition of libel from the domain of *musar*. It seems that the

217 See text at n. 66 above.

218 For example, he suggests that “a person who guards his soul will distance himself” from the permit to speak libel before three people (*Hafetz Hayim*, Part 1, 2:10). He utilizes a similar expression when discussing the issue of speaking praise about another person, when it may cause the person listening to counter with negative comments (*Hafetz Hayim*, Part 1, 4 *Be'er Mayim Hayim* 37). He rules similarly with regard to believing libel from a person who states it in innocence (*Hafetz Hayim*, Part 1, 7:16). In another place, he specifically uses the expression “beyond the letter of the law” (*lifnim mi-shurat ha-din*), when he teaches that a person should accept responsibility for an act that he did not do in order to prevent libel about another person (*Hafetz Hayim*, Part 1, 10:16).

219 For more on this point, see my “‘Soft Stringency’ in the Mishnah Brurah: Jurisprudential, Social and Ideological Aspects of a Halakhic Formulation,” *Contemporary Jewry* 27 (2007): 1-41.

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strongest proof of this claim is that the book includes so many explicit and implicit norms that are incompatible with human nature. According to the Hafetz Hayim, a person cannot say anything negative about another person, whether a living person or dead, in the presence of that other person or in his absence, explicit or implied, oral or written, true or false, said seriously or in jest, stated as a fact or as an opinion.²²⁰ According to the Hafetz Hayim, if my wife asks me about my lecture today, and I reply that it was mediocre, I transgressed the prohibition of libel (and maybe she did, too), which applies even to discussion between spouses; even to cases in which the subject of the libel is the speaker himself; even if he were simply expressing a disrespectful opinion on “sermons”; and even if he were using understatement. The prohibition against gossip embraces even the recounting of non-negative facts. All of the exceptions that the Hafetz Hayim imposes on the application of the prohibition relate to the act itself and do not reflect leniencies relating to outcomes, such as the degree to which the libelous statement spreads, the actual damage caused to the offended party, the possibility that the offended party does not even sense the offense, and the like. This approach to the prohibition can lead to misunderstanding regarding the distinction between a serious transgression, a minor transgression, and an offensive remark that is forgivable by the standards of normal human society. This would be within the realm of acceptability were we talking about principles, but when talking about rules, it impairs the normative applicability of the standards, and makes their implementation considerably difficult.

The all-embracing approach of the Hafetz Hayim to the prohibition is sharpened when we see how the later interpreters of the book dealt with it. In attempting to be true to the Hafetz Hayim’s approach of seeing the whole topic as a legal issue, some of the rabbis raised the following questions: does a person have to forfeit money in order to

220 Modern law also refrains at times from making these distinctions, but it is hard to find a modern legal system that comes close to the level of stringency imposed by the Hafetz Hayim.

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not transgress the prohibition of libel, as is the case with all negative commandments? Is a person permitted to mock another person within the context of a Purim party, which traditionally includes satirical teasing? Is it permissible for a father to inquire about his son's progress in school if it is not for a direct purpose? It is probable that these questions were not discussed before the time of the Hafetz Hayim because their permissibility was taken for granted, primarily because the prohibition of libel was perceived as a principle of *musar*. They only became "halakhic questions" when libel was transformed into a legal issue. The answers given to these questions by the authorities that addressed them are often interesting. With regard to forfeiting money, Rabbi Shlomo Rosner ruled, in the footsteps of Rabbi Shmuel Houminer, that a person is indeed required to forfeit money in order to refrain from transgressing the prohibition of libel.²²¹ Rabbi Moshe Kaufman rules similarly, but only with regard to speaking libel, not to hearing it.²²² With regard to the satires on Purim, Rabbis Kaufman, Cohen and Levi all agree that it is forbidden.²²³ Of the three, Rabbi Kaufman is somewhat more moderate in that he is prepared to permit it if the object of the teasing foregoes his honor and permits it, but suggests that it is best not to do so in any case. With regard to the right of a father to check on his son's progress, Rabbi Levi rules that "the father is permitted to check on his son's academic progress only if he does so in order to help him." He emphasizes that "if his interest is motivated solely by curiosity, he cannot inquire. This law applies to all relatives as it does to all others."²²⁴ In contrast, Rabbi Kaufman feels that such a demand is not reasonable. He has difficulty finding a halakhic source to support this permit, and therefore turns to human feelings – almost in

221 Rosner (*supra*, n. 2), 42.

222 Kaufman (*supra*, n. 2), 295-96.

223 *Ibid.*, 324-26; Cohen, (*supra*, n. 2), Part 1, 3:12, 91 (in the footsteps of O. Yosef, *She'elot u-Teshuvot Yehavve Da'at*, vol. V, 50); Levi (*supra*, n. 2), Part 1, 21 84; and Part 2, 2, 201-203.

224 Levi (*supra*, n. 2), Part 1, 12:6, 77.

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the spirit of natural law – as he rules that “it is permissible, because this is the meaning of the appellation ‘father,’ that he is connected to his son with a deeply imbedded love and always takes interest in him.” Nevertheless, he admits that “many might utilize this permit to ask or tell out of curiosity under the guise of a valid purpose.” However, he continues, “I have nevertheless not refrained from stating what appears correct in my humble opinion – that the permit is necessary, and that God will not withhold goodness from those who proceed with complete integrity.”²²⁵ All of these distinctions are designed to blunt the sweeping character of the Hafetz Hayim’s rulings, to make the prohibition more complex and consequently more practical for application.

