

## Hercules Within the Halakhic Tradition

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As a talmudist, I have found Ronald Dworkin's description of Hercules – perhaps his *alter ego*? – a fascinating and even compelling figure.<sup>1</sup> In turn, my concern with the Babylonian Talmud, the formative document of Rabbinic Judaism and its most authoritative source for the last millennium and a half, and which functions more as its “Bible” than Scripture itself does, compels me to attempt to measure Dworkin's formidable construct against one of the great authorities of that Talmud (hereafter: the Bavli). My purpose in this essay is two-fold: to investigate the usefulness of Hercules as a construct in a comparative perspective, and to see what light he can shed on the processes of halakhic determination.

The rabbi chosen was one of the most influential and creative *amoraim* of the Bavli, Rava (-352 CE). By considering his work against the towering if mythical shadow of Hercules I hope to shed some light on the interface of legal theory as represented by the work of Dworkin and Jewish law as it developed in the fourth century, certainly one of its golden ages.

Hercules, as described by Dworkin in *Law's Empire* and as a behind-the-scenes actor in *Freedom's Law*,<sup>2</sup> is a “figure of superhuman talents

- 1 As indeed may be said of Dworkin himself. However, the Dworkin of this paper has been shrunk to manageable dimensions (for me), and consists mainly of his *Law's Empire* (Cambridge: Harvard University Press, 1986), and idem, *Freedom's Law* (Cambridge: Harvard University Press, 1996).
- 2 See for example Dworkin's reference to “law as integrity” in chapter 3 of *Freedom's Law*, “What the Constitution Says,” 83, and n. 20, and compare his opening comments regarding the “moral reading” of the Constitution,

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and unlimited time.”<sup>3</sup> While no human judge can measure up to such a figure, halakhists have a somewhat easier task, since the body of relevant traditions from which they must draw their decisions as “law as integrity” is more limited than those of an American Hercules. By the rules of halakhic discourse, they are seemingly more bound to precedent than is Hercules, as we shall see.

Hercules functions within a model of legal theory set forth by his creator, that of “law as integrity.” Dworkin devotes major effort to defining and exemplifying this system in his *Law's Empire*, and in distinguishing it from conventionalism and pragmatism, in particular the latter, which he deems to be the greater challenge. However, before examining the distinction, I should first describe the utility of Dworkin's system for helping to define essential characteristics of the rabbinic system as it seems to operate in the Bavli.

What then is the understanding of Dworkin's position that will guide us in our quest to understand halakhic practice in its light? I take it as he describes “law as integrity” in the following passages. I will italicize key phrases for convenience. First, in a preface to the chapters in *Law's Empire* dealing with “law as integrity,” in a paragraph headed by the superscription “Agenda,” he states:

We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws *morally coherent*, and an adjudicative principle, which instructs that the *law be seen as coherent in that way*, so far as possible....We ask whether the assumption that integrity is a distinct ideal of politics, fits our politics, and then *whether it honors our politics*.<sup>4</sup>

and his comments regarding “political morality,” in “Hercules Is a Fraud,” *Law's Empire*, 260-63.

3 *Law's Empire*, 245.

4 *Ibid.*, 176.

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And later:

Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a *single, coherent scheme of justice and fairness in the right relation*. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.<sup>5</sup>

Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism... It insists that legal claims are *interpretive* judgments and therefore combine back- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither ... Law as integrity asks judges to assume, so far as this is possible, *that the law is structured by a coherent set of principles about justice and fairness and procedural due process....*<sup>6</sup>

Before proceeding, we ought to ask whether our search for a rabbinic Hercules is even appropriate. Were the Babylonian rabbis judges? Were they not rather law professors? It seems to me that in Dworkin's system this is a distinction without a difference. Hercules as a judge or law professor is bound to the same set of principles. Moreover, as many talmudic passages document, it is clear that the talmudic rabbis, or at least some of them, the *amoraim*, functioned as both judges *and* theoreticians.<sup>7</sup> Furthermore, as I have shown elsewhere, some of them,

