

# **Ancient Jewish Law and Narrative in Comparative Perspective: The Damascus Document and the Mishnah**

Steven D. Fraade \*

## **1. Introduction**

The question of the intersection of law and narrative has long preoccupied scholars of the Hebrew Bible and of rabbinic literature, and more recently of such second temple period texts as the Book of Jubilees. It has also been a perennial subject of interest among scholars of law, literature, and culture much more broadly. Although law and narrative are commonly the preoccupations of separate specialties of scholarly inquiry, all too often in limited communication with one another, legal discourse is often deeply embedded in and dependent upon narrative structures and rhetoric. Likewise, the stories that cultures

\* This essay began as a paper presented at a special session on Qumran law at the Association for Jewish Studies Annual Conference, in Washington, DC, December 2005. An earlier paper focusing just on the Damascus Document was presented at the Annual Meeting of the Society of Biblical Literature, Philadelphia, November 2005. My thanks to the conveners of those sessions for the opportunities to give my thoughts test runs, and to the other panelists and the audience for their responses. This essay also benefited greatly from its being discussed at a meeting of the Jewish Law and Legal Theory Workshop at Cardozo Law School, April 2006, especially from comments by the respondent, Richard Weisberg, and the convener, Suzanne Last Stone. The following colleagues generously read and commented on a penultimate version: Maxine Grossman, Martin Jaffee, and Ishay Rosen-Zvi. I also benefited from the assistance of Leib Moscovitz and Ranon Katzoff.

## The Damascus Document and the Mishnah

tell of themselves, especially of their origins and histories, are profoundly implicated in their legal values and institutions.<sup>1</sup>

With a few important exceptions, the interrelation between legal and narrative modes of rhetoric in the Dead Sea Scrolls has received little attention, with an implicit division of labor between the two among scholars of the scrolls. In the case of early rabbinic literature, especially the Mishnah, there have been a number of important studies of late that explore narrative aspects of legal discourse and the role of stories set within texts otherwise characterized as legal.<sup>2</sup> However, comparative explorations of this question between the two bodies of literature have been virtually non-existent. While several post-biblical works extract and reassemble Torah laws according to topical group-

- 1 For a fuller treatment of this interrelation, with many more examples from ancient Jewish literature and with references to recent scholarship, see Steven D. Fraade, "Nomos and Narrative Before *Nomos and Narrative*," *Yale Journal of Law and the Humanities* 17 (2005), 81-96.
- 2 For the Mishnah, see Chaya T. Halberstam, "Rabbinic Responsibility for Evil: Evidence and Uncertainty" (PhD diss., Yale University, 2004); Beth A. Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (Oxford: Oxford University Press, 2006); idem, "Negotiating Violence and the Word in Rabbinic Law," *Yale Journal of Law and the Humanities* 17 (2005), 125-50; Moshe Simon-Shoshan, "Halachah Lema'aseh: Narrative and Legal Discourse in the Mishnah" (PhD diss., University of Pennsylvania, 2005); Ishay Rosen-Zvi, "The Ritual of the Suspected Adulteress (Sotah) in Tannaitic Literature: Textual and Theoretical Perspectives" (Hebrew) (PhD diss., Tel-Aviv University, 2004); idem, "Ha-Guf v'ha-Mikdash: Reshimot Mumei ha-Kohanim ba-Mishnah u-Mekomo shel ha-Mikdash be-Vet ha-Midrash ha-Tanna'i," *Jewish Studies* (forthcoming); idem, "Mi Yegalleh 'Afar me-'Eneka': Mishnat Sotah Perek 5 u-Midrasho shel R. Akiba," *Tarbiz* (forthcoming); Yonah Fraenkel, "Ha-'Aggadah sheba-Mishnah," in Yaakov Sussman and David Rosenthal (eds.), *Mehqerei Talmud III: Talmudic Studies Dedicated to the Memory of Professor Ephraim E. Urbach* (Jerusalem: Magnes, 2005), 655-83. For the Babylonian Talmud, see Jeffrey L. Rubenstein, *Talmudic Stories: Narrative Art, Composition, and Culture* (Baltimore: Johns Hopkins University Press, 1999); Barry Wimpfheimer, "But It Is Not So': Toward a Poetics of Legal Narrative in the Talmud," *Prooftexts* 24 (2004), 51-86.

### Steven D. Fraade

ings, none do so to the extent of the Damascus Document and the Mishnah. In both cases, reordered laws are also renarrativized in significant, albeit very different ways. Yet, surprisingly, there have been no systematic, overarching comparisons between the two legal collections, each of central importance for our understanding of its respective community of “readers” (or students). For example, in two excellent recent discussions of the generic characterization of the Mishnah (both of which end up being inconclusive in this regard), comparisons are made to biblical, cuneiform, Roman, Syriac, and Persian legal corpora, in some cases hundreds if not thousands of years apart, without even a mention of the more geographically and linguistically, and in some cases chronologically proximate second temple antecedents, most notably the Damascus Document.<sup>3</sup> Of course, whatever their significant differences, the Damascus Document and the Mishnah share the same foundational Torah text, however differently and complexly they relate to it in form, content, and ideology. While I will explore with greater specificity other lines of comparison between the Damascus Document and the Mishnah, suffice it for now to add that for neither document

- 3 See Yaakov Elman, “Order, Sequence, and Selection: The Mishnah’s Anthological Choices,” in David Stern (ed.), *The Anthology in Jewish Literature* (New York: Oxford University Press, 2004), 53-80, esp. 65-70; Simon-Shoshan, “Halachah Lema’aseh,” 82-99. For other recent comparative studies of the Mishnah with respect to Roman legal codes, see Alan Watson and Khaled Abou el Fadl, “Fox Hunting, Pheasant Shooting, and Comparative Law,” *American Journal of Comparative Law* 48 (2000), 1-37; Catherine Hezser, “The Mishnah and Ancient Book Production,” in Alan J. Avery-Peck and Jacob Neusner (eds.), *The Mishnah in Contemporary Perspective* (Leiden: Brill, 2002), 167-92; idem, “The Codification of Legal Knowledge in Late Antiquity: The Talmud Yerushalmi and Roman Law Codes,” in Peter Schäfer (ed.), *The Talmud Yerushalmi and Graeco-Roman Culture I* (Tübingen: Mohr Siebeck, 1998), 581-641 (although focusing on the Palestinian Talmud, her comparisons are equally apt for the Mishnah). Note also the pessimistic view of Seth Schwartz, *Imperialism and Jewish Society, 200 B.C.E. to 640 C.E.* (Princeton: Princeton University Press, 2001), 163.

## The Damascus Document and the Mishnah

does there exist a scholarly consensus regarding its characterization and function as a legal corpus.<sup>4</sup>

Why is the Damascus Document a good place to begin such an inquiry? First, it is emblematic of the division of scholarly attentions between law and narrative. Although the Cairo Damascus Document (CD) is roughly divided in halves between the opening Admonition (CD 1-8, 19-20), which depends heavily on narrative accounts of Israel's and the sect's past, and its Laws (CD 15-16, 9-14), with the recent addition of fragments from Qumran Cave 4 (4QD), that division is estimated to be one-third Admonition and two-thirds Laws, with several passages occupying a gray area between the two. Nevertheless, scholars of the Dead Sea Scrolls, again with important exceptions, have focused much more on the Admonition than on the Laws, in part because of their preoccupation with the possible value of the former for reconstructing the origins, history, and ideology of the Qumran community. In fact, some translations and commentaries to CD have treated the Admonition in complete isolation from the Laws, something that would be harder to do now that the 4QD legal materials have been published.<sup>5</sup> Even the commonly used titles for the scroll, and hence its implicit characterization, as the "Damascus Document" and, before that, the "Zadokite Document," derive from the occurrences of the terms "Damascus" and "Zadok" in the Admonition but never in the Laws.<sup>6</sup>

4 For various views of the nature and function of the Mishnah, see H. L. Strack and Günter Stemberger, *Introduction to the Talmud and Midrash* (trans. and ed. Markus Bockmuehl, 2nd ed.; Edinburgh: T&T Clark, 1996), 135-38; Elman, "Order, Sequence, and Selection."

5 See, for example, Michael A. Knibb, *The Qumran Community* (Cambridge: Cambridge University Press, 1987); Philip R. Davies, *The Damascus Covenant: An Interpretation of the "Damascus Document"* (Sheffield: JSOT Press, 1983), both of which omit entirely the Laws from their translations of and commentaries to the Damascus Document. On the history of neglect of the Laws, see Charlotte Hempel, *The Damascus Texts* (Sheffield: Sheffield Academic Press, 2000), 17, 71-74.