Another problem regarding the halakhization of the prohibition of libel relates to the degree to which it gives solutions to the difficulties that face the individual in the social situation in which he is to implement the law. Rules, in contrast to principles, are intended to give clear normative guidance for actual life situations. Indeed, the Hafetz Hayim does not simply present the rules, but also provides examples. As we saw above, however, these examples relate primarily to the areas of matchmaking and business, which are the most common scenarios for the average person. It is these issues, rather than more public or more innovative problems, that engage the Hafetz Hayim. From this standpoint, we could characterize the approach of the Hafetz Hayim as “retail rulings.” As such, the halakhization of the prohibition of libel, which was supposedly designed to provide answers to all situations in which the problem manifests itself, falls short. First and foremost, it should relate to situations in which it faces the classical tension between freedom of expression and the right of a person to his good reputation, which is a major topic in modern law. This theoretical dilemma, however, is foreign to the spirit of the traditional *halakhah*, which is a “duties talk” rather than a “rights talk.” It is consequently foreign to the Hafetz Hayim as well. Seemingly, one could try to anchor the freedom of expression in his principle of “benefit,” which at times balances the

225 Kaufman (*supra*, n. 2), 339.

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prohibition of libel in his writings; after all, the freedom of expression in modern culture is also not a categorical imperative, but rather a means toward achieving “benefits.” However, if we examine the four rationales for freedom of expression in modern democracy, we find that for the most part, they do not relate to the world of the *Hafetz Hayim*. These rationales relate to freedom of expression as an instrument for clarifying the truth, as a component of the self-actualization of the individual, as a condition for the democratic process (namely, elections), and as a means of letting off “societal steam [...] through the quiet path of expression, rather than through the violent path of action.”²²⁶ Even if each of these is a “benefit,” they relate to long-term outcomes on the general societal level. In contrast, the considerations of the *Hafetz Hayim* were short-term concerns relating to the level of the individual (except for issues relating to the denunciation of heretics and evil people). Consider the fact that the *Hafetz Hayim*, in raising the possibility of permitting libel in the case of one who stole from or damaged another in the hope that it would pressure him to give back the stolen object or compensate the damage, rejects this possibility on the basis of his own reasoning, contending that this hope is “very distant,” particularly in comparison to the more immediate damage that might be caused by the libel.²²⁷ If this “benefit” is considered “very distant” in his eyes, then how much more so would he find the “benefits” contained in the above rationales, which are less imminent and more general, to be distant. There is no question that this approach is the opposite of the modern-democratic perspective, which is expressed in the well-known statement of Justice Louis Brandeis: “Sunlight is said to be the best of disinfectants.”²²⁸ No less than this expresses the gap

226 These four rationales of freedom of expression are taken from a decision of Judge A. Barak in *Kahane vs. the Board of Directors of the Israel Broadcast Authority*, *PD* (Israel Supreme Court Decisions) 41:3 (1987), 272-79.

227 *Hafetz Hayim*, Part 1, 10 *Be'er Mayim Hayim* 18.

228 L. Brandeis, *Other People's Money and How the Bankers Use It* (New York, 1932), 92.

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between the modern and the Jewish legal systems with regard to their essential values and different ways of thinking: traditional halakhic thought refrains, at least openly, from taking account of “distant future [events]”²²⁹ and systemic considerations, preferring to focus on directly observable outcomes that are imminent.²³⁰ And indeed, the approach of “retail rulings” is characteristic of the Hafetz Hayim, not just in the area of libel, but essentially in all of his rulings, which prefer to focus on questions that are pointed and traditional, taken from the world of the simple man, and not on larger-scale and more novel questions.²³¹

This approach is reflected as well in the identification of the areas in which the Hafetz Hayim wanted to systematize norms. The modern tension between freedom of expression and the individual’s reputation arises regularly in a variety of areas including journalism, academic freedom, and artistic freedom, which applies as well to art criticism. The Hafetz Hayim does not discuss any of these issues systematically, in spite of the fact that some of them were already relevant to the Jewish community in his time.

The Hafetz Hayim does not relate at all to freedom of the press in his work on libel, nor does he refer to newspapers or other more

229 This is the expression used by the Hazon Ish. See *Hazon Ish on Oholot*, 22:32.

230 This does not reflect narrow-mindedness, but rather a latent theological position that expresses a lack of confidence in the ability of man to consider the complex connections between means and ends, and, on the other hand, a confidence in the Torah that already maximally integrates these considerations.

231 Thus, for example, his magnum opus, the *Mishnah Brurah*, deals with issues of daily life, and refrains from dealing with new issues of technologies that were already raised in generations that preceded him, such as riding on a train on the Sabbath, machine-made matzah, machine-made *tzitzit*, or the use of electricity on the Sabbath. With regard to machine-made matzah, his son reports that he “did not wish to express his opinion on issues disputed by the authorities of the generation.” A. L. ha-Cohen, “Kitzur Toledot Hayav,” in *Kol Kitvei he-Hafetz Hayim ha-Shalem, supra*, n. 95, vol. 3, 76.