5 Ibid., 219.

6 I have melded two passages from *Law's Empire*, 225 and 243.

7 See Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Texts and Studies in Ancient Judaism 89; Tübingen: Mohr Siebeck, 2002), where he shows that some aspects of theory – “creative, quasi-philosophical concepts” – only come to the fore in the fourth generation, that is, with the

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especially in Mahoza, a suburb of the Persian capital of Ctesiphon, and whose Jewish community lived with Christians, Manichaeans and Zoroastrians, were consequently quite cosmopolitan in their attitudes to both non-Jews and to Jews who deviated from rabbinic practice in some respect.<sup>8</sup> The configuration of the Mahozan Jewish community also required its rabbis to compete with the Persian courts in matters of civil law;<sup>9</sup> another consequence was the need to respond to theological challenges, especially from Zoroastrianism and Manichaeism,<sup>10</sup> and, as we shall see below, it also generated an attitude of skepticism toward rabbinic authority.

Likewise, the fact that most of the disputes between Rava and his older contemporary, Abaye (-338 CE), are formulated as disputes over abstract principles is irrelevant, since they may easily be reformulated in terms of specific cases. Thus, “unwitting despair [of getting a lost article back] is [retroactively effective as abandonment],”<sup>11</sup> the subject of a well-known dispute between the two, is no different from one formulated concretely: “one who serves an idol because of love or fear is not liable [to the death penalty or a sacrifice].”<sup>12</sup>

Another basic question to be asked is whether we may claim that the rabbinic system can be said to be seen as fair and just, given its

work of our rabbinic Hercules, Rava. However, my understanding of theory or concept is much broader, and encompasses legal constructs and theories even when they are not “quasi-philosophical.” His parade example of such a concept is the talmudic *bererah*, “the retrospective determination of reality.”

8 See my “Middle Persian Culture and Babylonian Sages: Accommodation and Resistance in the Shaping of Rabbinic Legal Tradition,” in C. E. Fonrobert and M. S. Jaffee, eds., *Cambridge Companion to Rabbinic Literature* (Cambridge: Cambridge University Press, 2006), 304-60.

9 See my “Yeshivot Bavliyot ke-Vatei Din,” in E. Etkes, ed., *Yeshivot u-Vatei Midrash* (Jerusalem: Merkaz Zalman Shazar, 2006), 31-55.

10 See my “Acculturation to Elite Persian Norms in the Babylonian Jewish Community of Late Antiquity,” in E. Halivni, Z. A. Steinfeld, and Y. Elman, eds., *Netivot Le-David* (Jerusalem: Orhot, 2004), 31-56.

11 B.M. 21b.

12 Sanh 61b.

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built-in discrimination between Jews and non-Jews. In response, I would point to two relevant texts in the Bavli, first, that rabbinic law incorporates laws, or better, mitzvot for Noahides, that is, non-Jews,<sup>13</sup> and second, that these laws were considered less stringent than those relevant to Jews, thus implicitly justifying the latter's status as "chosen people." Indeed, this requirement is considered intuitively obvious by the rabbis, and Rava himself, our "test rabbi," enunciates this assumption when he asks, in the discussion of the Noahide mitzvot, "is there anything that an Israelite is not obligated [to do] but a non-Jew is obligated [to do]?"<sup>14</sup> Having said this, I must also point out that both the discussion of these mitzvot, and Rava's comment, are expressions of the Mahozan school of Babylonian halakhic learning and analysis, as I have demonstrated elsewhere.<sup>15</sup> The discussions on the Noahide mitzvot is dominated by Mahozans; Pumbeditans take no part in it, at least as represented by the talmudic text, though I would point out that lack of interest is not the same as rejection. In any case, it is Rava, our candidate for the rabbinic Hercules, who is both interested in the subject and also expresses a more cosmopolitan view on matters of status than does Abaye of Pumbedita, a smaller town some hundred kilometers from the capital.<sup>16</sup>

Two aspects of Dworkin's analysis noted above strike me as particularly fruitful for an analysis of rabbinic law and practice. One is that a judicial decision should "provide the best constructive interpretation of the community's legal practice,"<sup>17</sup> and that it is "both the product of and the inspiration for comprehensive interpretation of legal practice."<sup>18</sup> We will return to this below.

