RABBINIC CONTESTATIONS OF AUTHORITY

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INTRODUCTION

The following well-known text from the Babylonian Talmud (redacted ca. 600 C.E.) has had an enormous influence on scholarly accounts of the relation between divine authority and human authority in talmudic rabbinic Judaism.

[Regarding a certain kind of oven, R. Eliezer rules that it is ritually pure and the sages rule that it is ritually impure.]

It was taught: On that day, R. Eliezer responded with all possible responses, but they did not accept them from him. He said to them, “If the law is as I say, let this carob [tree] prove it.” The carob uprooted itself from its place and went 100 cubits—and some say 400 cubits. They said to him, “One does not bring proof from a carob.” The carob returned to its place.

He said to them, “If the law is as I say, let the aqueduct prove it.” The water flowed backward. They said to him, “One does not bring proof from water.” The water returned to its place.

He said to them, “If it [the law] is as I say, let the walls of the academy prove it.” The walls of the academy inclined to fall. R. Joshua rebuked them, “When sages argue with one another about matters of law, what is it to you?” It was taught: They did not fall out of respect for R. Joshua, and they did not straighten up out of respect for R. Eliezer, and they are still inclined.

He said to them, “If it is as I say, let it be proved from Heaven.” A heavenly voice went forth and said, “What is your problem with R. Eliezer, since the law is like him in every place?”

R. Joshua stood up on his feet and said, “It is not in Heaven” (Deuteronomy 30:12).

What is “It is not in Heaven?” R. Jeremiah said, “We do not listen to a heavenly voice, since you already gave it to us on Mt. Sinai and it is written there, “Incline after the majority” (Exodus 23:2).

R. Nathan came upon Elijah. He said to him, “What did the Holy

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One do at the time [of R. Joshua’s and R. Jeremiah’s bold statements]?” [Elijah] said to him, He laughed and said, “My children have conquered me, my children have conquered me.”1

In b. BM 59b, R. Eliezer locks horns with other rabbinic sages over the purity status of a particular type of oven. After all arguments have been exhausted, R. Eliezer resorts to miraculous feats to prove his view—uprooting carob trees, causing rivers to run backwards and walls to tumble, and ultimately calling upon the very heavens for support.

As Jeffrey Rubenstein notes, in this story the rabbis dramatically assert not only that the majority has authority over the minority but that the sages’ rulings have authority over God, the very author of the legal system whose interpretation and application they are debating.2 No miracle, not even a heavenly voice, can legitimate or ground the authority of a legal opinion because, the rabbis insist, while the Torah may be from Heaven “it is not in Heaven” any longer. Deuteronomy 30:12 is here construed as teaching that control over the interpretation and administration of the Torah has been ceded by God to admittedly fallible human beings who must follow proper legal processes of argumentation and majority rule. God has been locked out of the courtroom, the legislature and the academy. God is depicted as celebrating this bold assertion of rabbinic legislative and interpretative authority, even if it leads to substantive error and even if it is at the expense of his own authority.

This passage, and a few others like it, certainly talk the talk and modern scholars have waxed poetic about the innovative boldness of the rabbis, their radical assertion of human reason and rabbinic prerogative in the interpretation and administration of God’s law—the Torah. Texts like these, which are found more frequently in later Babylonian rabbinic works (fifth to seventh century C.E.), are taken as an indication that rabbinic Judaism grew immensely in strength and confidence as it established itself over the centuries and further to the east.

Certainly b. BM 59b talks the talk, but the real question is: did the rabbis walk the walk? Did they actually exercise their authority in bold, even radical ways, or did they just talk about it? Have scholars been misled by rabbinic rhetoric? I will argue that, contrary to scholarly belief, an examination of actual cases in later and particularly Babylonian talmudic sources, reveals an increasing discomfort with and

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1 BABYLONIAN TALMUD, TRACTATE Baba Mezi’A, 59b (referred to in the text as b. BM). All translations are those of the author. Translations of the Babylonian Talmud are based on the standard Vilna-Romm printed edition in consultation with manuscripts and/or early editions; translations of the Palestinian Talmud are based on the Venice printed edition in consultation with the Leiden manuscript; and translations of Mishnah are based on the first printed edition in consultation with early manuscripts.

2 See the full and insightful discussion of this text in JEFFREY L. RUBENSTEIN, TALMUDIC STORIES: NARRATIVE ART, COMPOSITION, AND CULTURE 34-63 (1999).
reduced incidence of the radical exercise of rabbinic authority. While early Palestinian sources depict rabbis exercising their authority in a bold manner—whether as interpreters, as legislators or as legal scholars—later Babylonian authorities avoid such practices themselves and even work to undermine the radical implications of the activities of earlier authorities. Yet, paradoxically, it is the later Babylonian material that contains the most grandiose and hyperbolic assertions of rabbinic authority—comparable to b. BM 59b.

Before I speculate as to what all this might mean I must build my case by adducing a series of texts. Each of these texts deals with a different aspect of rabbinic authority and each points to a chronological and geographical shift in rabbinic attitudes towards certain bold exercises of rabbinic authority: a shift from an earlier Palestinian confidence to a later Babylonian anxiety. Of course, the details are a little messier than this schematized portrayal, but we can nevertheless speak of a clear trend. And that trend goes against the conventional scholarly view of an increasingly confident and assertive rabbinic authority in later, and especially Babylonian, talmudic times.

I have identified what I will call four indices of anxiety. In each case, an early practice is either avoided, modified, or undermined in later, especially Babylonian sources. In some cases, this retrenchment is accompanied by a good deal of rhetoric that touts the very practice that is no longer exercised. Our first index of anxiety involves the exercise of rabbinic authority in matters of legislation. The point at issue is whether the rabbis can issue a *taqqanah* (a ruling or law) that uproots or contradicts Torah law—a radical exercise of rabbinic authority.