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advanced forms of communication. It is important to point out that the question was clearly relevant at his time, for in the year that his book was published (1873), a number of Jewish periodicals flourished in the Russian Empire in Yiddish, Hebrew, and Russian. He reserved dealing with them to later publications and letters, in which he expressed a sweeping ban on reading newspapers.²³² There is no indication that this ban excluded ultra-orthodox newspapers or other “kosher” journals. This prohibition was so extreme that even the Hafetz Hayim could not maintain it. We know of quite a few instances from his later years in which he wrote to Orthodox newspapers in Poland,²³³ and of several instances in which he responded to articles that had been published in secular or Haskalah newspapers.²³⁴ In general, he negates the value of

232 See for instance his “Iggrot u-Ma’amaram,” in *Kol Kitvei he-Hafetz Hayim ha-Shalem*, *supra*, n. 95, vol. 3, text no. 42 (p. 84); *idem*, “Dugma mi-Darkhei Avi,” in *Kol Kitvei he-Hafetz Hayim ha-Shalem*, article 82 (31).

233 Yoskor, *supra*, n. 5, vol. II, 760-70.

234 See his son’s account in “*Kitzur Toledot Hayav*” (*supra*, n. 231), 65-66; M. M. Yoskor, *The Hafetz Hayim – His Life and Works* (New York, 1961), I:367 (Hebrew). I parenthetically point out at least one other incident in which the Hafetz Hayim did not maintain a standard that he established in the Hafetz Hayim: the book emphasizes the strict prohibition of publicly embarrassing another individual (*Hafetz Hayim*, Negative Commandments 14 ff.), and establishes that when rebuking a person or demeaning a person for a permitted outcome, it must be done privately in order not to embarrass him (*Hafetz Hayim*, Part 1, 4:5, 3, *Be’er Mayim Hayim* 1, 4, *Be’er Mayim Hayim* 15 and 23, etc.). Yet, the Hafetz Hayim’s son, R. Leib, tells that at his Bar Mitzvah celebration, when he boasted a bit about the speech that he had given, his father hit him in front of the guests and said “a great [Torah scholar] will not come out of you, because of your words.” The son, who recounted the story decades after it had occurred, indicated that it left an indelible mark on him (A. L. ha-Cohen, “Dugma mi-Darkhei Avi,” in *Kol Kitvei he-Hafetz Hayim ha-Shalem*, *supra*, n. 95, vol. 3, article 31, 9). It is important to point out that this type of behavior was very rare, and is inconsistent with the descriptions of the Hafetz Hayim that characterize him as extremely careful about such things. It is also inconsistent with Leib’s own description of his father’s almost-friendly relationship with his children (*ibid.*, 63:33, 25). Nevertheless, I see no room to question the veracity of this story.

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“the right of the public to know,” even in absolutely public issues. For example, the rabbinic prohibition for a judge to reveal to a defendant after the trial that he advocated a minority opinion to exonerate²³⁵ is extended by the Hafetz Hayim to other public institutions and to non-judicial processes.²³⁶

Neither did the Hafetz Hayim relate at all to academic freedom or art criticism, ideas that were completely foreign to his cultural world. The tension between freedom of expression and libel arises most strongly with regard to the study of history. Given the prohibition expressed by the Hafetz Hayim to speak libel about the deceased²³⁷ and his very limited definition of significant outcomes that might justify libel, not only is it clear that he would limit academic freedom in this regard, but he applies these concepts even to biographies of the traditional type. Moreover, even when the rabbinic Sages saw fit to denigrate a contemporary, the Hafetz Hayim was careful to make sure that it not be extrapolated to create a more general permit.²³⁸ Here too, the fact that this approach cannot be taken for granted stands out on the background of the sharp criticism of Rabbi Shlomo Zalman Kook, who wrote:

Ignorant as I may be, I do not know what corroboration to the prohibition one can find in a general event that was well known in its time and that the Rabbis recorded for the ethical principle that can be derived from it. If you do not take it this way, how can we understand the existence of all the stories [containing denigrating information about some figures] in the Bible, and what analogy is

235 mSan 3:7.

236 *Hafetz Hayim*, Part 1, 2:11.

237 *Ibid.*, 8:9.

238 When the Mishnah denigrates particular families for not revealing certain trade secrets relating to the Temple worship, thereby causing them to be forgotten (mYoma 3:11), the Hafetz Hayim, relying on his own reasoning, recreates the special circumstances that must have existed in order to justify mentioning them in a negative light (*Hafetz Hayim*, Part 1, 4, *Be'er Mayim Hayim* 11).

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there between these [stories of general value] to personal matters that are not well known, and in the present day?!²³⁹

It is clear that the approach of Rabbi Kook values historical documentation of matters that are not “personal events” because of the fact that it is possible to learn lessons from them. As such, he opens the door to a more or less free discussion of history, an approach that is not found in the works of the Hafetz Hayim.