6 For Damascus, see CD 6:5, 19; 7:15, 19; 8:21; 19:34; 20:12; 4Q266 3 iii 20

### Steven D. Fraade

Now that we have the opening and closing sections of the Damascus Document from the 4QD fragments, as well as much more of its central legal contents, it is clear that a truer title (and characterization) would be פרוש המשפטים, “the elaboration of the laws.”<sup>7</sup>

However, in the corrective characterization of the Damascus Document as primarily a legal text, it would be a mistake, it seems to me, simply to relegate the Admonition to the status of a hortatory “introduction” or “preface” to its corpus of Laws, as some have done.<sup>8</sup> Just as scholars have invested fruitful labors in the redactional and source-critical analysis of the composite Admonition on the one hand and of the composite Laws on the other (albeit with limited historical conclusions of consensus), it is now time to ask how these two sections function *performatively* in relation to one another within the document as a whole.<sup>9</sup>

(=CD 6:19). For Zadok, see CD 4:1, 3; 5:5; 4Q266 5 i 16 (a bridge between the Admonition and the Laws; see Hempel, *Damascus Texts*, 34).

- 7 For this phrase, see the opening section, 4Q266 1 a-b 1 (restored; see *DJD* 18:31-32); the concluding section, 4Q266 11 18 (=4Q270 7 ii 12; 4Q269 16 16-17 [restored]; see comment in *DJD* 18:78); as well as CD 14:18 (par. 4Q266 10 i 11-12; 4Q269 11 i 1-2), referring to the preceding rules for those “dwelling in camps.”
- 8 For this characterization, see Joseph M. Baumgarten and Daniel R. Schwartz in James H. Charlesworth (ed.), *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Volume 2: Damascus Document, War Scroll, and Related Documents* (Tübingen: J. C. B. Mohr [Paul Siebeck]; Louisville: Westminster John Knox, 1995), 5, 61; Joseph M. Baumgarten, “Damascus Document,” in Lawrence H. Schiffman and James C. VanderKam (eds.), *Encyclopedia of the Dead Sea Scrolls* (Oxford: Oxford University Press, 2000), 167; idem, “The Laws of the *Damascus Document* in Current Research,” in Magen Broshi (ed.), *The Damascus Document Reconsidered* (Jerusalem: Israel Exploration Society; Shrine of the Book, Israel Museum, 1992), 52, 55; Knibb, *Qumran Community*, 15.
- 9 A similar appeal for an integrative approach to the Admonition and Laws is made by Charlotte Hempel, *Damascus Texts*, 52-53, 88; idem, *The Laws of the Damascus Document: Sources, Traditions and Redaction* (Leiden: Brill, 1998), 192. The term “performative” is used here and below to denote how texts actively and transformatively engage their audiences in the process of

## The Damascus Document and the Mishnah

Even as the laws of the Damascus Document may be said to have been extracted from some antecedent source or sources so as to be reorganized according to legal topical rubrics (סרכים), they have also been renarrativized according to the historical self-understanding of the Qumran community as expressed in the Admonition, together with what we now know to have been the concluding section of the Damascus Document, to which we will shortly turn. In this regard, it might be argued that the Damascus Document is both a latter-day Book of Deuteronomy (on which it might be structurally modeled) and an antecedent to the Mishnah of Rabbi Judah the Patriarch.<sup>10</sup> While space will not allow me a full explication of the text in support of this thesis, let me offer a few salient exemplifications.

conveying meaning and cultivating identity. See further, Steven D. Fraade, *From Tradition to Commentary: Torah and its Interpretation in the Midrash Sifre to Deuteronomy* (Albany: State University of New York Press, 1991), 13-14, 183 n. 46. With respect to the Dead Sea Scrolls, see most recently, Maxine L. Grossman, *Reading for History in the Damascus Document: A Methodological Study* (Leiden: Brill, 2002); Carol A. Newsom, *The Self as Symbolic Space: Constructing Identity and Community at Qumran* (Leiden: Brill, 2004).

- 10 On this broader pattern of legal extraction, redaction, and renarrativization, see Fraade, “Nomos and Narrative Before *Nomos and Narrative*.” I am told that in an unpublished paper, entitled “The Damascus Document: A Historiosophic Theology or a Book of Laws?” (Third Orion International Symposium: The Damascus Document, A Centennial of Discovery, 4-8 February 1998, Hebrew University of Jerusalem, Israel), Moshe David Herr argued similarly for the modeling of the Damascus Document after the Book of Deuteronomy. The relation of the Mishnah to the Book of Deuteronomy is less evident, although there have been suggestions that the Hebrew word *משנה* (oral teaching) as the title for the Mishnah, hints at *משנה התורה*, “a copy of the Law” (from Deuteronomy 17:18), the rabbinic designation for the Book of Deuteronomy, and the basis of the Latin designation of the same book as *Deuteronomion*, or “second law.” Patristic authors refer to both as *deuterosis*. See Strack-Stemberger, *Introduction to the Talmud and Midrash*, 109, 126. Moses Maimonides, in choosing “*Mishneh Torah*” as the title of his medieval code, appears to be modeling (or justifying) it after both the Book of Deuteronomy (implicitly) and the Mishnah (explicitly). See Menachem

Steven D. Fraade

## 2. Beginning and End

The 4QD evidence for the beginning and end of the Damascus Document will inform our understanding of the document as a whole. Although the opening of the document, as preserved in 4Q266 1 a-b - 2 i and parallels, is fragmentary (including the hint of a collective prayer for knowledge), from what words are preserved we can see several themes that will recur throughout the Admonition and that are illuminated by the Laws. The Maskil (restored), or wise leader, reveals to the “[s]ons of light” what is otherwise hidden from humankind: the ways of wickedness from which they must separate themselves; the commandments according to which the righteous must live and which the wicked ignore, subvert, and slander; the divinely fixed “appointed times” (מועדים) in history for the visitations of punishment of the wicked and the favoring of the righteous. Thus, from the very beginning of the text what is vouchsafed to the elect alone, what defines them over against their opposites, is their knowledge of the divine orchestration of history and of the commandments according to which they are to conduct themselves if they are to reap its blessings:

He ordained a period of wrath for a people that knows him not, and he established times of favour for those that seek his commandments and for those that walk on the path of integrity. And he uncovered their eyes to hidden things and they opened their ears and heard profundities, and they understood all that is to be before it comes upon them.<sup>11</sup>

However, it is the end of the document, now known from three 4QD fragments, that is even more significant for our understanding of the document as a whole, and for its performative social setting. Following

Genack, “Rambam’s Mishneh Torah: The Significance of Its Title,” *Tradition* 38 (2004), 78-85.

11 4Q266 2 i 3-6; par. 4Q268 1 5-8. Translation from *DJD* 18:35.

## The Damascus Document and the Mishnah

the corpus of laws, both for the “cities of Israel” and for those “dwelling in camps” (CD 12:19, 22-23), as well as a penal code for the latter, we find a ceremony for the expulsion of retrograde members in conjunction with an annual communal ceremony for the renewal of the covenant in the third month, presumably in conjunction with the Festival of Weeks on the fifteenth day thereof.<sup>12</sup> By all indications, this was the most important ritual and liturgical event in the annual festival cycle of the Qumran community, and one which echoes strongly in other aspects of Qumran prayer and liturgy.<sup>13</sup> Following an admonition to accept one’s punishment willingly, on analogy to the bringing of a sin offering or a guilt offering, with communal discipline substituting for sacrificial offerings,<sup>14</sup> we find the ceremony for the expulsion of “anyone who rejects these regulations (המשפטים האלה)<sup>15</sup> [which are] in accordance with all the statutes (חוקים) found in the law of Moses ... for his soul has despised righteous instruction (יסורי הצדק).”<sup>16</sup> These terms presumably refer to the previously enunciated Laws. A prayer is recited by the

12 I have been influenced in my treatment by that of Daniel K. Falk, *Daily, Sabbath, and Festival Prayers in the Dead Sea Scrolls* (Leiden: Brill, 1998), 230-35. For other passages dealing with the expulsion of members for failure to live according to the community’s rules, see CD 19:32-20:13, with which compare IQS 6:24-7:25; 8:16-9:2. However, the IQS expulsion does not make reference to a ritual.

13 This is emphasized by Falk, *Daily, Sabbath, and Festival Prayers*, esp. 217-51. For the annual covenant renewal ceremony of blessings and curses at Qumran, especially as reflected in 4QMMT, see Steven D. Fraade, “Rhetoric and Hermeneutics in Miqsat Ma’ase Ha-Torah (4QMMT): The Case of the Blessings and Curses,” *DSD* 10 (2003), 150-61. For the ceremony in the context of the Community Rule, see Newsom, *Self as Symbolic Space*, 117-27.

14 4Q266 11 1-5; par. 4Q270 7 i 15-19. For such substitution, compare IQS 3:4-12; 5:6; 8:3-10, 16-18; 9:3-6; IQSa 1:3; 4Q265 7 8-9. Cf. Josephus, *War* 2.144. See Falk, *Daily, Sabbath, and Festival Prayers*, 232-33, 239-47.

15 For this phrase, or אלה המשפטים (cf. Exod 21:1), referring either to rules preceding or following, see CD 12:19; 13:22 (par. 4Q266 9 iii 14); 20:27; 4Q266 11 5-6 (par. 4Q270 7 i 19-20); 4Q270 7 i 15. Cf. זה/הזה פרוש המשפטים, above, n. 7. See also below, nn. 31, 44.

16 4Q266 11 5-7; par. 4Q270 7 i 19-21; 4Q269 16 3-5 (restored).