I. *TAQQANOT* (RABBINIC RULINGS) THAT UPROOT OR CONTRADICT TORAH LAW

In the rabbinic conception, there are several *sources of law* (i.e., sources for creating or finding law): Scripture and its interpretation, legislation, custom, and reason. There is, however, only one *source of legal authority* in Jewish law: Scripture as the expression of the divine will. Thus, classic accounts of Jewish law describe a hierarchical arrangement of the *sources of law*, since all of these sources are subordinate to a single *legal authority*. The Hebrew Bible, or Torah, enjoys a primary and supreme legal status in rabbinic Judaism. Laws derived from the biblical text, through rabbinic interpretation (a process known as midrash) are equally classified as *de’oraita*—Torah law, enjoying Toraitic authority. Another source of law is legislation.
According to the Bible, new rulings may be rendered by the competent authorities of the day understood in the Common Era to be the rabbis of Palestine and Babylonia. These laws belong to the secondary category of law—they are derabbanan, rabbinic law rather than Torah law. In the words of Menachem Elon, “legislative enactments were understood to be introducing something entirely new into the Halakhah—something not capable of being derived from any preexisting authoritative legal precept.” Legislation is thus a source of law but it is not an independent source of legal authority. Its authority derives from Scripture. Thus, it is in theory impossible for the rabbis to legislate in a manner that contradicts or overturns provisions of the Torah. Such laws, like laws passed by Congress that contradict the Constitution, would presumably have no validity. Ideally, rabbinic enactments function as a seyag leTorah: a fence around the Torah (an idea found already in third century works) safeguarding and promoting the observance of biblical laws through additional prohibitions or extended requirements, and not, generally speaking, uprooting or contradicting biblical laws.

So it is remarkable that in the first two centuries of the Common Era in Palestine rabbinic authorities did on occasion pass laws that overturned biblical law. To put it another way, “unconstitutional” innovations were on occasion tolerated—obviously a bold exercise of rabbinic authority. I do not refer here to temporary emergency legislation. Jewish law has long recognized the right of rabbis to abrogate Torah law as a temporary measure in an emergency situation: to save a life or prevent violation of a more serious Torah law. I refer here to the right of rabbis to abrogate Torah law for the long term and under relatively ordinary circumstances, perhaps because the law is inconvenient, difficult, impracticable, or inappropriate in a changed society. Only later, in the talmudic period, beginning in the third century C.E. and developing further over time, do we detect in our texts any real resistance to rabbinic laws that overturn or uproot biblical law. The Palestinian Talmud (Yerushalmi = PT) allows some contradictory taqqanot to stand, but in other cases we find a kind of legal revisionism, explaining innovative laws as not in fact innovative at all. The sages of the Babylonian Talmud (Bavli = BT) express an even greater anxiety. They do not tolerate any contradictory taqqanot; instead they go to great lengths to neutralize or deny the innovative or “unconstitutional” nature of these laws.

Two brief examples will have to suffice. In the Mishnah (compiled around 220 C.E. and containing the legal traditions and

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3 2 Menachem Elon, Jewish Law: History, Sources, Principles 477 (Bernard Auerbach & Melvin J. Sykes trans., 1994). For a full discussion of the nature, objectives and principles of legislation by halakhic authorities, see id. at 494-544 and the sources cited and discussed there.
controversies of Palestinian rabbinic sages) we learn of a *taqqanah* attributed to Rabban Gamliel. Prior to Rabban Gamliel’s *taqqanah*, even after a bill of divorce (a *get*) had been delivered to a woman, the woman’s husband could convene a court wherever he was and annul it. Rabban Gamliel enacted a *taqqanah* (*hitqin*) ordering that this should not be done, to prevent the problem of the woman who does not know that her husband has annulled the divorce document, who then assumes she is legally divorced when she is not, and who then remarries, thereby violating a prohibition of the Torah.

In the Palestinian Talmud (an extensive analysis and discussion of much of the Mishnah compiled around 370 C.E. in Palestine), the question arises of a husband who transgresses and convenes a court to nullify the bill of divorce in the manner described above. Must the annulment be recognized, since by Torah law he has the right to do this and it is only the rabbis who have ruled against it? In essence, we have a conflict of authority here. Which prevails: Torah law according to which the husband can annul the bill of divorce even after its delivery or rabbinic law according to which a husband cannot annul a bill of divorce once delivered? Rabbi Judah asserts that Torah law prevails while Rabbi Shimeon b. Gamliel asserts that rabbinic law prevails, and it is Rabbi Shimeon b. Gamliel’s more radical view that is endorsed. But what is most revealing for our purposes is the postscript that explores the reason for Rabbi Judah’s dissenting view.

But what is the reason behind the position of Rabbi [Judah that Torah law should prevail? This is his reasoning:] According to Torah law the husband may nullify the bill of divorce but [the rabbis] ruled that he may not nullify it. Now do rabbinic rulings uproot a rule of the Torah? (vedivrehen ‘oqrin divre torah?).

The question appears to be rhetorical. Could the rabbis seriously say that a rabbinic ruling can uproot, overturn, set aside, or contradict a law of the Torah? To the reader’s surprise the Talmud responds by asserting that, yes, the rabbis do indeed have the power to uproot a rule of the Torah and another case is then cited in demonstration of that assertion.