As for the freedom of artistic criticism, the closest that the Hafetz Hayim comes to relating to it is his discussion of derisive reactions of the audience to a sermon that they heard. As expected, the Hafetz Hayim is stringent in this matter, forbidding critical reactions and censuring those who express them.²⁴⁰ He even includes criticism of a craftsman who is incompetent within the parameters of prohibited libel,²⁴¹ and if the comments threaten the livelihood of the craftsman, they also constitute a transgression of the commandment that “your brother should live with you.”²⁴² As I have noted before, he does not at all try to deal with the fact that in the words of the Sages and in the works of the medieval authorities (the *Rishonim*), there are quite a few stinging remarks about the arguments of their antagonists.²⁴³ It is worth noting that the Hazon Ish, who revered the Hafetz Hayim and was largely responsible for the elevation of his authority in the post-

239 S. Z. Kook, *supra*, n. 2, 101.

240 *Hafetz Hayim*, Part 1, 2:12. H. Levi limits to some degree the sweeping prohibition expressed by the Hafetz Hayim. See Levi (*supra*, n. 2), Part 1, Section 11, 83-84.

241 *Hafetz Hayim*, Part 1, 2, *Be'er Mayim Hayim* 14.

242 *Ibid.*, opening ch., Positive Commandments, 4.

243 One who tried to deal with this problem was Rabbi Hannan Levi, who stated briefly: “What appear to be critical remarks on the part of earlier scholars in their discourses were intended for a purpose, that the student not think that he should accept their opinions as halakhic rulings” (Levi, *supra*, n. 2, Part 1, 73). This is also a contrived response. It is clear that the author, like the Hafetz Hayim, would not accept the validity of such expressions in the contemporary halakhic discourse.

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Holocaust period, was more moderate than him on this point and permitted expressing “professional criticism” regarding rabbis and scholars who might mislead the public. In his words: “If it is permissible to speak libel about a craftsman with regard to his craft to a person who asks about him for his need, how much more so about one for whom Torah is his craft, that it is permissible to inform those who follow the Torah and need to know.” He adds, however, that “this [permit] requires great caution.”²⁴⁴

Indeed, the Hafetz Hayim, in the spirit of “retail rulings,” does not give an opinion regarding the questions of how to conduct Jewish politics, Jewish journalism, Jewish historiography, or Jewish cultural life within the far-reaching restrictions imposed in his book. The context of libel for the Hafetz Hayim is limited to the narrow picture of Smith and Jones tattling on a third party in the streets of the town, on their way out of the synagogue, or in the neighborhood store.

These lacunae in the *Hafetz Hayim* motivated some of its commentators to fill in the gaps in the discourse by relating to broader issues of a more public nature. The question of libel in the press stands out in their writings.²⁴⁵ We might consider these commentators as

244 *Pe'er Ha-Dor*, ed. S. Cohen et al. (Bnei Brak, 1966), 308; A. Y. Karelitz, *Kovetz Iggerot Hazon Ish*, ed. S. Greineman (Bnei Brak, 1990), vol. II, p. 133.

245 See the annotated editions mentioned above in n. 2; E. Korngut, *Or Yehezkel* (Petah Tikvah, 1993), 335-66. A. Y. Shvat, “Newspapers and News – Commandment or Prohibition?” *Talelei Orot* (1995): 164-88; S. Oppenheimer, “Journalism, Controversy and Responsibility: A Halakhic Analysis,” *The Journal of Halacha and Contemporary Society* 41 (2001): 99-119; D. Henneman, “Jewish Law and Mass Media – A Study of the Prohibition of Libel,” *Mayim Mi-Dalyav* 15 (2004): 157-68. Some of these articles attempt to broaden the concept of a permit for a “benefit” to include things that can help in the proper functioning of society. An additional gap addressed by his commentators is in the area of education. In contrast to the previous topics, this topic and related tangential topics (such as the status of a minor with regard to libel as the teller, listener, or the offended party) are discussed in various places in the *Hafetz Hayim*, but are not dealt with in a focused fashion. See the editions of the *Hafetz Hayim* mentioned, index topic “minor” (*katan*). See also Levi (*supra*, n. 2),

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having contributed to the ripening of the halakhization of the prohibition of libel, a stage that the writings of the Hafetz Hayim still had not reached. We are left with the impression that he took the halakhization process to a certain level, but stopped there and failed to advance it to higher planes.

A study of the halakhization of the prohibition of libel is not complete without a discussion of the issue of sanctions. In most modern legal systems, the publication of libel is considered both a criminal offense and a civil wrong. In the Talmud, by contrast, it is considered a “negative commandment that does not relate to an act.” As a result, it carries no corporeal punishment or compensation for damages.²⁴⁶ Nevertheless, already in the times of the Geonim, ordinances were enacted that imposed excommunication on one who acted abusively toward another, and in later generations we find the imposition of flagellation, compensation, and public apology.²⁴⁷ Very surprisingly, the Hafetz Hayim does not relate at all, either positively or negatively, to the issue of punishment, and gives no references to sources that deal with the issue. This is a resounding silence. Indeed, the Russian law that

Part 1, Section 28, Part 2, Sections 6, 7, 19; S. Houminer, A. L. Rosenblum, and B. Eizenblat, “Massa u-Mattan be-Inyan Lashon ha-Ra al Katan,” in *Marpe Lashon* 2 (1979): 17-20; S. B. Werner, *supra*, n. 2, pp. 109-10. In addition, there is a contradiction regarding the Hafetz Hayim’s position on a minor who has been offended by a libelous remark. In volume 1, he indicates that libel about a minor is not as categorical as it is about an adult, and that it depends on the damage that is actively caused (*Hafetz Hayim*, Part 1, 8:3), while in Part 2, he equates the minor and the adult (*Hafetz Hayim*, Part 1, 7:1) and refers the reader to his comments in Part 1. The commentators on the *Hafetz Hayim* dealt with this contradiction, and tended to extend the prohibition to minors (Kaufman *supra*, n. 2 on *Hafetz Hayim*, Part 1, *supra*, n. 2, on *Hafetz Hayim*, Part 1, 8:3; Cohen, *ad loc.*).