**Steven D. Fraade**

“priest in charge over the many,”<sup>17</sup> which incorporates the themes of history and law, that is, the divine giving of law in the context of Israel’s history, that run through the Damascus Document, and whose very language echoes parts of the previous Admonition. Its words are as follows:<sup>18</sup>

Blessed are you, almighty God, in your hand is everything, and [you] make everything. You established peoples in accordance with their families and tongues for their tribes, but made them go astray in a trackless void. But our ancestors you did choose and to their descendants you gave your true statutes (חוקי אמתכה) and your holy laws (חוקי קודשכה), which if a man does them, he shall live.<sup>19</sup> You have set boundaries (גבולות) for us and cursed those who transgress them, for we are the people of your redemption and the flock of your pasture. You have cursed those who transgress them, but we have upheld [them].<sup>20</sup>

17 Cf. CD 14:6-7 (par. 4Q267 9 v 10-11; 4Q268 2 2 [restored]).

18 4Q266 11 8-14; par. 4Q269 16 6-12 (restored). See Hempel, *Laws of the Damascus Document*, 180-82.

19 For very similar language, see the Admonition, CD 3:12-16, which recounts the original establishment of the covenant community. For the biblical idiom, see Lev 18:5; Ezek 20:11, 13, 21; Neh 9:29.

20 The above translation follows that of *DJD* 18:77, with slight modification. The last phrase (ואנו הקימונו) (4Q266 11 14; par. 4Q269 16 12) is translated there incorrectly as “but you have preserved us.” It is similarly mistranslated by Florentino García Martínez (*The Dead Sea Scrolls Study Edition. Vol. One: 1Q1-4Q273* [Leiden: Brill, 1997], 597), as “You curse those who cross them but us you have raised up”; and by Michael Wise, Martin Abegg, Jr., and Edward Cook (*The Dead Sea Scrolls: A New Translation* [San Francisco: Harper Collins, 1996], 74) as “Thou hast cursed the transgressors; but Thou hast made us firm.” The verb must be *hiph’il*, perfect, first person, common of קום, with no pronominal suffix. My translation accords with those of Geza Vermes (*The Complete Dead Sea Scrolls in English*, rev. ed. [London: Penguin, 2004], 155) and Charlotte Hempel (*Laws of the Damascus Document*, 176, 181), contrasting the “we” who uphold God’s laws (“boundaries”) with those who transgress them. Alternatively, some have taken the unstated object of the verb to be not the “boundaries,” but the

## The Damascus Document and the Mishnah

The expulsion ceremony concludes with the departure of the person expelled and instructions to others not to have any further dealings with him: “His case shall be inscribed in front of the Overseer (המבקר), and his judgment shall be complete (שלים משפטו).”<sup>21</sup>

The context for the judicial expulsion of individual members appears to have been the annual assembly in the “third month,” during which the community as a whole curses those who “turn aside to the right or to the left of the law,” thereby echoing Deuteronomy 28:14, in the context of the Deuteronomic ceremony of blessings and curses.<sup>22</sup> While this annual ceremony of blessings and curses is more fully described in IQS 1:16-2:18, it is more powerfully evoked in our passage at the end of the Damascus Document, in large measure through the direct articulation of the prayer recited by the Priest. In combination, the judicial ritual of expulsion and the liturgical recitation of blessings and curses serves performatively to delineate most clearly the lines that differentiate those within the community from those without (us vs. them), and to justify the community’s elect self-understanding within history as a function of their maintaining of the divinely revealed laws

curse against the transgressors, that is, that the community, through its expulsion of transgressors, enacts God’s curse on them. Thus, Aharon Shemesh (“Expulsion and Exclusion in the Community Rule and the Damascus Document,” *DSD* 9 [2002], 47) renders and explains, “You cursed those who transgress them, and we have fulfilled...’ that is, we, through the imminent expulsion of the offender, are observing and implementing the curse that you imposed upon transgressors”; and Falk (*Daily, Sabbath, and Festival Prayers*, 231), who translates, “You have cursed those who transgressed them, and we effect (your judgment).” Whether the “we” uphold the boundaries or effect the curse of those who transgress them does not change my understanding of this prayer and its import for my larger argument.

21 4Q266 11 16. There is some uncertainty whether the subject is the one being expelled or anyone who continues to have dealings with him. I prefer the former, on the assumption that the text is broken. See Hempel, *Laws of the Damascus Document*, 182-83.

22 See above, n. 13.

### Steven D. Fraade

(boundaries), which have been revealed to them both through Moses and their own teachers. This is emphatically underscored in the concluding words of the document:

This is the elaboration of the laws (והזהה פרוש המשפטים) to be followed during the entire period of visitation, that which will be visited upon them during the periods of wrath and their journeys, for all who dwell in their camps and all who dwell in their towns. Behold it is all in accordance with the final interpretation of the Torah (הנה הכול על מדרש התורה האחרון).<sup>23</sup>

The foregoing document is understood to contain the correct and latest elaboration of the laws, both for Israel as a whole (“who dwell in their towns”; cf. CD 12:19) and for the sectarians (“who dwell in their camps”; cf. CD 12:22-23), in accordance with which the elect community is to live during the present historical period of divine wrath, especially as it nears its consummation.<sup>24</sup>

### 3. Intermediary Mixes and Transitions

If we look now at some mixed and transitional passages between the editorial bookends of פרוש המשפטים, “the elaboration of the laws,” we will see that the bipartite division of the Damascus Document into

23 4Q466 11 18-21; 4Q270 7 ii 12-15; 4Q269 16 16-19. Translation is from *DJD* 18:77. For מדרש התורה האחרון (partly restored), see 4Q266 5 i 17. For מדרש התורה, see CD 20:6; 1QS 8:15 (par. 4Q259 iii 6). For פרוש המשפטים, see above, n. 7. For פרוש התורה, see CD 4:8 (par. 4Q266 3 i 2); 6:14; 13:6 (par. 4Q267 9 iv 2).

24 For the first and last laws, revealed to the community during pre-ordained times, see CD 4:6-12; 20:6-10, 30-33; 1QS 9:10b-11. On whether “the final interpretation of the Torah” is a title for the Damascus Document, or for some other document from which the above laws have been taken, see *DJD* 18:78. Cf. Paul Mandel, “*Inclusio*: On the Final Section of the *Damascus Document* and Its Literary Significance” (Hebrew), *Meghillot: Studies in the Dead Sea Scrolls* 2 (2004), 57-68.

## The Damascus Document and the Mishnah

separate sections of Admonition and Laws is rendered much more complex.<sup>25</sup> To begin with, as is well known, important statements of law and legal scriptural interpretation are central to the Admonition itself, often interwoven with accounts of the community's origins, its self-understanding with respect to covenantal history, and its derision of adversaries for their legal laxity (e.g., "seekers after smooth things," "movers of boundaries"). The section of the Admonition on the "Nets of Belial" (4:12-5:15) contains important rules, enunciated through scriptural exegesis, forbidding polygamy (or second marriage) (4:20-5:6) and niece-marriage (5:7-11), as well as condemnations of those who, through laxity with respect to sexual relations with menstruants, defile the sanctuary (5:6b-7), and, more generally, of those who spurn the "statutes of God's covenant" (חוקי ברית אל) (5:12), from whom the addressees are admonished to keep apart (5:11-15).<sup>26</sup> Furthermore, in CD 6:14b-7:4a, following an admonishment to "all those who have been brought into the covenant" (וכל אשר הובאו בכרית) not to enter the sanctuary to offer sacrifices (6:11b-14a), we find a mini-corpus of twelve brief rules, most of whose more specific articulations are found in the section of Laws. It may be that this summary of the rules functions somewhat as does the Decalogue in Deuteronomy 5:16-18 as part of the hortatory preamble to the laws proper.<sup>27</sup> There follows a series of promises of reward for obedience to the laws and warnings of consequences for disobedience, with a rule inserted regarding the obligation of those who do marry and bear children to obey Torah laws regarding family relations (7:6b-9a; par. 19:1-5), followed by additional warnings of future punishment of the wicked and the community's backsliders (7:9b-8:21a; par. 19:5b-20:27a). In brief, the Admonition itself contains a significant number of rules, anticipating thereby the

25 See Hempel, *Damascus Texts*, 88; idem, *Laws of the Damascus Document*, 163-70.

26 Cf. CD 20:8-13.

27 See Hempel, *Laws of the Damascus Document*, 169; A. D. H. Mayes, *Deuteronomy* (Grand Rapids, MI: Eerdmans, 1979), 160-65.