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4 *Mishnah*, Tractate Gittin, 4:2.
5 *Palestinian Talmud*, Tractate Gittin, 4:2, 45c (emphasis added).
6 The Palestinian Talmud’s approach in these cases contrasts sharply with the neutralization approach of the Babylonian Talmud. Thus, b. Yev 90b, *Babylonian Talmud*, Tractate Yevamot, 90b, deflects entirely the innovative nature of the *taqqanah* regarding the annulment of the *get* by introducing a principle that justifies the special authority of the sages in questions of marriage, enabling them retroactively to cancel the original betrothal. See the discussion of this case in Y.D. Gilat, *A Rabbinical Court May Decree the Abrogation of a Law of the Torah* (Heb.), in *Annual of Bar-Ilan University* VII-VIII 117-32 (1970) (Heb. refers to works in Hebrew). Pages 128 to 129 of the same article discuss the general phenomenon of neutralization: *mishnayot* and early laws that abrogate Torah law are later explicated in a manner that restricts their scope.
Olives [may be separated as heave offering] for olive oil and grapes for wine [a citation of Mishnah Terumot 1:4]. Is it not Torah law that one may separate as heave offering [the one for the other], but the sages ruled to the contrary, that one may not separate olives as heave offering for olive oil or grapes as heave offering for wine, in order to prevent the theft [of valuable goods—wine and oil] from the priests. And not only this but they also ruled that if one transgressed and separated [olives or grapes], that which he has designated as heave offering is not heave offering.7

Rabbi Judah is defeated. On occasion, taqkanot do uproot or contradict Torah law.

Nevertheless, it seems that at a certain point anxiety over such taqkanot led to their revision. A case in point is the prozbul of Hillel. The Mishnah tells us that Hillel (early first century C.E.) instituted the prozbul. While there is some dispute over the way in which the prozbul actually worked, in essence it was a transaction with the court that enabled one to circumvent the release of debts commanded by the Torah to take place in the sabbatical year.8 Hillel’s prozbul has often been labeled the most explicit example of a rabbinic decree that uproots or overturns a provision of the Torah. Where the Bible prohibits the collection of debts in the seventh year, Hillel’s prozbul makes it possible for debts to be preserved and ultimately collected.

In both the Palestinian Talmud and the Babylonian Talmud (an extensive analysis and discussion of much of the Mishnah compiled around 600 C.E. in Babylonia), Hillel’s prozbul is subjected to a revisionist strategy that undercuts its radical implications. Later

and application (e.g., the principle of “hefqer bet din hefqer” to justify rabbinic authority in cases involving property). The principle invoked in b. Yev 90b is one such neutralizing strategy.

7 PALESTINIAN TALMUD, TRACTATE GITTIN, 4:2, 45c (emphasis added). The case in the Babylonian Talmud that most closely parallels the heave offering case of the PT is found in the same sugya as the case of the annulled get. BABYLONIAN TALMUD, TRACTATE YEVAMOT, 89a-90b. Although the Babylonian Talmud discusses m. Ter 2:2, MISHNAH, TRACTATE TERUMOT, 2:2, regarding the separation of ritually impure produce for pure produce (rather than m. 1:4—the separation of olives and grapes for oil and wine), the same theoretical question is raised. R. Hisda asserts that in the ex post facto case, undertaken willfully, the heave offering is not heave offering. Rabbah objects “is it possible that there is something that by Torah law is heave offering but the rabbis . . . declare it to be not heave offering? Can a court make an enactment that uproots a law of the Torah?” Insofar as R. Hisda fails to find an example of a rabbinic law that uproots Torah law, we can only surmise that the Babylonian Talmud’s answer to this question is negative (or more precisely, a court may uproot a law of the Torah only temporarily and under special emergency conditions). Thus, where the Palestinian Talmud allows unconditionally for the possibility that rabbinic law abrogates Torah law, the Babylonian Talmud does not.

8 Note that we are not here concerned with the details of the prozbul’s operation or historical questions of its rise, use and application. For this information see, e.g., Solomon Zeitlin, Prosbol: A Study in Tannaic Jurisprudence (Heb.), 37 JEWISH Q. REV. 341 (1947); Pinhas Shiffman, Prozbul and Legal Fiction, S’VARA, Winter 1991, at 63. What concerns us is the amoraic perception of this law and the source of its authority to set aside the biblical requirement of a sabbatical release of debts.
anonymous strata of both Talmuds explicitly raise and reject the possibility that Hillel’s ruling uproots or contradicts Torah law. In the Palestinian Talmud, R. Huna asks directly: has Hillel created an ordinance that contradicts biblical law (veHillel matqin al devar Torah)?9 And in the Babylonian Talmud, we find the anonymous question: “Is it possible that where according to the Torah the seventh year releases, Hillel should ordain that it should not release?” Both Talmuds resolve the question the same way. Through some standard rabbinic exegesis, they conclude that the biblical text envisages two releases that must operate in tandem: the release of debts in the seventh year, and the release of land in the fiftieth or Jubilee year. After the Roman conquest of Palestine in the first century B.C.E., Jews lost the power or authority to observe the Jubilee year return of land. Since rabbinic interpretation of the Bible yields the principle that the Jubilee year release of land and the seventh year release of debts must operate in tandem or not at all, and since Jews were not at the time of Hillel in a position to observe the Jubilee year release of land, they were therefore not obligated by the Torah to observe the seventh year release of