246 N. Rakover, “On Libel and its Punishment in Jewish Law,” *Sinai* 51 (1962): 200. Rottenberg claims that this characteristic attests to the relatively weak nature of this prohibition in the halakhic system (see Rottenberg, *supra*, n. 5, 332).

247 See Rakover, *supra*, n. 24, pp. 200-209; Korngut, *supra*, n. 240.

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disbanded the community in 1844 negated the right of rabbinic courts to exist in the Russian Empire, yet they continued to function even without formal approval and to impose excommunication.²⁴⁸ Even so, they very rarely imposed sanctions for libel.²⁴⁹ It seems, therefore, that the Hafetz Hayim wanted to base compliance with the laws of libel on the religious conscience of the individual by stressing its severity and the consequent divine punishments associated with it. For example, he indicates that the punishment of leprosy, which appears in the Torah as the punishment imposed on Miriam for speaking libel, might still strike one who violates the prohibition in our time, albeit invisibly.²⁵⁰ On the one hand, such threats heighten the force of the prohibition and bolster its normative status. On the other hand, they are more characteristic of *musar* literature than of halakhic literature. In fact, it is not necessary that a norm have an associated sanction in order for it to be part of the halakhic corpus. Nevertheless, it is significant that the Hafetz Hayim shelved existing traditional halakhic sanctions, essentially foregoing intentionally an element that could strengthen the halakhic nature of

248 A. Shohat, "The Administration of the Jewish Communities in Russia Following the Abolition of the Kahal," *Zion* 42 (1977): 143-233, and esp. at 211-24; I. Levitats, *The Jewish Community in Russia 1844-1917* (Jerusalem, 1981), 61-63, 88-90, 139-46.

249 I recently found a 19th century responsum from Eastern Europe that imposed an excommunication for libel. It related to degrading remarks made within the context of a sharp rabbinic debate. See Y. I. Rabinovitch, *She'elot u-Teshuvot Ateret Yitzhak* (Jerusalem, 1925), 47-48. A more systematic search will hopefully reveal other examples that will enrich both the historical and halakhic discourse, but already now it is clear that the use of this instrument was rare.

250 I. M. ha-Cohen, *Shemirat Ha-Lashon* (Jerusalem, 1984), *Sha'ar ha-Zekhirah* 6 (pp. 36-37). On the issue of extension, see Rottenberg, *supra*, n. 5, pp. 332-36. On the punishment of leprosy in rabbinic literature, see M. Gruzman, "The Opinion of the Rabbis on Leprosy as a Punishment for Libel," in *Shema'atin* 121-122 (1995): 109-13; idem, "Leprosy as a Punishment – Not on all Libel," *Shema'atin* 123-124 (1995): 34-37. Gruzman claims that according to rabbinic literature, the punishment of leprosy applies only when the libel is mendacious.

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the domain of libel, and strengthened its connection to *musar*.²⁵¹ In contrast, some of the authors who continued the Hafetz Hayim's course of the halakhization of libel already support the imposition of civil sanctions for violation of the prohibition.²⁵²

It seems that even on the terminological level the Hafetz Hayim did not completely free himself from the characteristics of *musar* literature with regard to the prohibition of libel. We saw above that one indication of the *musar* nature of the prohibition was the fact that one who consistently speaks libel was called a “*ba'al lashon ha-ra*,” rather than a “*mumar*” (habitual sinner, in the halakhic terminology). According to Rabbi Yosef Caro, Maimonides established four categories of the sin of libel: gossiping, speaking libel, speaking mendacious libel, and *ba'al lashon ha-ra* – one who habitually transgresses.²⁵³ The fact that Rabbi Caro included a separate category for one who transgresses habitually indicates that he viewed it as a *musar* issue and not a halakhic one, for in halakhic literature habitual transgression is never considered a different type of transgression than the sin itself, but as a more severe degree of the transgression (the *mumar*). In contrast, the Hafetz Hayim, true to his approach of halakhization, indicates in a listing of transgressions at the beginning of his book that there can be a *mumar* with regard to libel.²⁵⁴ Apparently, because of the difficulty mentioned, he does not list *ba'al lashon ha-ra* as a separate category of the transgression.²⁵⁵ However, he does not return to this distinction of habitual transgression anywhere else in the book, and does not draw the implied halakhic conclusions attached to the concept of *mumar*. On the contrary, when he deals with

251 Compare with my “The Hafetz Hayim on Delayed Wages: Toward a Modernization of Halakhic Labor Law?” (Hebrew), *Tarbiz* 75 (2006): 79-118.

252 Korngut, *supra*, n. 240, pp. 359-66.

253 *Kesef Mishneh* on Maimonides, *Hilkhot De'ot*, 7:1.

254 *Hafetz Hayim*, opening ch., Curses, 3.