### Steven D. Fraade

more concentrated and expanded collection of the Laws to come. Conversely, the Laws themselves, particularly those that structure the life of the community, stress the importance of collective instruction in the detailed history (as the sect understood it) of God's dealings with humankind:

This is the rule for the Overseer of the camp: He shall instruct the Many in the acts of God, and cause them to discern the wonder of His mighty deeds, and recount to them the happenings of eternity according to [their] interpretations.<sup>28</sup>

Especially important for our understanding of the Damascus Document as a whole is the conclusion of the Admonition, according to CD (20:27b-34, with partial parallels in 4QD), which, after condemning those who have “broken the boundary of the Torah” (פרצו את גבול התורה) (20:25), blesses those who remain steadfast in their obedience of the laws, appearing just prior to the beginning of the Laws:<sup>29</sup>

But all those who hold fast to these rules (כל המחזיקים במשפטים האלה), going and coming in accordance with the Torah, who obey the teacher and confess before God, [saying]: “Truly we have acted wickedly, we and our fathers, in that we have walked contrary to the statutes of the covenant, righteousness and truth are your judgments against us”; who do not act presumptuously against his holy statutes, his righteous precepts, and his true testimonies; who have been instructed in the first rules (התיסרו במשפטים)

28 CD 13:7b-8; par. 4Q267 9 iv 3-5. The last word is פרתיה in CD 13:8, but פתריהם in 4Q267 9 iv 5. For the affinities of this passage with the Admonition, see Hempel, *Laws of the Damascus Document*, 119. Hempel also argues that this passage may have been inserted from another context, where it related originally to the duties of the Maskil (wise leader), rather than the Overseer (מבקר). However, in its present, redacted setting, it clearly is part of the rules for the community.

29 The 4QD parallels are very fragmentary, but extend the text slightly: 4Q266 4 i 7-13; 4Q267 3 6-7. The translation that follows, with only slight modification, is from Knibb, *Qumran Community*, 75.

## The Damascus Document and the Mishnah

הראשונים) in which the men of the community were governed;<sup>30</sup> who obey the teacher of righteousness and do not reject the statutes of righteousness when they hear them (לא ישיבו את חוקי) (הצדק בשמעם) – they will rejoice and be glad, and their heart will be strong, and they will triumph over all the sons of the earth, and God will make expiation for them, and they will see his salvation because they have taken refuge in his holy name.

First, it is unclear whether the expression “these rules” (במשפטים האלה) at the outset of this passage refers back to the summary of the duties of members in 6:11b-7:4a, or forward to the collection of the Laws (CD 9-16, greatly enlarged by 4QD). Whatever its original reference, in its present redacted setting it could have been understood to refer to either or both.<sup>31</sup> The communal confession, provided as a direct quotation, is so similar to that found in IQS 1:24-26, as part of the annual covenant renewal ceremony at the Festival of Weeks, that they must be variants on the same confessional prayer.<sup>32</sup>

As we have seen, the concluding passage of the Damascus Document (from 4QD fragments), with its ceremony of expulsion, is similarly placed in the third month, and also contains a prayer, there recited by the “priest in charge.” Just as the expulsion ceremony at the end of the Damascus Document, following the Laws, could be applied to the apostate cursed at the conclusion of the covenant renewal ceremony as described in IQS 2:11-18,<sup>33</sup> so too the communal confession of CD,

30 On “first rules,” see above, n. 24.

31 See Knibb, *Qumran Community*, 76. Compare ואלה החוקים למשכיל in 4Q266 5 i 17, in another transitional passage before the Laws, which could also point either back or forward. Similarly, see CD 12:20-21 for the same phrase in a transition between sets of laws. See below, n. 44, as well as above, nn. 7, 15.

32 See Falk, *Daily, Sabbath, and Festival Prayers*, 226-30.

33 See *ibid.*, 234: “That this ritual [of expulsion] occurs at the end of the covenant ceremony as described in IQS 1-2 and appears at the end of the *Damascus Document* adds a measure of support to the theory that the *Damascus Document* reflects in some way the structure of the covenant ceremony.”

### Steven D. Fraade

just prior to the Laws, could have been appropriately recited as part of that same ceremony, just prior to the expanded priestly blessing. Thus, the Laws of the Damascus Document are bracketed by two liturgical invocations of the annual ceremony of covenant renewal, in which new members were admitted, continuing members were promoted or demoted, and retrograde members were expelled. That is, the Laws are performatively preceded by the confession and blessing of the elect, and followed by the cursing and expulsion of the errant. In light of similar themes that run throughout the Admonition, beginning with its repeated rehearsal of the origins and history of the community's covenantal place within Israel's sacred narrative, the Damascus Document as a whole, especially its overall structure, takes on meaning in relation to the covenant ceremony, to which its parts could easily have provided elements of the liturgical "script," even as the covenant ceremony itself varied over time. As Daniel Falk has argued:

In CD, the confession comes at the end of a lengthy Admonition, during which God's deeds in the past and the sins of Israel were recounted, judgment was pronounced upon outsiders and backsliders, and blessing called upon those who "hold fast to these judgments" and confessed their sins. Since the excommunication ritual described at the end of the *Damascus Document* ... was explicitly intended for an annual covenant ceremony in the third month, and since the covenant ceremony in the *Community Rule* also probably took place during the Feast of Weeks following the calendar of *Jubilees*, it may be concluded that the confession of the *Damascus Document* is a variant of the one in 1QS and was recited in the course of a Feast of Weeks covenant ceremony. That is, the context of the *Damascus Document* is not a description of a ceremony as in the *Community Rule*; rather, it is an allusion to it which appears in the course of an exhortation for the purpose of recalling the members to the initial act whereby they entered the covenant.<sup>34</sup>

34 Ibid., 228.

## The Damascus Document and the Mishnah

Falk stresses that the very *structure* of the Damascus Document as a whole, with all of its variations between different recensions, “reflects in some way the structure of the covenant ceremony.”<sup>35</sup>

There is one other aspect of the concluding passage to the Admonition in CD that I wish to emphasize. In contrast to the cursed who have not only disobeyed, but reviled the rules, those to be blessed do not only obey the rules, but have been receptive to being “instructed in the first rules” (CD 20:31), and “do not reject the statutes of righteousness when they hear them” (CD 20:32-33; par. 4Q266 4 7). The emphasis here on collective *hearing* of the laws suggests that the annual covenant renewal ceremony comprised not only the public recitation of history, confession, blessings, curses, and expulsion, but also the reading and perhaps study of *משפטי צדקו*, “his righteous precepts,” and *חוקי הברית*, “statutes of the covenant,” in other words, the ritualization of both law and legal study as part of the community’s performative reaffirmation of its covenantal bonds and identity. Those rules could have been selectively drawn, at least in part, from the Laws of the Damascus Document for recitation and possibly instruction in the annual ritual of covenantal reenactment.<sup>36</sup> Thus, as Michael Knibb comments here: “Perhaps [this is] an allusion to the solemn recital of the laws at ceremonies of the movement, for example the ceremony for the renewal of the covenant.”<sup>37</sup>

This suggests that the section of Laws, whatever its origins and redactional history, whether as a whole or in its parts, should be viewed

35 *Ibid.*, 234.

36 On the ritualization of reading and study at Qumran, see Steven D. Fraade, “Interpretive Authority in the Studying Community at Qumran,” *JJS* 44 (1993), 46-69, esp. 56-58. Such study may also have been a component in the examination of the members for promotion or demotion within the communal ranks. See 1QS 5:23-24 (par. 4Q258 ii 3-4; 4Q261 1a-b 3-5), where the members are examined “every year” for their “spirit and their works [in Torah].” It is likely that “every year” (*שנה בשנה*) refers to an annual occasion. See Knibb, *Qumran Community*, 114. Cf. 1QS 6:22.

37 Knibb, *Qumran Community*, 76. See also *ibid.*, 14.

**Steven D. Fraade**

in relation to, and not apart from, the larger structure and function of the Damascus Document, and that the Laws themselves functioned not just juridically, but also (if not mainly) pedagogically and liturgically, that is rhetorically and performatively, in a particular social setting. I will return to some specific implications of this suggestion shortly, but I should here stress that I am neither saying that the Laws of the Damascus Document were the only ones studied on the occasion of the annual covenant renewal ceremony (I have previously suggested this as a possible context for the use of 4QMMT<sup>38</sup>), nor that this would have been the only time or context in which the Laws of the Damascus Document would have been read or studied.<sup>39</sup> However, I would agree with Falk,<sup>40</sup> that when the Damascus Document was read or studied on

38 See Steven D. Fraade, "To Whom It May Concern: 4QMMT and Its Addressee(s)," *RevQ* 19 (2000), 507-26; idem, "Rhetoric and Hermeneutics in Miqṣat Ma'áse Ha-Torah." For strong affinities between the laws of the Damascus Document and those of 4QMMT, see Charlotte Hempel, "The Laws of the Damascus Document and 4QMMT," in Joseph M. Baumgarten, Esther G. Chazon, and Avital Pinnick (eds.), *The Damascus Document: A Centennial of Discovery. Proceedings of the Third International Symposium of the Orion Center, 4-8 February, 1998* (Leiden: Brill, 2000), 69-84.

39 Another context could have been the nightly study sessions described in IQS 6:6-8 (לדורוש משפט). The fact that the Damascus Document only obliquely refers to the context of its performative use is not an obstacle to my suggestion. Note Jeffrey Tigay's comment on the covenant ceremony of Deuteronomy 29:9-20 (*The JPS Commentary: Deuteronomy* [Philadelphia: Jewish Publication Society, 1996], 277): "Moses has alluded to this ceremony before ..., but we do not know precisely when it took place or of what it consisted, since the text never actually narrates it. Other covenant texts from the ancient Near East likewise allude to ceremonies without narrating the actual performance of the agreement." Thus, parts of the Damascus Document could have provided partial scripts for use as part of the annual ceremony of covenant renewal, without the text as a whole having been a unified narrative script for that ceremony. I will return to this in my conclusions regarding the Damascus Document as an "anthology."