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9 For “al” in the sense of “contradicting/uprooting” (and not merely “in addition to” or “beyond”) compare the phrase “hitnah al mah shekatuv batorah” in m. BB 8:5, MISHNAH, TRACTATE BABA BATHRA, 8:5, which can only be translated as “he made a condition contradicting/contrary to what is written in the Torah.” My translation of the prozbul passage is in line with the interpretation of traditional commentators (see Qorban ha-Edah to p. Git 21b who paraphrases R. Huna’s question as follows: “It is a difficulty: How could Hillel make an enactment not to release and so uproot ['aqar] biblical law?” and Pene Moshe to p. Git 21b who paraphrases the question this way: “and if it is by Torah law that the seventh year releases then can Hillel make an enactment to transgress [la’avor al] Torah Law?”). See PALESTINIAN TALMUD, TRACTATE GITTIN, 21b. That this is the proper understanding of “al” in the phrase “lehatqin al devar Torah” is born out by similar talmudic passages which utilize other, more explicit phrases for the same phenomenon. First and foremost is the parallel talmudic passage of the Babylonian Talmud (b. Git 36a), in which the same legal question is phrased as follows: “is it possible that there be something [a debt] that according to Torah law is released in the seventh year but Hillel enacted is not released?” BABYLONIAN TALMUD, TRACTATE GITTIN, 36a (umi ika midi demide’orayta meshameta shevi’it veheitqin Hillel dela meshameta?). In other words, is it possible that Hillel enacted a ruling that contradicts the law of the Torah? That this is the sense of the Babylonian Talmud’s question is indicated by b. Yev 89b where an identically phrased question (“is there something that by Torah law is X but . . . the rabbis declare it to be not-X?”) is immediately rephrased in the following general terms: “can a court make an enactment that uproots (la’aqor) a law of the Torah?” BABYLONIAN TALMUD, TRACTATE YEVAMOT, 89b. B. Yev 89b is explicit: at issue are rabbinic rulings that uproot or contradict Torah law. Since b. Yev 89b employs the same formula as b. Git 36a (“is there something that by Torah law is X but . . . the rabbis declare it to be not-X?”) and b. Git 36a poses the same legal question as is posed in the Palestinian Talmud’s parallel, we may conclude that the Palestinian Talmud’s lehatqin al devar Torah means “to enact a taqqanah that contradicts or uproots biblical law.” Other discussions in both Talmuds that struggle with the same phenomenon—a rabbinic enactment that contradicts biblical law—use even more explicit language (e.g., vedivrehen ‘oqrin divre torah? which translates to “can the rabbis uproot a rule of the Torah?”) leaving little doubt as to the meaning of the phrase (hitqin al) employed here. See the discussion, infra, of PALESTINIAN TALMUD, TRACTATE BETSAH, 2:1, 61a-b and PALESTINIAN TALMUD, TRACTATE GITTIN, 4:2, 45c.
debts. Then why were people observing it? Because even though the Torah no longer strictly required it, rabbis prior to Hillel had decided to extend its observance (and it is certainly within the bounds of rabbinic authority to add to the obligations of the Torah, to create a seyag le-Torah, not uprooting it but extending it). Thus, Hillel’s institution of the prozbul merely set aside a rabbinic requirement and, in so doing, actually restored the exemption envisaged by the biblical text. Hillel was no radical innovator. On the contrary, according to the Palestinian Talmud’s revisionist account, he was a conservative, returning the law to its proper biblical condition after earlier unnamed and undocumented rabbis had extended its demands (properly enough) as a seyag le-Torah. It was this rabbinically extended obligation that Hillel overturned.

This kind of revisionism—clearly an artificial construction in which innovation is recast as restoration—occurs occasionally in the Palestinian Talmud; however, in at least ten cases in which a rabbinic taqqanah is said to contradict Torah law, the contradiction is tolerated. By contrast, later strata of the Babylonian Talmud adopt this and other strategies in order to redescribe all contradictory taqqanot as not in fact contradictory of biblical law.

II. “CREATIVE” EXEGESIS OF SCRIPTURE

The rabbis were not simply legislators; they were also the authoritative interpreters of scriptural law. The authority to interpret Scripture can be utilized in more or less radical ways and the rabbis of the talmudic period have earned some notoriety for the unrestrained and convoluted exegesis by which almost anything was read out of, or perhaps into, the biblical text. For some time, scholars have tended toward the view that the rabbis simply perceived no difference between

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10 In short, the very creative midrashic argument is that the seventh year release of debts and the fiftieth year release of land operate in tandem or not at all. If Jews are not in a position to observe the fiftieth year release of land then neither are they obligated to observe the seventh year release of debts.

11 The Babylonian Talmud contains essentially nothing new in its discussion of the prozbul of Hillel. The same revisionist strategy is adopted in the Babylonian Talmud’s sugya and it is motivated by the same concern, as we read in b. Git 36a: “is it possible that there be something [a debt] that according to Torah law is released in the seventh year but Hillel enacted is not released . . . ?” BABYLONIAN TALMUD, TRACTATE GITTIN, 36a (uni ikka midi demide’oraya meshameta shevi’it vehitqin Hillel demeshameta?). Nevertheless, other scholars have read the Babylonian Talmud as taking a radically different approach that emphasizes innovative boldness and rabbinic prerogatives vis-à-vis the Torah. For a fuller discussion and refutation of this position, see Christine Hayes, The Abrogation of Torah Law: Rabbinic Taqqanah and Praetorian Edict, in THE TALMUD YERUSHALMI AND GRAECO-ROMAN CULTURE 643, 643-74 (Peter Schäfer ed., 1998) (see especially 646-50 and notes).
good contextual interpretation and wildly creative midrashic interpretation; that they were not bothered by the gap between the contextual meaning of a verse and its midrashic exposition. This lack of self-consciousness, it is argued, is itself a function of the rabbinic view of Scripture as omnisignificant—as so suffused with meaning that every aspect of it can and must be interpreted.

According to conventional accounts, anxiety over midrashic excess arose only in the post-talmudic Jewish world with the emergence of new textual assumptions and new standards of textual meaning and linguistic significance in the tenth to thirteenth century. However, I have argued elsewhere that the rabbis did indeed perceive the difference between contextual and fully midrashic methods of interpretation, that they did indeed feel some anxiety over extreme interpretive strategies, and that this anxiety is increasingly pronounced in later talmudic, and especially Babylonian, sources.