255 He does list the first three categories, a difficulty already raised by O. Hadaya, *supra*, n. 2, 227.

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one who habitually speaks libel, he refers to him explicitly as a *ba'al lashon ha-ra*, and suffices with the *musar*-style censure.²⁵⁶ The only place in which he comes close to dealing with a habitual speaker of libel as a “habitual sinner with regard to one matter” (*mumar le-davar ehad*) is in a footnote in the section on gossip, where he establishes that it is forbidden to tell anything negative about another person to one who is “a gossip by nature,” even if it will protect him from entering into a dangerous partnership with him.²⁵⁷ Yet, here too, he does not use the halakhic terminology of *mumar*. Also, this sweeping and problematic prohibition²⁵⁸ is not established as a sanction that applies because the person is a *mumar*, but rather because of the concern for the conflict (*mahloket*) that might break out when the report is spread. From all of this, we learn that the Hafetz Hayim did not place the habitual sinner of the prohibition of libel in the category of *mumar le-davar ehad*, and consequently that he virtually treated this prohibition as a category of *musar*.

256 *Hafetz Hayim*, Part 1, 1:3. Kaufman had difficulty with the distinction between *mumar* and *ba'al lashon ha-ra*. He tries to resolve the difficulty by claiming that they refer to two different halakhic categories, but his resolution is not convincing. In his opinion, the category of *ba'al lashon ha-ra* is not a normative halakhic category, but rather a description of an individual human trait (“establishing the facts about a person”). He compares this category to one who imposes fear on the community, which is a phenomenon from the domain of *musar*. These attest to an “inner corruption,” but do not represent a “deviation from Jewish practice to become a *mumar*,” for it does not refer to one who “publicly cast off the warnings of the Torah” (Kaufman, *supra*, n. 2, 293). This claim, however, is problematic. The halakhah distinguishes between two types of *mumar* – one who does so out of spite, and one because of “appetite.” Rabbi Kaufman’s definitions are compatible with the former, but do not explain why such a person would not be considered a *mumar* for one transgression.

257 *Hafetz Hayim*, Part 2, 9 *Be'er Mayim Hayim* 5.

258 S. Z. Kook (*supra*, n. 2, 103) already raised its problematic nature by pointing out that the Hafetz Hayim thus turns the gossiper into one who does not fall into the category of a “friend” who would be protected by the law (Lev 19:16): “You shall not stand idly by the blood of your

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It seems that the best evidence for this assessment is another book of the Hafetz Hayim himself. In 1881, only a few years after his works on libel, the Hafetz Hayim published his book *Mahane Yisrael*, addressed to Jewish soldiers enlisted in the Russian Army. The book is divided into two sections: one, the *ma'amarim*, is dedicated to *musar* exhortations and the other, the *dinim*, to rules of law. Surprisingly enough, the father of the halakhization of libel integrated the chapter on “guarding one’s tongue” in the *ma'amarim* section,²⁵⁹ and it is written altogether in the spirit of *musar*!

From a literary-normative perspective, we may conclude, then, that the Hafetz Hayim’s process of halakhization of the prohibition of libel met with only partial success. He accomplished part of the task, but did not complete it. Apparently, the same is true on the socio-cultural level, as well. On the one hand, it seems that the book *Hafetz Hayim* is still perceived by many of its readers as a *musar* work. For example, in *yeshivot*, it is studied during the time designated for *musar* study. Similarly, in book stores and libraries, and in most synagogues, it is generally shelved in the section of *musar* literature.²⁶⁰ On the other hand, it seems that the process of halakhization was in some ways quite successful. In the wake of the success of the *Hafetz Hayim*, both halakhists and halakhic oriented advocates of *musar* have tried to advance the process of halakhization in other areas of *musar*.²⁶¹ Furthermore,

friend.” He apparently has in mind the rabbinic teaching which indicates that this verse refers not only to saving of a friend’s life, but also to saving his money: “If you know something you can testify on for him [for your neighbor], you cannot remain silent thereon” (Sifra, Kedoshim, 2 4), apparently even in civil suits. See also Shvat, *supra*, n. 245, 175-77.

259 *Mahane Yisrael*, part 1 (*ma'amarim*), ch. 15, in *Kol Kitvei he-Hafetz Hayim ha-Shalem*, vol. 3.

260 It is interesting to note that even the DBS software lists it in the category of “Jewish thought and *musar*.”

261 For example, see M. Lichtenstein, *Mitzvat Ha-Levavot* (Warsaw, 1902), who wrote a halakhic treatise on obligations of intent, love of Jews, the prohibition of vengeance and bearing a grudge, the prohibition of em-

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Israeli jurists have turned to the *Hafetz Hayim* as a source to enrich discussions of secular law.²⁶² In addition, of the numerous commentaries written on the *Hafetz Hayim*, many utilize the scholarly-halakhic mode. Similarly, most of the articles in the journals that have sprung up on the issue of libel – such as *Marpe Lashon*, and *Areshet Sefateinu* – are halakhic discourses and only a minority are in the *musar* style. The many lectures that are given on the topic, primarily in the ultra-orthodox world, are presented as halakhic lectures. Also, a daily order of study has been adopted for the *Hafetz Hayim*, an honor generally reserved for canonical works. One finds a multitude of notices, signs and stickers publicizing the prohibition of libel with a tone that is categorically halakhic. Societies have been founded for the promotion of this idea, and they perceive themselves as safeguarding the halakhah.²⁶³

barrassing another person, etc. It is clear that the author is not a follower of the Musar Movement. One of the endorsements for the work is given by Rabbi Hayim of Brisk, who was one of the fiercest opponents of the Musar Movement. In contrast is the noticeable trend in the Musar Movement reflected by Y. D. Epstein in his interesting books *Mitzvot Ha-Bayit* (New York, 1975), 2 vols.; *Mitzvot Ha-Shalom* (New York, 1970), and *Mitzvot Ha-Musar* (New York, 1973). He even points to the Hafetz Hayim as an exemplary model of this approach. See n. 5 above.