40 *Daily, Sabbath, and Festival Prayers*, 228, cited above.

## The Damascus Document and the Mishnah

other occasions, it would have functioned as a reminder, even a re-enactment, for its audience of their original entry and annual re-confirmation into the covenant.

Mention should be made of another section of the Damascus Document, newly known from 4QD, and dubbed a “Catalogue of Transgressions,” which its editors place after CD 20 but before the Laws, that is, as a transition between the Admonition and the Laws.<sup>41</sup> This has led to some debate as to whether the “Catalogue of Transgressions” should be considered to be part of the Admonition or part of the Laws, since it could be considered akin to the warnings of the former (modeled loosely on Deuteronomy 27), followed by a call to hearken (שמעו) that recalls similar calls earlier in the Admonition,<sup>42</sup> or to be the opening summary of the more fully stated rules of the latter.<sup>43</sup> Finally, another fragmentary bridge text (4Q266 5 i 1-19; par. 4Q267 5 ii 1-7) has some vocabulary that is distinctive to the Admonition and other terminology that is distinctive of the Laws, pointing, as it were, in both directions.<sup>44</sup>

All of this is to say that the redactional hand on display here sought to tie the Admonition and the Laws to one another, thereby blurring any sharp demarcation between them. This suggests, to reiterate, that they need to be understood in rhetorical relation to one another, with the laws, through their recitation and study, serving to shape and to reinforce as much communal identity as practice.

41 4Q270 2 i 9-ii 21; 6Q15 5.1-5.

42 4Q270 2 ii 19; cf. CD 1:1; 2:2, 14; 4Q266 1 a-b 5.

43 See Hempel, *Damascus Texts*, 33-34; idem, *Laws of the Damascus Document*, 163-70; idem, “Laws of the Damascus Document and 4QMMT,” 80-83.

44 See Hempel, *Laws of the Damascus Document*, 170-74. As noted earlier (above, n. 31), the phrase אלה החוקים למשכיל (4Q266 5 i 17b; CD 12:20-21), like similar phrases elsewhere in transitional passages, could point either forward or back or both. See also above, n. 15.

Steven D. Fraade

#### 4. A Legal-Historical Case

What are the legal-historical implications of such a rhetorical and performative view of the Laws of the Damascus Document? Space only allows me to deal, and at that briefly, with one case. As is well known, at several points the sectarian Dead Sea Scrolls portray a community that, in severe criticism of the practices and impurities of the Jerusalem temple and its priests, has separated itself from participation in its sacrificial rites.<sup>45</sup> However, at several points in the Laws of the Damascus Document, rules are given that assume sacrificial worship and participation in the temple rites.<sup>46</sup> To give one example, from the section that begins, “concerning the Sabbath to guard it according to its precept”:

- 45 See CD 6:11b-14a (par. 4Q266 3 ii 17b-19); perhaps 4Q266 11 1-5 (par. 4Q270 7 i 15-19). See also above, n. 14. For the pollution of the sanctuary, see CD 4:17-18; 5:6-7; 1QpHab 12:7-9. For the Essenes, see Philo, *Prob.* 76; Josephus, *Ant.* 18.19. For discussion of the Essenes in this regard, see John J. Collins, “Essenes,” in *Anchor Bible Dictionary* (New York: Doubleday, 1992), 2:621-22, 624; Todd S. Beall, *Josephus’ Description of the Essenes Illustrated by the Dead Sea Scrolls* (Cambridge: Cambridge University Press, 1988), 115-19; Albert I. Baumgarten, “Josephus on Essene Sacrifice,” *JJS* 45 (1994), 169-83, esp. 176. On attitudes toward the temple in the Dead Sea Scrolls, see Philip R. Davies, “The Ideology of the Temple in the Damascus Document,” *JJS* 32 (1982), 287-301; Joseph Baumgarten, “Sacrifice and Worship Among the Jewish Sectarials of the Dead Sea (Qumran) Scrolls,” *HTR* 46 (1953), 141-59; idem, “The Essenes and the Temple,” in *Studies in Qumran Law* (Leiden: Brill, 1977), 57-74; Lawrence H. Schiffman, “Community Without Temple: The Qumran Community’s Withdrawal from the Jerusalem Temple,” in Beate Ego, Armin Lange, and Peter Pilhofer (eds.), *Gemeinde ohne Temple/Community without Temple: Zur Substituierung und Transformation des Jerusalemer Tempels und seines Kults im Alten Testament, antiken Judentum, und frühen Christentum* (Tübingen: Mohr Siebeck, 1999), 267-84; Hilary Evans, “The Relationship between the Damascus Document and the Community Rule: Attitudes toward the Temple as a Test Case,” *DSD* 14 (2007).
- 46 See CD 9:13-14; 11:17-12:1a; 16:13-17; 4Q266 5 ii 4-7, 11; 4Q266 6 ii 12-13; 4Q271 2 8.

## The Damascus Document and the Mishnah

No man on the Sabbath shall offer anything on the altar except the Sabbath burnt-offering; for it is written thus: "Except your Sabbath offerings" (Lev 23:38). No man shall send to the altar any burnt-offering, or cereal offering or incense, or wood, by the hand of one smitten with any uncleanness, permitting him thus to defile the altar. For it is written, "The sacrifice of the wicked is an abomination, but the prayer of the just is an agreeable offering" (Prov 15:8). No man entering the house of prostration shall come unclean and in need of washing. And at the sounding of the trumpets for assembly, he shall go there before or after, and shall not cause the whole service to stop, for it is holy.<sup>47</sup>

Without going into the details of this list of rules, with their explicit and implicit scriptural interpretations, and possible polemics against other positions, it is *not* necessary to assume, as is usually done, that behind them lies a community that participated in sacrificial worship, whether in the Jerusalem temple or some other holy site. Even if the "authors" of these rules considered the Jerusalem temple to be defiled by the impurities of those who entered or served there, and even if they did not perform sacrificial worship, they would still have found it meaningful, even obligatory, to expound the rules relevant to the offering of sacrifices on the Sabbath and the proper procedures for approaching and entering the holy place of worship.<sup>48</sup> The usual way that scholars have approached such passages, so as to reconcile them with others that express sectarian separation from the temple, is to

47 CD 11.17-12.1a (par. 4Q266 9 i 3-4; 4Q270 6 v 20-21; 4Q271 5 i 11-17). The translation, slightly modified, is from Vermes, *Complete Dead Sea Scrolls in English*, 142.

48 Similarly, Gary A. Anderson ("Sacrifice and Sacrificial Offerings: Old Testament," *Anchor Bible Dictionary*, 5:882-86) speaks of the "scripturalization of the cult" in second temple and early rabbinic Judaism (especially the Temple Scroll for the former and the Mishnah for the latter), but continuing as well through present-day traditional Jewish study of the laws of sacrifice: "the movement ... to transform the sacrificial system from that of a physical reality into an exegetical reality..." (885), both post- and pre-70 CE.

### Steven D. Fraade

historicize them, on the presumption that they must reflect actual communal sacrificial *practice*. According to this presupposition, therefore, such rules must either derive from and represent a *past* stage in the community's history, before its separation from the temple in Jerusalem, or be intended for *future* "better times," when the community will once again be able to participate in the temple worship, or they are said to derive from *another branch* of the sectarian movement. But whatever the solution, they are presumed *not* to be relevant to the *present* time of a Qumran community that did not participate in temple worship.<sup>49</sup> These sorts of positivist strategies will be abundantly familiar to scholars of the Mishnah, much of whose rules deal with the temple, its priesthood, and its forms of worship some 150 years after the second temple's destruction in 70 CE.<sup>50</sup>

Even if we presume that the Qumran Community at late stages in its development rejected marriage, private property, and temple worship for most of its elect members,<sup>51</sup> it hardly understood those

49 For recent examples of such approaches, see Hempel, *Damascus Texts*, 31 (although she is much more cautious in this regard in *Laws of the Damascus Document*, 36-38); Falk, *Daily, Sabbath, and Festival Prayers*, 232-33, 241-42; Baumgarten and Schwartz in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Volume 2: Damascus Document, War Scroll, and Related Documents*, 7 ("the CD laws about the Temple could be meant for better times"); Lawrence H. Schiffman, *Reclaiming the Dead Sea Scrolls: The History of Judaism, the Background of Christianity, the Lost Library of Qumran* (Philadelphia: Jewish Publication Society, 1994), 282; Baumgarten, *Studies in Qumran Law*, 43-46. Even Maxine L. Grossman, whose *Reading for History in the Damascus Document* offers a much-needed critique of historicist readings of the Damascus Document, understands its laws relating to sacrifice in terms of current communal practice (175-76).

50 For a long-overdue corrective, see Rosen-Zvi, "Ha-Guf v'ha-Mikdash." For the sake of comparison, I count in the mishnaic tractate Shabbat twelve references to the temple, sacrifice, or priestly practice as if they were operative.