An exciting new book by Azzan Yadin supports this claim by tracing this anxiety to a very early period in Jewish intellectual history. Specifically, Yadin argues that while many rabbinic texts support a principle of biblical omnisignificance, not all do. At an early stage, the midrashic works associated with R. Yishmael explicitly reject, in both word and deed, the idea that all elements of Scripture are hermeneutically marked and thus interpretable. I would argue that this early view grew in strength through the talmudic period until eventually laws were no longer generated by the kind of creative exegesis that served as a source of law at an earlier time. In practice, later Babylonian authorities eschewed the radical midrashic techniques of past rabbis, even as they praised their interpretive pyrotechnics.

There are several texts in which the anxiety generated by midrashic excess is thematized. R. Akiva, a second century Palestinian sage and the rabbinic poster child of unrestrained exegesis, is often a central protagonist in these texts. In the famous late Babylonian story of R. Akiva’s schoolhouse, Moses himself cannot follow the complex midrashic expositions by which R. Akiva gives various laws a scriptural derivation. Moses is relieved, finally, when R. Akiva admits concerning one law that it cannot be derived from Scripture.

Moses went and sat down behind eight rows [in R. Akiva’s schoolhouse, with the least skilled students], but he could not

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12 Some version of this view can be found in DAVID WEISS HALIVNI, PESHAT AND DERASH: PLAIN AND APPLIED MEANING IN RABBINIC EXEGESIS vi, 20, 34 (1991); JAY HARRIS, HOW DO WE KNOW THIS? MIDRASH AND THE FRAGMENTATION OF MODERN JUDAISM 6, 85, 252 (1995).


understand what they were saying. His strength left him. But when they came to a certain topic and the disciples said to him [to R. Akiva], “Rabbi, whence do you know it?” he replied to them, “It is a law given to Moses at Sinai [a halakhah le-Moshe mi-Sinai].” And Moses was comforted.\(^\text{15}\)

This law, R. Akiva states, is simply a halakhah le-Moshe mi-Sinai—a law revealed orally to Moses alongside the written Torah, a law that by definition cannot be derived from Scripture and must simply be accepted as transmitted orally from Moses.

In another passage from the Babylonian Talmud (b. Men 89a / b. Nid 72b),\(^\text{16}\) the assertion that a particular law is a halakhah le-Moshe mi-Sinai counters the midrashic zeal of R. Akiva who presents a complex and convoluted exegesis based on the Scriptural words “with oil.” R. Elazar b. Azariah is said to respond to this display of midrashic virtuosity with the contemptuous remark:

Akiva, even if you repeat the words “with oil” the whole day long I shall not listen to you; rather, the half log of oil of the thank offering, the quarter log of oil of the nazirite and the eleven days between menstrual periods are [each a] halakhah le-Moshe mi-Sinai.\(^\text{17}\)

In this and many other texts, the contrived and counterintuitive interpretations of the overzealous sage are depicted as evoking incomprehension or incredulity among non-rabbis and rabbis alike. These texts give voice to the anxiety that one can carry midrashic exegesis too far and in the process undermine rabbinic credibility and by extension rabbinic authority. Nevertheless, these expressions of doubt and anxiety appear alongside hyperbolic praise of the great midrashic masters of the past and their extreme methods—indicating a basic rabbinic ambivalence.

### III. LAW AND TRUTH: JUDICIAL OR LEGISLATIVE ERROR

There are other practices that seem to have been accepted at an earlier period, but then to have inspired anxiety later, and eventually to have fallen from favor. Our third index of anxiety concerns shifting attitudes towards legislative or judicial error as we shall see in the following case. The Mishnah (m. Rosh HaShanah 2:8-9)\(^\text{18}\) describes two incidents purportedly occurring in the late first and early second century C.E. in which witnesses offer clearly erroneous testimony regarding the phases of the moon (the calendar at this time was

\(^{15}\) Babylonian Talmud, Tractate Menahoth, 29b.

\(^{16}\) Id. at 89a; Babylonian Talmud, Tractate Niddah, 72b.

\(^{17}\) Babylonian Talmud, Tractate Menahoth, 89a.

\(^{18}\) Mishnah, Tractate Rosh HaShanah, 2:8-9.
determined on the basis of eyewitness testimony concerning the behavior of the moon). In both cases, R. Gamliel accepts the testimony and establishes the calendar over the objections of his angered colleagues. A reconciliation is brought about by R. Akiva who argues that the rabbinic power to determine the calendar is biblically grounded, and that for the sake of the stability of the system the ruling of the court must be accepted even if in error. In short, this Mishnah upholds the power of halakhic authorities to make a legal determination even when that determination is contradicted by physical reality. To reverse decisions because they are out of step with empirical evidence or physical reality is explicitly rejected in this Mishnah as posing a threat to rabbinic authority (“[I]f we question the court of R. Gamliel then we must question every court that has existed from the time of Moses until now!”). But in the later Talmuds, the opposite intuition emerges. In the later Talmuds, the legal declaration known to be mistaken or false (and not its retraction) is perceived as a threat to rabbinic authority.