262 This in spite of the fact that secular law is based on approaches that are much different than the halakhic approach to libel, as demonstrated by Dadon, *supra*, n. 5. For examples of reliance on Jewish law in Israeli law, see: Elon, *supra*, n. 70, vol. 4, pp. 1642-44; N. Rakover, *Ha-Mishpat Ha-Ivri Ba-Hakikat ha-Knesset* (Jerusalem, 1989), 631-46 (collection from the Knesset protocols); Ben Gurion v. Applebaum, PM (Decisions of the Israel District Courts) 14, 307, 383; Friedman v. Segal, PD (Decisions of the Israel Supreme Court) 27 (2), 225, 244; 7/79 Ha-Hayim Publishers v. The Israel Broadcast Authority, PD 35 (2), 365-69. In reality, in most of the sources cited, it is specifically aggadic and *musar* sources that are brought to adorn the legal claim. For an analysis of the use of a source from the Hafetz Hayim as the basis of a real Israeli legal ruling, see U. Dassberg, "How did the Hafetz Hayim Get into Court?" *Tehumin* 25 (2005): 292-96, which analyzes the court decision in Brizon v. Ha-Tzofeh in the Tel Aviv magistrate (unpublished).

263 For example: *Agudat Notzrei Lashon*, founded in memory of S. Trauvitch

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One of the best demonstrations of the success of the halakhization of the prohibition of libel is a discussion that was found in a pamphlet relating to the “*daf ha-yomi*” daily Talmud study program. The author raised the question as to why the prohibition of libel was not codified in the *Shulhan Arukh*. He categorically rejects the possible response that libel is a concern of *musar* and not *halakhah*, because the Hafetz Hayim showed us that it is a thoroughly halakhic matter. Rather, he concludes in all seriousness, the author of the *Shulhan Arukh* did not include it because in his days people hardly ever transgressed in this area.²⁶⁴

We can summarize this section by stating that both on the literary-normative plane and on the socio-cultural plane the success of the halakhization process initiated by the Hafetz Hayim was not unequivocal. There are aspects that indicate success and aspects that indicate failure. We might conclude from the indications of failure that the area of libel as a religious concept is simply not compatible with the halakhic framework, and that the intuition of the talmudic Sages and the *rishonim* to view it as a component of *musar* was well founded – that the process of halakhization is essentially not possible. Yet, it seems to me that such a conclusion would be hasty. The process of halakhization is a complex process of consciousness-formation that cannot be put into effect in one

(see: [Anon.], “The Silent Revolution of the Guarding of One’s Tongue,” *Yated Ne’eman*, 12.26.1997): 14; The Chofetz Chaim Heritage Foundation (see their websites at <http://chofetzchaim.shemayisrael.com> and <http://www.chofetzchaimusa.org>).

264 *Me’orot Ha-Daf Ha-Yomi*, issue no. 274, bArak 11-17 (5th of Elul 5764/2004): 3, based on a responsum by R. S. K. Gross, *Responsa Shevet ha-Kehati*, Jerusalem, 1988, vol. 2, #321. It is worth noting that even if we view the *Hafetz Hayim* as a work of *musar* literature, it still contains an important innovation. If we categorize the classic *musar* works from the Middle Ages until the 18th century according to the three accepted philosophical classifications of activity – thought, speech and action – we find that most of the works relate to thought and some to action. To the best of my knowledge, until the Hafetz Hayim, nobody focused on the middle activity (speech), which bridges the other two. The Hafetz Hayim places this domain of activity at the center of attention, and views it as a central aspect of the quest for perfection in Judaism.

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instant by one publication or one individual. The fact that rabbinic literature after the Hafetz Hayim continued to develop the direction that he had begun, and succeeded in enriching it with additional rules, might attest to the fact that, in the final analysis, the process is becoming stronger and that in the not-too-distant future, it will be complete. If secular law succeeded in establishing libel as a recognized branch of jurisprudence, there is reason to believe that a similar process could take place in the world of *halakhah*.

6. Conclusion

We can conclude that the transformation of the prohibition of libel from a *musar* approach to one of *halakhah* involved three primary changes:

Style and Formulation: In contrast to *musar* literature, in which principles are central and rules are only used as illustrations, in the book *Hafetz Hayim*, rules are central, and are formulated as a well ordered, systematic, and detailed system.

Exegesis: *Hafetz Hayim* discusses statements of the rabbis and the *rishonim* on libel as if they are halakhic statements, using the exegetical approaches that are accepted in this genre.

Normative Tendency: Transforming statements that had been used as illustrations for a “morality of aspiration” into guidelines for a “morality of duty” brings with it an inherent tendency toward stringency. Indeed, the rulings of the Hafetz Hayim on libel clearly reflect such a stringent tendency. It is reflected in his interpretation of rabbinic statements, in which he tries to limit what might appear to be permissive statements through creative (if at times contrived) exegesis.