51 Note Josephus's statement (*War* 2.120-21) regarding the celibacy of the Essenes: "It is not that they abolish marriage, or the propagation of the species resulting from it." In other words, we could imagine the Essenes (whom I invoke here by way of analogy to, not necessarily identity with,

## The Damascus Document and the Mishnah

practices as being outlawed by Torah law, and should not be presumed to have been any less preoccupied with the exposition of Torah laws relating to those subjects as a study practice of religious value and social meaning in its own right. Such legal expositions were no less, and perhaps much more, performatively significant in the *absence* of their practical application within the life of the community.<sup>52</sup> To take the above passage for example, the community's collective understanding and articulation of laws for the proper conduct of sacrificial temple worship according to their understandings of rules of purity would have provided a powerful justification for their present *separation* from it, for their prayers as just substitutes for sacrifice,<sup>53</sup> and for their solar festival calendar (which largely avoided the congruence of Festival and Sabbath sacrifices).<sup>54</sup> In other words, the ritualized recitation and/or study of such rules of temple and sacrifice would have been *especially* constructive of sectarian identity when performed in a ceremony of covenant renewal in the very here and now of the Qumran community's worship as a present, but not permanent, alternative to the Jerusalem temple cult.<sup>55</sup>

the Qumran community) avoiding marriage for themselves even while expositing Torah rules for family life. Cf. CD 7:6-7; 16:10-12.

- 52 For study itself as a substitute for sacrificial worship, see Fraade, "Interpretive Authority," 63-65, 58 n. 36. For the performative force of talmudic study of the ritual laws of sacrifice in contemporary modern times, see Samuel C. Heilman, *The Gate Beyond the Wall: A Pilgrimage to Jerusalem* (New York: Summit, 1984), 62-66.
- 53 See above, nn. 14, 45, 52.
- 54 For fuller discussion, see Joseph M. Baumgarten, "Halakhic Polemics in New Fragments from Qumran Cave 4," in Janet Amitai (ed.), *Biblical Archaeology Today: Proceedings of the International Congress on Biblical Archaeology, Jerusalem, April 1984* (Jerusalem: Israel Exploration Society, 1985), 395-96; Cana Werman, "CD XI:17: Apart from Your Sabbaths," in Baumgarten, Chazon, and Pinnick (eds.), *Damascus Document*, 201-12; Steven D. Fraade, "Mabbat Ḥadash 'al ha-Midrash ha-Hashva'ati': Megillot Yam ha-Melaḥ u-Midreshe Ḥazal," in Yaakov Elbaum, Joshua Levinson, and Galit Hasan-Rokem (eds.), *Minchat Yonah: Festschrift for Prof. Yonah Fraenkel* (Jerusalem: Magnes, forthcoming).
- 55 Others have similarly problematized the use of legal interpretations of the

Steven D. Fraade

## 5. Conclusions I

I hope to have opened some doors within the walls that all too often separate the Admonition from the Laws of the Damascus Document. Rather than seeing the former as a mere preface to the latter, or the latter as a mere appendage to the former, the two are deeply implicated in one another, just as they are in what I take to be the scriptural model for the Damascus Document, the Book of Deuteronomy.<sup>56</sup> As in that scriptural book, the central corpus of laws is as much framed by the recitational narrative of Israelite scriptural history overall, as by the performative narrative of covenant renewal.<sup>57</sup> With the addition of the 4QD texts to our knowledge of the narrative structure and legal contents of the Damascus Document has come a greater appreciation of the fluidity of the redacted document as a composite text.

However, I would go a step further to claim that the redacted text of the Damascus Document, in all of its variations, is not simply a composite *drawn from* a variety of sources, but is an anthology that was *drawn upon* so as to provide performative “scripts” (along with other texts and in other contexts) for the annual covenant renewal ceremony, which itself would have been fluid over time.<sup>58</sup> This would go a long

Damascus Document and other Qumran legal texts for the historical reconstruction of Qumran practice. See Philip R. Davies, “Halakhah at Qumran,” in Philip R. Davies and Richard T. White (eds.), *A Tribute to Geza Vermes: Essays on Jewish and Christian Literature and History* (Sheffield: JSOT Press, 1990), 37-50; Sarianna Metso, “In Search of the *Sitz im Leben* of the Community Rule,” in Donald W. Parry and Eugene Ulrich (eds.), *The Provo International Conference on the Dead Sea Scrolls: Technological Innovations, New Texts, and Reformulated Issues* (Leiden: Brill, 1999), 306-15; idem, “Methodological Problems in Reconstructing History from the Rule Texts Found at Qumran,” *DSD* 11 (2004), 315-35.

56 See above, n. 10.

57 See above, nn. 38-40.

58 Thus, the document would have served as a “source book,” from which the Maskil, or the Overseer, or the “priest in charge” would have selected from

## The Damascus Document and the Mishnah

way toward understanding the obvious disjunctions within the text in its several redactional recensions. Just as the Damascus Document would have provided a variety of alternative scripts for performatively recalling sectarian origins and understandings of history, with their emphasis on diverging paths and fates of those who embraced the laws of Torah (as the sect understood them to have been revealed over time) and those who spurned them, it would have provided a selective but representative digest of topically grouped laws, both for Israel as a whole and for the community in particular, whose recitation and study would have been as rhetorically powerful in the context of covenant renewal and reaffirmation as those of confession, expulsion, blessing, and cursing.<sup>59</sup>

several categories of scripts on a given occasion. This would explain why we have within the Damascus Document several historical introductions, several passages beginning with “hearken” (שמעו), several legal collections, etc. For a similar functional understanding of the anthological collections of rabbinic midrash, see David Stern, “The Anthology and the Polysemy in Classical Midrash,” in idem (ed.), *The Anthology in Jewish Literature* (New York: Oxford University Press, 2004), 108-39.

- 59 Compare Carol Newsom’s characterization (*Self as Symbolic Space*, 134-36) of the select laws incorporated into the Community Rule (which similarly mixes rules with hortatory prose): “They do not serve as reference materials to be consulted for information – even in the case of contradiction readers would know what was current practice and what was not – but rather as rhetorical expressions of important aspects of the community’s ethos. These excerpts function in a way that Nelson Goodman once described as ‘serving as an example of,’ that is, as something that *exemplifies* that to which it refers ... Not only does the content of such excerpts influence the one who immerses himself in them, but also the formal and aesthetic features that are part of the sample. These various sections are textual samples of the community’s life, values, and ethos” (135). Of course, there are several scriptural antecedents for the reading and teaching of Torah laws in the context of covenant renewal or reaffirmation, which presumably would have involved selections from a larger body of legal traditions: Exod 24:3-8; Deut 31:9-13 (especially as rabbinically imagined in mSotah 7:8 [with manuscript variants]; tSotah 7:17); Josh 8:30-35; 2 Kgs 23:1-3; Neh 8; 2 Chron 17:7-9.

### Steven D. Fraade

I do not claim to have explained all, or even most, aspects of the structure and history of the Damascus Document, depending as I do in these regards on the monumental work of others before me. Rather, I have argued that by looking at the legal and narrative sections of the Damascus Document in rhetorical relation to one another, we gain a different (and I hope, better) understanding of each, especially as viewed in terms of the performative force of the document as a whole as it might have functioned as a collection of ritual scripts for sectarian covenant renewal.

## 6. Comparing the Damascus Document to the Mishnah

Based on the above characterization of the Damascus Document, let me now sketch, in a most preliminary fashion, some salient lines of comparison and contrast between it and the Mishnah.

1. Both corpora are marked by the arrangement of Torah laws according to topical groupings, in contrast to the legal corpora of the Pentateuch itself, wherein laws are ordered more heterogeneously and transitions between types of laws are often unmarked. In the Damascus Document such topical groupings are introduced either with the preposition על, “concerning” (“Concerning one who is purifying himself in water” [CD 10:10]; “Concerning the Sabbath” [10:14]; “Concerning the oath of a woman” [16:10]), or with the term קרן, “rule” (as in “This is the rule for the Judges of the Congregation” [CD 10:4]; “This is the rule for the Guardian of the camp” [13:7]; “This is the rule for the Congregation by which it shall provide for all its needs” [14:12]). By contrast, the Mishnah employs topical rubrics for its internal division into orders and tractates, while the latter’s subdivisions into chapters often begin with topic sentences or questions introducing what follows.<sup>60</sup> While there

<sup>60</sup> For an overview of scholarship on the structure and subdivisions of the Mishnah, see Strack-Stemberger, *Introduction to the Talmud and Midrash*, 109-24.

## The Damascus Document and the Mishnah

are other Jewish antecedents to the Mishnah's reorganization of Torah law into topical groupings (e.g., Philo, Josephus, and the Book of Jubilees), the Damascus Document, especially as now significantly augmented with the 4QD fragments, is its closest and most extensive analogue in Hebrew, even as none of the second temple antecedents are nearly as radical as the Mishnah in this regard.<sup>61</sup> In all of these topical reorderings there are plenty of rough edges, that is, legal materials that do not fit comfortably within their assigned topical locations. Furthermore, in both the Damascus Document and the Mishnah, the redactional hand (that is, hands) has not simply rearranged Torah laws while leaving them otherwise untouched.<sup>62</sup> Rather, it has deeply transformed them, hermeneutically and ideologically, according to its particular linguistic and rhetorical preferences. However, it should be noted that even with this transformation of Torah law, both the Damascus Document and the Mishnah, in contrast to *all* other ancient legal corpora, remain, like the Torah itself, remarkably heterogeneous in the legal subjects (cultic, ritual, civil, and criminal) that they encompass overall.