In the Palestinian Talmud, R. Hiyya bar Abba (late third century C.E. sage) articulates the critically important question: how could R. Gamliel have seen fit to accept testimony that is palpably false? The answer: the testimony may not have been false, at least not by Rabban Gamliel’s lights. “R. Hiyya bar Abba said: ‘Why did R. Gamliel accept them? Because he had a tradition from his fathers that sometimes it [the moon] travels by a short route, and sometimes by a long route.’” By attributing to R. Gamliel an old family tradition that the moon sometimes completes its circuit by a shorter path, R. Hiyya b. Abba undercuts the Mishnah’s portrait of Rabban Gamliel as acting boldly. R. Gamliel does not consciously promulgate and uphold a legal determination based on objectively false evidence and the Mishnah does not depict a contest between law and fact. Rather, the Mishnah is now understood as depicting a contest between competing versions of the facts. Rabban Gamliel believed the evidence to be truthful and, if his family tradition is correct, it may indeed have been truthful. His “conscious error” turns out to be no error at all, but a wise decision based on little known facts about the behavior of the moon. The Babylonian Talmud also domesticates Rabban Gamliel’s bold behavior by suggesting a reality-based explanation for his rulings, but at the same time it cites traditions upholding the power and authority of rabbinic sages to make calendrical determinations that run counter to astronomical reality—a truly ambivalent text.

19 PALESTINIAN TALMUD, TRACTATE ROSH HA SHANAH, 2:8-9.
20 Id. at 2:8-9, 58b.
21 For a fuller discussion of this and similar texts, see Christine Hayes, Authority and Anxiety in the Talmuds: From Legal Fiction to Legal Fact, in JEWISH RELIGIOUS LEADERSHIP: IMAGE
IV. LAW AND TRUTH: LEGAL FICTIONS

Our fourth index of anxiety concerns a phenomenon closely allied to error, and that is legal fiction. A legal fiction is a statement propounded with a complete or partial consciousness of its falsity, but accepted because of its utility. Through legal fictions one can alter or extend the law while preserving the appearance of traditionalism.

Leib Moscovitz notes that legal fictions are barely attested (if at all) in any ancient legal system before the Roman period and only first emerge and gain wide acceptance among the Romans and the rabbis. Nevertheless, despite the widespread presence of legal fictions in the talmudic corpus, there is good evidence that: (1) some rabbis were discomfited by the gap between a legal fiction and reality, and (2) this anxiety lies behind efforts by later talmudic authorities either to eliminate or to provide more credible, realist-based rationalizations for some of the anxiety-inducing legal fictions of earlier authorities.

A single example will have to suffice.

1. A woman whose husband had gone to a country beyond the sea and they came and said to her “your husband is dead” and she married, must—if her husband subsequently returned—leave the one as well as the other and she also requires a letter of divorce from the one as well as the other. [The Mishnah continues with a long list of the marital rights and privileges that she has lost vis-à-vis both husbands.]

2. If she married without authorization she may return to him.

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22 For a full discussion of legal fictions see the classic work of Lon L. Fuller, Legal Fictions (1967).
23 Leib Moscovitz, Legal Fictions in Rabbinic Law and Roman Law: Some Comparative Observations, in Rabbinic Law in its Roman and Near Eastern Context 105, 111 (Catherine Hezser ed., 2003). According to Moscovitz, typologically similar fictions in both systems “generally seem to stem from essentially the same period. . . . [T]he development of similar types of fictions might be largely contemporaneous in Roman and rabbinic law.” Id. at 119.
25 The sugya from which this example is taken has been definitively analyzed in Shamma Friedman, A Critical Study of Yevamot X with a Methodological Introduction (Heb.), in Texts and Studies, Analecta Judaica I, at 275 (H.Z. Dimitrovsky ed., 1977). I rely (for the most part) on Friedman’s source-critical analysis of these sugyot as a convenient basis for my own discussion of rabbinic discomfort over, and elimination of, a radical legal fiction.
This Mishnah describes the case of a woman whose husband has gone abroad and is subsequently reported dead. She remarries only to have her first husband return. If the woman’s remarriage is formally authorized by the court (this condition is implied by its explicit absence in clause number two) then the court’s ruling stands as a valid ruling and the marriage stands as a valid marriage, despite the later emergence of facts to the contrary. The result is that should the husband return, the woman will find herself in the situation of being married to two men at once, which is prohibited by Torah law, and since each “prohibits the other” she must leave both and loses all marital privileges pertaining to both. However, if the court did not declare the woman permitted and formally authorize her second marriage (clause number two), the second union lacks legality and is automatically null and void upon the return of the first husband. The woman is married to only one man—her first husband—and returns to him.

The Mishnah is making the important claim that a legal determination by the court stands even in the face of clear and undeniable facts to the contrary that were unknown at the time of the court’s ruling. True, the court’s power does not extend to nullifying the first marriage completely and it is this that creates the problem of two simultaneously valid marriages. Nevertheless, the ruling is a bold assertion of the power of legal determinations. The fuller context makes it clear that the rabbis themselves understand it to be bold, but necessary in order to assist women trapped in marriages to husbands who may well have abandoned them.

In the Palestinian Talmud, the early Palestinian sage Rav radicalizes the law even further, by negating the first husband’s claims entirely and allowing the woman to remain in the second marriage even upon the first husband’s return. He does this by means of a legal fiction.

R. Nahman bar Yaakov (late third century C.E.) in the name of Rav (early third century C.E.): if she remarries on the basis of two witnesses, then even if he [the first husband] should come, they say to him “you are not he” [i.e., we do not legally recognize you].

If a woman remarries on the basis of proper testimony and her husband returns, the court can avail itself of a legal fiction, declaring

26 Mishnah, Tractate Yevamot, 10:1 (ca. 220 C.E.).
27 That this is not the only way to read the Mishnah, as argued in David Weiss Halivni, Sources and Traditions: A Source Critical Commentary on Seder Nashim (1968), but is interesting and important for understanding the Mishnah on its own terms, but not relevant to our discussion of the views found in the later talmudic sources which do indeed read the Mishnah as described above.
28 Palestinian Talmud, Tractate Yevamot, 15:4, 15a.
“you are not he” regardless of the actual facts of the matter. The fiction “you are not he” expresses the court’s right to refuse the returning husband’s claim by treating him as if he were not himself. As Shamma Friedman points out, the halakhah of Rav is a daring halakhah, in which a legal fiction trumps reality entirely.29

Rav’s legal fiction found a mixed reception. His halakhah is accepted though grudgingly in later Palestine. A Palestinian sage, R. Immi, reluctantly rules in line with Rav’s halakhah but underscores its moral defect: he tells the second husband that his children by the woman will be illegitimate.