The combination of these three changes represents a genuine transformation in the nature of the prohibition of libel. Everyday talk, a great deal of which refers to other people, is a normal activity of daily

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and social life. The halakhization of the main norm that relates to speech entails, therefore, the penetration of *halakhah* into a most central element in the life of the modern Jew. As Moshe Halbertal noted, “the laws of libel turn the *halakhah* into something more permeating and consciousness-shaping, with more impact on the society, to a degree previously unknown – this is a genuine revolution.”²⁶⁵ This revolution was not completed by the Hafetz Hayim, as there remain a number of gaps in his work, as well as remnants of the prior *musar* background of the prohibition. Yet, interpreters of the Hafetz Hayim and those who followed in his footsteps continued, and continue, his approach, and have advanced the process of the halakhization of this prohibition.

We found in our discussion that the instrument provided by Dworkin – the conceptual distinction between principles and rules – was helpful both on the theoretical legal level, the framework in which it was created, and in the domain of religious scholarship, or in our context, the study of Jewish religious tradition. In our analysis of the halakhization of the prohibition of libel, we found that at least in one regard, this distinction shed more light on the study of traditional Judaism than on the study of law. While in the area of law it essentially

265 In an e-mail communication to this author (April 10, 2007), M. Halbertal wrote that this prohibition, together with the prohibition of *bittul Torah* (neglecting Torah study) created a “complete enclosure” around the Jewish person. It is noteworthy that, indeed, the Hafetz Hayim’s rulings on Torah learning reflect an endeavor to minimize the avoidance of its learning. See my “The Value of Torah Study in the Teachings of the Hafetz Hayim and his Rulings on Torah Study for Women,” *Diné Israel* 24 (2007): 79-118. In truth, already in the Talmud we find a hint of the complementary linkage between these two prohibitions: “Rabbi Alexander announced: ‘Who wants life, who wants life?’ Everyone huddled and came to him, and said: ‘Give us life.’ He said to them: ‘Who is the man who desires life etc., keep your tongues from evil [and your lips from speaking falsehood, shun evil and do good]’ (Ps 34:13). May a person say: ‘I have kept my tongue from evil and my lips from speaking falsehood, now shall I indulge in sleep?’ Says the Torah: ‘Shun evil and do good’ (Ps 37:27) – there is no good other than Torah [learning], as it says: ‘I give you good instruction, forsake not my Torah’” (Prov 4:2) (bA.Z. 19b).

Principles to Rules, *Musar* to *Halakhah*

facilitates a distinction between different types of norms within one system, in the study of Judaism it enables us to distinguish between two different systems – *halakhah* and *musar* – and to characterize the relationship between them.

The very phenomenon of the “halakhization of *musar*” is not relevant to the study of law, or at least to modern law. In modern law, when there is a readiness to draw norms from extra-legal systems, it is done in a very specific manner – the legislator formulates the norm in the form of a rule and enters it into the legal code. In the world of Jewish law, where there is practically no method for enacting new legislation, this process is impossible. The authority who wishes to effect such a change must do so in indirect ways, such as by treating non-halakhic sources as if they are halakhic, or by using a weak halakhic source as the basis for broadening the application of the law. This is not a clear-cut process. In this case, the authority must preserve the connection to his traditional sources, and reformulate them through a process that appears to be exegesis. Our ability to follow this exegetical process is much clearer when we are able to distinguish between rules and principles. In our case, this model enabled us to discern the stages in the process of halakhization, and to analyze the implementation of the process by the Hafetz Hayim and the areas in which he failed to complete the process. In reality, we found that while the prohibition of libel was incorporated into the halakhic system, which is characterized by rules, in some areas it remained stamped with the mark of *musar* literature and its characteristics.

A similar phenomenon can be identified on the socio-cultural level as well. While some indicators attest to the fact that in the ultra-orthodox world, the prohibition of libel is still perceived as an area of *musar*, others demonstrate that it is treated as an area of *halakhah*.

In fact, it seems that at the current stage of development, the prohibition of libel includes elements of both *musar* and *halakhah*, but at this point, the halakhic elements are stronger. Indeed, the Hafetz Hayim did not create a finished product. Rather, he initiated a process that

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continued to develop after he completed his work, and even more so after his death. The transition from principles to rules is not linear, and requires a period of adaptation in which halakhists must free themselves from categories that traditionally applied to the prohibition of libel, and consider the prohibition from the perspective of new categories. The Hafetz Hayim's achievement was not only pioneering this process, but also knowing how to create a dynamic that would facilitate further stages of development.

A must-read on this topic is Benjamin Brown's "From Principles to Rules and from Musar to Halakhah: The Hafetz Hayim's Rulings on Libel and Gossip," which you can read at this link. Furthermore, while the Chafetz Chaim's conclusions became the standard for much of the Orthodox community, this was primarily simply due to his being the first person to systematically discuss the topic. "Rechilut" is celebrity gossip. The defamation law is actually called "Lashon Hara," and even the Supreme Court sometimes turns to the Chafetz Chaim for guidance on new issues, like internet comments. Newspaper gossip columns are called "Rechilut.") ReplyDelete.