2. In the laws of both the Damascus Document and the Mishnah, explicit citation and interpretation of scriptural verses is to be found, but relatively infrequently. The structure and rhetoric, and presumably

61 See my discussion, in this regard, of the Book of Jubilees, Philo's *The Special Laws*, and Josephus's *Jewish Antiquities*, Book 4, as well as other Dead Sea Scrolls (the Temple Scroll, the Community Rule, the War Scroll, the Messianic Rule, and 4QMMT), in "Nomos and Narrative Before *Nomos and Narrative*," 85-89. For more partial (and fragmentary) examples from the Dead Sea Scrolls, see 4QHalakha A (4Q251), 4QOrdinances<sup>a</sup> (4Q159), and 4QMiscellaneous Rules (4Q265). It is important to note in this regard that the grouping of laws in the Book of Jubilees, in Philo's *The Special Laws*, in Josephus's *Jewish Antiquities* 4, and in the Temple Scroll are still more dependent on scriptural narrative and sequence than is either the Damascus Document or the Mishnah.

62 For such a (false) conceit, see Josephus, *Ant.* 4.197 (and *passim*); *Abot R. Nat.* 18; on both of which see Fraade, "Nomos and Narrative Before *Nomos and Narrative*," 87 n. 20; 93 n. 41.

**Steven D. Fraade**

authority, of these legal collections is not dependent on direct scriptural citation and interpretation (as is the case elsewhere in the Dead Sea Scrolls, especially the *pesharim*, or in rabbinic midrash halakhah). Nevertheless, the languages of both the Damascus Document and the Mishnah are deeply suffused with biblical vocabulary and allusions, and in both cases we may presume that their laws are the products of a long process of scriptural interpretation, even when not explicit. In both texts, it is difficult to determine why explicit scriptural citation and interpretation is employed where it is and why not elsewhere.<sup>63</sup> Having said this, the language and diction of the Damascus Document is much closer to biblical Hebrew than is that of the Mishnah. While this may be, at least in part, a function of the Damascus Document's earlier dating, and hence greater chronological proximity to the Hebrew Bible in the historical development of the Hebrew language, it may just as well reflect a rhetorical "bibilicizing" tendency in Qumran Hebrew. This may, in turn, point to a greater self-consciousness among the mishnaic sages and editors of being "post-biblical," pointing thereby to the community of the rabbinic sages as the source of mishnaic textual authority, rather than to continuing prophetic authority, as in the Damascus Document.<sup>64</sup>

63 For more on the relative absence of legal midrash in the Dead Sea Scrolls, and in the Damascus Document in particular, see Steven D. Fraade, "Looking for Legal Midrash at Qumran," in Michael E. Stone and Esther G. Chazon (eds.), *Biblical Perspectives: Early Use and Interpretation of the Bible in Light of the Dead Sea Scrolls. Proceedings of the First International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature, 12-14 May, 1996* (Leiden: E. J. Brill, 1998), 59-79. Cf. Devorah Dimant, "The Hebrew Bible in the Dead Sea Scrolls: Torah Quotations in the *Damascus Covenant*" (Hebrew), in M. Fishbane, E. Tov, and W. Fields (eds.), "*Sha'arei Talmon*": *Studies in the Bible, Qumran, and the Ancient Near East Presented to Shemaryahu Talmon* (Winona Lake, IN: Eisenbrauns, 1992), 113\*-22\*.

64 For Qumran and Mishnaic Hebrew, see Angel Sáenz-Badillos, *A History of the Hebrew Language* (Cambridge: Cambridge University Press, 1993), 130-46, 161-201. For the ideological assertions of Qumran Hebrew, see William M. Schniedewind, "Qumran Hebrew as an Antilanguage," *JBL* 118 (1999), 235-52; as well as essays by Schniedewind, Moshe Bar-Asher, Joshua Blau,

### The Damascus Document and the Mishnah

3. Both the Damascus Document and the Mishnah are redacted, anthological texts, like early Roman legal collections, that draw their legal traditions from antecedent sources and contexts that are unavailable to us. Interestingly, they both explicitly acknowledge the existence of successive stages in their legal histories (that is, early laws and later laws).<sup>65</sup> While post-mishnaic rabbinic tradition attributes the redaction of the Mishnah to Rabbi Judah the Patriarch (or at least his circles, ca. 200-220 CE), and earlier recensions to his predecessors, we have no knowledge of who is responsible for the Damascus Document in either its final or medial forms. Nor do we know for either document to what extent its characteristic structural and stylistic features are the products of successive or final stages of redaction. Since each is a composite text, historians seek to peel back the layers of the text, not only to reconstruct the history of the text, but also the history of the society behind the text. The ability to do so, however, depends on the extent to which we presume a sedimentary redactional process whereby each successive textual layer left its predecessors intact and unworked.<sup>66</sup>

4. Despite the fact that the Mishnah is much more extensive in its contents than is the Damascus Document, neither one is a comprehensive, systematic “code” of law, both being selective in what they

Avi Hurvitz, Jan Joosten, Shelomo Morag, and Elisha Qimron in Takamitsu Muraoka and John F. Elwolde (eds.), *Diggers at the Well: Proceedings of a Third International Symposium on the Hebrew of the Dead Sea Scrolls and Ben Sira* (Leiden: Brill, 2000).

65 For the Damascus Document, see above, nn. 24, 30. For the Mishnah, note the expression בראשונה, “at first,” meaning, “in earlier times,” which serves to contrast a former practice with a later one (twenty-three occurrences). In most such instances, the change is occasioned by some new historical circumstance to which a rabbinic ordinance responds.

66 For surveys of different scholarly views of the structure and level of editorial intervention in the creation of the Mishnah, see Strack and Stemberger, *Introduction to the Talmud and Midrash*, 118-39; Simon-Shoshan, “Halachah Lema’aseh,” 12-17. For the composite nature of the Damascus Document, see Hempel, *Damascus Texts*, 44-53.

**Steven D. Fraade**

include, with both assuming a larger corpus (or knowledge) of law, whether written or oral. It is difficult to know, especially in light of uncertainty as to the purposes of the documents, why what was included was included, whether for purposes of exemplification, polemic against contested legal traditions, or clarification of difficult and ambiguous cases.<sup>67</sup> Therefore, the constructions of legal or social history from these documents, especially in isolation from their broader poly-textual systems, are potentially illusory.

5. From the two Genizah manuscripts and ten Dead Sea Scroll fragments, it is increasingly apparent that the Damascus Document remained a fluid text, that is, circulated in multiple recensions with continual accretions. The same can be and has been said of the Mishnah, based on the examination of manuscript and attestational evidence.<sup>68</sup> In both cases, this raises questions regarding the initial reception versus the eventual authority of the text, as well as the way in which it was socially used and referenced.<sup>69</sup>

6. Related to the preceding is the fact that both the Damascus Document and the Mishnah “synoptically” intersect other legal texts, e.g., the Community Rule, the Temple Scroll, 4QMMT for the Damascus Document, and the Tosefta and tannaitic midrashim for the Mishnah. The significance of these intersections is not always clear, that is, how they should be understood in terms of the historical relations between the documents, their contained legal traditions, their particular

67 Compare Carol Newsom’s characterization (*Self as Symbolic Space*, 134-36) of the select laws incorporated into the Community Rule (which similarly mixes rules with hortatory prose), cited above, n. 59.

68 See especially Jacob Nahum Epstein, *Introduction to the Mishnaic Text* (Hebrew) (3rd ed.; Jerusalem: Magnes, 2000), 2:946-79.

69 For the Mishnah, see David Weiss Halivni, “The Reception Accorded to Rabbi Judah’s Mishnah,” in E. P. Sanders (ed.), *Jewish and Christian Self-Definition, Vol. II: Aspects of Judaism in the Greco-Roman Period* (Philadelphia: Fortress, 1981), 204-12; Elizabeth Shanks Alexander, *Transmitting Mishnah: The Shaping Influence of Oral Tradition* (Cambridge: Cambridge University Press, 2006).