A case came before R. Immi (late third century C.E.). He said to [the second husband after the first had come back], “Yes, it is true that she is permitted to you. But you should know that your children [by her] will be bastards [illegitimate] in the sight of heaven [even if not by the laws of man].” And R. Zeira praised him for laying out the results of the matter with clarity.30

Note this dichotomy between the laws of heaven (which are “true” or correct) and the rule of Rav, which though valid is not true. Interestingly, the Palestinian Talmud describes the situation among their Babylonian brethren as even more fraught. There in Babylonia, it is reported, Rav’s disciples had to use force to compel others to accept their master’s ruling.

A case came before the rabbis over there (in Babylonia). They said to him. “You are not he” [i.e., we do not legally recognize you]. Abba bar Ba (early Babylonian) got up and whispered in his [the second husband’s] ear: “By your life! Give her a divorce by reason of the doubt [as to whether or not he is the original husband, and so protect her from a simultaneous marriage].” The disciples of Rav got up and hit him. . . .

Shmuel said: “I was there . . . my father [Abba bar Ba] was flogged and accepted it [i.e., Rav’s ruling].”31

Despite the controversy and the heated objections by other rabbis, Rav’s legal fiction is implemented according to the Palestinian Talmud, and practical decisions are rendered in accordance with it in both Palestine and Babylonia. But the Babylonian Talmud gives a different impression.32 In the Babylonian Talmud, Rav’s legal fiction is treated with great disdain and is ultimately dismantled by being converted into fact.

Rav said: “This [ruling, that she must divorce both husbands] was taught in regard to a woman who married on the evidence of a single

29 Friedman, supra note 25, at 332.
30 PALESTINIAN TALMUD, TRACTATE YEVAMOT, 15:4, 15a.
31 Id.
32 BABYLONIAN TALMUD, TRACTATE YEVAMOT, 88a.
witness, but if she married on the evidence of two witnesses, she need not leave [the second husband]."

In the West (i.e., Palestine) they laughed at him: “Her husband comes, and there he stands, and you say, ‘She need not leave?!’”

Rav’s law applies only where she [really] does not know (recognize) him.33

The Babylonian Talmud reports an anonymous comment that highlights the absurdity of Rav’s teaching. Rav’s teaching, it is asserted, inspired ridicule even in Palestine and was mocked: “How can you say she need not leave the second husband, when her first husband stands before you alive and well!” The Babylonian Talmud assumes that no one in his right mind would utter such a teaching because it is too absurd, too incredible. So what did Rav really mean? He must have been talking about a case in which the woman really does not recognize the man who claims to be her first husband.

Observe what has happened to Rav’s legal fiction. The phrase “you are not he” has been converted from a fiction employed by the court into a factual condition that determines the application of Rav’s law. In other words, when Rav said that the woman stays with the second husband, he was speaking only about cases in which the woman looks at the man who claims to be her first husband and says, you are not he; that is, cases in which she really does not recognize her first husband. But in all other cases, the Talmud claims, even Rav would agree that the law is as the Mishnah says and, therefore, she must divorce both husbands. Rav’s effort to provide a mechanism that would free the woman from the first marriage entirely through a legal fiction is defeated. His rule is interpreted as referring to cases of real, not fictive, non-recognition by the wife. And, in a lengthy further discussion, Rav’s law is limited even more narrowly to a highly circumscribed and, one may say, unlikely set of circumstances.

The Babylonian Talmud’s treatment of Rav’s radical legal fiction would appear to be symptomatic of anxiety over uses of rabbinic authority that strain credulity because they are out of step with commonsense notions of truth and reality. This hypothesis gains in probability when we realize that in this very chapter of the Talmud a great deal of space is given over to discussion of the limits of rabbinic authority.34 Ironically this passage is often cited as the locus classicus for the bold assertion of rabbinic authority. But close examination reveals that this late Babylonian discussion spares no effort in recasting earlier bold exercises of rabbinic authority as conservative and legitimate (or emergency) uses of that authority.

33 Id. at 88a.
34 Id. at 89a-90b.
CONCLUSION

We have seen that later (fourth century C.E. on), especially Babylonian, sources exhibit a pronounced anxiety over bold exercises of rabbinic authority of an earlier period (pre-fourth century) and tend to eschew interpretative, legislative, and judicial strategies that overstep the perceived bounds of rabbinic authority or threaten to undermine confidence in rabbinic authority because they strain credulity. These include the issuance of rabbinic legislation contrary to Torah law, extreme forms of Scriptural exegesis, rulings based on conscious error, and legal fictions. We are speaking about a tendency, not a full-blown about-face. This growing anxiety had paradoxical results: while we witness a reduction in the bold exercises of rabbinic authority in practice, we see the retention and even expansion of grandiose assertions of rabbinic authority in aggadic passages. How are we to explain this?

There is a better way to formulate the question. In truth, it is not the later period that requires explanation as much as the earlier period. For as I will argue now, it is the early and primarily Palestinian tolerance for radical exercises of rabbinic authority that is remarkable. The explanation for the early Palestinian attitude may be found in the Roman legal environment to which the Palestinians were exposed.

Certain fundamental differences between the Roman and Jewish legal systems may illuminate the developments I have described. The Roman legal system differed from the Jewish legal system in two ways that are of great importance to us. First, the Roman legal system was not hierarchical. It did not posit one single source of legal authority. The Roman legal system comprised several independent and equally primary sources of law and legal authority: legislation, particularly the founding document known as the Twelve Tables and subsequent enactments of the comitia; a senatus consultum, a resolution of the senate which at a certain point in Roman history acquired the force of law; edicendi, or edicts of the magistrates; and there are others. Being independent, these sources might challenge or be challenged by one another. Of particular interest are the edicts of magistrates, particularly those of a magistrate known as the praetor (established 367 B.C.E.).

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35 For details of the establishment of the praetorship, see H. F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 16, 48-49 (3d ed. 1972). The praetor’s legal function was the administration of the civil process (jurisdiction) in Rome. About 242 B.C.E. a second praetor (the praetor peregrinus as opposed to the praetor urbanus) was added to control litigation between foreigners. For the exact relationship between, and the respective responsibilities of, the urban and peregrine praetor, see ALAN WATSON, LAW MAKING IN THE LATER ROMAN REPUBLIC 63-87 (1974); DAVID DAUBE, THE PEREGRINE PRAETOR, 41 J. ROMAN STUD. 66, 66-70 (1951). The praetor was always given a definite sphere (provincia) in which to exercise his power. In the second century B.C.E. these provinciae comprised two
While the praetor’s edict could not abolish clauses of the old civil laws—the latter’s terms were still there for all to see—it could render provisions of the civil law inoperative. It could supplant them in practice by stating that certain laws would not be enforced and certain remedies would not be granted, regardless of what was written in the civil law.

In 130 C.E., Hadrian consolidated all the edicts of past praetors into a code given the force of law, the *Edictum Perpetuum*, containing about two hundred separate provisions published regularly and so persisting as a functioning body of law alongside the old civil law, whose provisions it occasionally supplanted. I have argued at length elsewhere that there are many formal, terminological, and substantive parallels between the rabbinic *taqqanah* and the praetorian edict. It may be that *taqqanot* that improved, repaired, and on occasion overturned Torah law arose and were largely tolerated in Roman Palestine in the first three centuries of the Common Era, because of the highly visible and parallel phenomenon in the surrounding Roman legal culture, namely, edicts designed to improve, repair, and on occasion overturn provisions of the civil law. But the example of Roman law did not succeed in completely dispelling an aversion to *taqqanot* that contradict Torah law. As it became an accepted principle that rabbinic enactments had no authority independent of that ceded to them by the written Torah, it was more difficult to accept rabbinic enactments that
abrogated provisions of the primary legislation upon which their own authority depended. Thus, as time passed, an intolerance of enactments that contradict provisions of Torah law began to (re)assert itself, as reflected in the handful of revisionist accounts found in the fourth century Palestinian Talmud.39

Babylonia was entirely outside the sphere of the Roman legal system, and the Babylonian rabbis did not have before them the living example of a respected legal tradition in which enactments by certain authorities were commonly held to contradict and render inoperative provisions of a basic civil law. Perhaps it is not surprising then that the Babylonians rabbis found taqqanot that contradict biblical law to be completely intolerable and adopted a revisionist approach to each and every one: subordinating the voice of the rabbis to the voice of Scripture.

The idea of subordination, an idea compatible with (or better, necessary in) a hierarchical system of law in which there is one ultimate source of authority, may explain the trend away from excessively creative midrash. Interpretations that feature a heavy dose of interpretive intervention generate uneasiness because the voice of Scripture appears to be illegitimately subordinated to the voice of the human interpreter. This uneasiness existed even in early Palestine, but became more pronounced in later Babylonia where the fundamentally hierarchical nature of the Jewish legal system is more strongly asserted.

The second fundamental difference between Roman and Jewish law is that Roman law is secular while Jewish law claims a divine origin. While inelegant and bold legal fictions can arouse opposition in any legal system, they may appear all the more intolerable in a legal system that purports to be divine in origin. If the divine origin of the law is understood to ensure its freedom from falsehood, then legal fictions and legal determinations based on blatant falsehoods may engender greater anxiety than they would in a secular legal system. Almost by definition, an erroneous or contrary-to-fact ruling ceases to be God’s law and becomes instead a mere human determination. As human administrators of a perfect divine law, later Babylonian rabbis may feel a certain compunction about anything that appears blatantly unreasonable or simply untrue. But this had not always been the case, as seen in earlier Palestinian rabbinic texts which employ bold legal

39 Why the natural intolerance for enactments contradicting Torah law should reassert itself in the late third to early fourth century is difficult to say. However, it is interesting to note that at approximately the time that rabbinic sages explicitly raise the concern that some taqqanot appear to be contrary to the written Torah, a similar concern is expressed in the Roman world. In 315 C.E., Constantine decreed that rescripts contrary to the civil law were invalid. THEODOSIAN CODE 1.2.2. Constantine’s decree is itself the result of internal constitutional developments in Rome which led to the consolidation of all law-making in the hands of the emperor and thus, for all practical purposes, a single source of law and legal authority.
fictions, which depict rabbis upholding determinations that are contrary-to-fact and which, in a few fascinating passages, explicitly acknowledge that law and truth are not always and necessarily aligned.

For the first two centuries of the Common Era, rabbis of Palestine not only talked the talk, they also walked the walk, both proclaiming and exercising their authority in a bold manner. Given the hierarchical and divine nature of Jewish law, the behavior of these sages was remarkable. I have suggested that this behavior should be understood in the context of the secular Roman legal system that pervaded their environment, with its multiple sources of law and legal authority operating independently and often at cross-purposes. But bold uses of rabbinic authority sat uneasily in a system that was, after all, on its way to becoming more clearly hierarchical—with various sources of law subordinated to an ultimate and divine source of authority. As later fourth to sixth century rabbis, especially in Babylonia, became anxious about the activity of their predecessors they honored them in word only, but not in deed.