## The Damascus Document and the Mishnah

didactic functions, and the communities or circles they represent or address.<sup>70</sup>

7. As I have argued above for the Damascus Document's laws regarding sacrifice, both it and the Mishnah (even more so) contain laws, especially relating to scriptural topics, that were not applicable or actualized in the current practices of their respective communities. While it is generally recognized that mishnaic laws relating to sacrificial rites in the temple, or court structures and procedures that assume political and judicial sovereignty, were not applicable in rabbinic society of the late second-early third centuries, the same has been less commonly acknowledged for the legal texts of the Dead Sea Scrolls (except perhaps the Temple Scroll), with some noteworthy exceptions.<sup>71</sup> Sharing positivist understandings of law, scholars of both the Mishnah and the Dead Sea Scrolls have assumed that such inapplicable laws must either derive from an earlier time when they were applicable, or were intended for such a future time when conditions would allow their restored applicability. However, as I have argued above and as recent studies of mishnaic law have demonstrated,<sup>72</sup> Torah law remained binding as the subject of study and interpretation, as a religious preoccupation (and experience) and the vehicle for the expression of communal values and aspirations, even when, or particularly when, it could no longer be actualized, whether by reason of choice (separation from the temple for the Qumran community) or circumstance (destruction of the temple for

70 For this question with respect to the Damascus Document, see the contributions of Charlotte Hempel ("The Laws of the Damascus Document and 4QMMT"), Sarianna Metso ("The Relationship between the Damascus Document and the Community Rule"), and Lawrence H. Schiffman ("The Relationship of the Zadokite Fragments to the Temple Scroll") in Baumgarten, Chazon, and Pinnick (eds.), *Damascus Document*, 69-84, 85-93, 133-45. For this question with respect to rabbinic literature, see Shaye J. D. Cohen (ed.), *The Synoptic Problem in Rabbinic Literature* (Providence, RI: Brown Judaic Studies, 2000).

71 See Davies and Metso, cited above, n. 55.

72 See above, n. 2.

Steven D. Fraade

the Rabbis).<sup>73</sup> Of course, many areas of laws included in the Damascus Document and the Mishnah *were* applicable in their times, although it is often difficult to determine degrees of applicability (e.g., marriage rules at Qumran or judicial procedures among the rabbis). Nevertheless, applicable and non-applicable laws (with shades in between) are so interwoven that we need to have an understanding of legal discourse in these documents that can encompass both. That is, we must assume that to some extent legal interpretive discourse was, in and of itself, an obligatory and religiously self-defining practice. Needless to say, such an understanding of the rhetorical and performative functions of legal discourse has significant implications for the use of the Damascus Document and the Mishnah for purposes of historical retrieval and reconstruction.<sup>74</sup>

8. Having highlighted thus far points of similarity (*mutatis mutandis*) between the Damascus Document and the Mishnah, it is precisely in their combination of law and narrative that they are the most tellingly different. With our expanded understanding of the Damascus Document, thanks to the 4QD fragments, we can now see that its substantial legal core was surrounded by a hortatory beginning and ending that set its laws in both sacro-historical and liturgical/ritual contexts, both of which, together with the laws, reinforce the master-narrative within

73 See above, n. 48, for Gary Anderson's understanding of the "scripturalization of the cult" in both second temple and rabbinic Judaism, as well as above, n. 52. For such a non-positivist approach to law more generally, see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983), 4-68. I should stress that the Mishnah at points both acknowledges the past destruction of the temple (e.g., Ma'as. Š. 5:2; Sukk 3:12; RH 4:1, 3, 4; MK 3:6; Naz 5:4; Sotah 9:12, 15; Menah 10:5) and expresses the hope that it be rebuilt (e.g., Tamid 7:4). However, such expressions are relatively rare and do not in and of themselves detract from my argument that non-applicable mishnaic laws need to be understood first and foremost for their rhetorical force within the here-and-now of rabbinic study.

74 See above, n. 55.

## The Damascus Document and the Mishnah

which the community understood itself in covenantal terms. In this regard it is very similar to the legal codes of the Torah, especially to the Book of Deuteronomy (upon which I have suggested it is modeled),<sup>75</sup> as well as to ancient Near Eastern law codes more generally.<sup>76</sup> Although some legal traditions are embedded within the Admonition,<sup>77</sup> there are hardly any narrative elements within the Laws themselves. As I have argued above, the narrative and hortatory frame of the Damascus Document suggests a public, ritual setting in which the laws, or some part thereof, would have been read out loud (and perhaps studied) as part of an annual covenant renewal ceremony.

The Mishnah, by contrast to the Torah, the Damascus Document, and other ancient Near Eastern legal corpora, lacks a ritual frame or grand-narrative (except perhaps for *mAvot* 1, which scholars consider to be a later addition to the Mishnah). It therefore is much more difficult to determine from the Mishnah itself its purpose or function. Instead of a narrative frame, however, the laws of the Mishnah are suffused throughout with a wide range of narrative and dialogical elements and, to a lesser extent, stories (מעשׂים). In this regard, the Mishnah is closer to contemporary Roman legal collections than to its ancient Near Eastern (including biblical) antecedents.<sup>78</sup> This suffusion of law with narrative may at first seem surprising, given that the Mishnah is often considered to be the prime exemplum of halakhah, rather than of aggadah. However, this is based on a mistaken bifurcation of the two and a mischaracterization of the Mishnah overall as “apodictic.”<sup>79</sup> A few such

75 See above, n. 10.

76 See Simon-Shoshan, “Halachah Lema’aseh,” 83-93. For the narrative framing of ancient Near Eastern law codes, see Victor Avigdor Hurowitz, *Inu Anum Širum: Literary Structures in the Non-Juridical Sections of Codex Hammurabi* (Philadelphia: University Museum, 1994).

77 See above, at n. 27.

78 See Simon-Shoshan, “Halachah Lema’aseh,” 93-99. For recent works that compare the Mishnah to Roman legal codes, see above, n. 3, from which works my skeletal characterizations of such comparisons derive.

79 For a more integrated view of halakhah and aggadah, see Fraade, “Nomos

### Steven D. Fraade

salient narrative features (all absent from the Damascus Document, the Torah, and ancient Near Eastern legal corpora, but some shared with Roman legal codes) are as follows:

1. Mishnaic rules are often attributed to named sages of a variety of generations, spanning some three or four centuries, as if in direct speech (shared with Roman law), even though most are unattributed (not shared with Roman law).
2. Such named sages, or “schools” of sages are commonly portrayed, if only implicitly, in dialogic dispute with one another, or with the “sages” as an aggregate (חכמים אומרים) (not shared with Roman law).
3. Mishnaic legal discourse often takes the form of rhetorical questions and answers, as if addressed to an implied reader/student (not shared with Roman law).
4. Less frequently, but still regularly, mishnaic rules are exemplified by or traced to stories (מעשים), peopled by late second temple and early rabbinic characters and their contemporaries (shared with Roman law).

Thus, while the laws of the Damascus Document achieve their narrativity through an encompassing narrative and liturgical performative frame, the laws of the Mishnah, lacking such a grand-narrative frame, achieve their narrativity by means of a much greater variety of narrative features by which the laws *themselves* are rhetorically constructed and dialogically performed. If for the Damascus Document we might hope to ascertain the performative function of its laws from their narrative/ritual frame, for the Mishnah we must look to the

and Narrative Before *Nomos and Narrative*.” For the Mishnah as apodictic law, see David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law* (Cambridge, MA: Harvard University Press, 1986), 38-65. Cf. Elizabeth Shanks Alexander, “Casuistic Elements in Mishnaic Law: Examples from Mishnah Shevu’ot,” *JSQ* 10 (2003), 189-243.

## The Damascus Document and the Mishnah

narrativity of the laws themselves, thereby rendering the search for social function more opaque. In neither case can law be understood apart from narrative, but in the case of the Mishnah, we need consider the relationship to be less one of “law and narrative” than one of “law as narrative” (and “narrative as law”).<sup>80</sup>

## 7. Conclusions II

I have only scratched the surface of what needs to be a more thorough comparison of the Damascus Document and the Mishnah with respect to their combinations of law and narrative. Of course, listing aspects of similarity and difference between the two and accounting for them are very different matters. While their points of similarity may derive, at least in part, from their shared model of the laws of the Torah, their points of difference are more difficult to explain. Where they do differ, it would appear that the Damascus Document remains truer to the Torah (especially Deuteronomic) model, from which the Mishnah would appear to diverge. While in some cases these mishnaic divergences reflect similarities to contemporary Roman law, whether or to what extent that is the product of influence, direct or indirect, is harder to tell.<sup>81</sup> My own hunch is that the differences between the Damascus Document and the Mishnah need to be accounted for in relation to the very different ways in which the Qumran community and the early rabbinic sages constructed on the one hand their claims to legal interpretive authority, and on the other the performative means they developed for pedagogically transmitting their authoritative self-under-

80 See, for example, Peter Brooks, “Narrativity of the Law,” *Law and Literature* 14 (2002), 1-10.

81 See the literature cited above, n. 3. Here it should be stressed that while we can presume some level of familiarity by the rabbis with the local workings of Roman law, the extent to which they had first-hand knowledge of central Roman legal writings (e.g., codes) is more doubtful.

**Steven D. Fraade**

standings to their rising members.<sup>82</sup> But those are subjects for further consideration in future venues.

82 These, in turn, are related, no doubt, to other differences between the Dead Sea Scrolls and early rabbinic literature with regard to their respective textual practices and ideologies. To suggest just a few: attitudes toward orality (“oral Torah” for the rabbinic sages), pedagogic configurations of teachers and students (master/disciple circles for the rabbinic sages), the respective roles of prophecy and tradition (with the Scrolls emphasizing the former and the rabbinic sages the latter), the conception of each community’s “present” in relation to the biblical “past” and eschatological “future,” the relation of “retold” scriptural narratives to narratives of the community’s own protagonists, and the expression or muting of authorial voices.