13 See the series of rabbinic discussions (*sugyot*) in Sanh 56b-60b.

14 Sanh 58b.

15 See my "The Socioeconomics of Babylonian Heresy," *Jewish Law Association Studies* XVII (2007): 80-126.

16 See below, regarding our discussion of questions of valid and invalid testimony.

17 *Law's Empire*, 225.

18 *Ibid.*, 226.

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This latter requirement of *comprehensive interpretation* stands at some tension to Dworkin's "compartmentalization of law into different departments," which he asserts is "a prominent feature of legal practice," and thus must be explained.<sup>19</sup> "Law as integrity" condemns such compartmentalization, but since it is a feature of legal practice, Hercules must work with it, and seek "to find an explanation of the practice in its best light."

The boundaries between departments usually match popular opinion; many people think that intentional harm is more blameworthy than careless harm, that the state needs a very different kind of justification to declare someone guilty of a crime than it needs to require him to pay compensation for damage he has caused, that promises and other forms of explicit agreement or consent are a special kind of reason for state coercion, and so forth.<sup>20</sup>

Since the Babylonian Jewish community – and later rabbinically led communities as well – had no *sanhedrin* or king that could function as "legislative bodies," the rabbis were perforce the lawmakers, and the law they made was produced mostly, though not exclusively, by interpretation. Indeed, it is this aspect of rabbinic law that makes Dworkin's model so attractive. That is not to say that there was no political aspect to their activities, since there were rules that governed their enactments, rules such as "we do not enact decrees on the community that most of the community cannot abide by,"<sup>21</sup> or "better that they be inadvertent sinners than intentional ones [where they are currently ignorant of certain aspects of the law and would disregard further information]."<sup>22</sup> Again: the legislator/interpreter should take care that the results of his work should not be seen by the community as "making the words of the rabbis into a *huka ve-italula*," a "laughingstock" (lit., "laughter and

19 Ibid., 250-51.

20 Ibid., 252.

21 B.Q. 79b, B.B. 60b, A.Z. 36a, Hor 3b.

22 Bez 30a.

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jest”).<sup>23</sup> Thus Dworkin’s insistence on the need for the law to conform to “popular opinion” unveils an aspect of rabbinic practice that is often slighted in discussions of it. However, one might think that here is where Dworkin’s model might seem to lose some of its relevance for rabbinic law, that is, one might think that because of its divine nature, it is not subject to the vicissitudes of human moral opinion. The rabbinic concern for public opinion relates only to the rabbis’ own enactments, and thus may seem in theory ultimately a relatively minor factor. Indeed, the power of later rabbis to reverse earlier enactments is sharply circumscribed. But it is not negligible. Moreover, rabbinic modes of interpretation give them control even over Scriptural law, and they explicitly reserve the right to abrogate such laws with a decree of “sit and do not do” when necessary.<sup>24</sup> Ultimately, then, in a real sense Jewish law is rabbinic law, the divinely-sanctioned human interpretation of divine law.

The role of public opinion shows up in another context in Dworkin’s scheme, in his description of Hercules’ interaction with *changing* public opinion:

He (=Hercules) allows the doctrine [of compartmentalization] most force when the boundaries between traditional departments of law track widely held moral principles distinguishing types of fault or responsibility, and the substance of each department reflects these moral principles....But Hercules will not be so ready to defer to local priority when his test is not met, *when traditional boundaries between departments become mechanical or arbitrary, either because popular morality has shifted or because the substance of the departments no longer reflects popular opinion.*<sup>25</sup>

23 Eruv 68b. See M. Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Periods* (Ramat Gan: Bar-Ilan University Press, 2002), 438a.

24 See for example the classic case of *prozbul* in Git 36b. See also the discussion in Yev 90b.

25 *Law’s Empire*, 252-53.

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Nevertheless, even here, the rabbis employ their control of the interpretation of Divine Writ in response to contemporary needs, a subject that has often been canvassed before, especially by non-Orthodox thinkers.<sup>26</sup> For Orthodox writers it remains a sensitive area. Nevertheless, academic historians have provided us with a number of thoroughgoing studies that investigate the interplay of Jewish law and economic necessity.<sup>27</sup> And it is in the nature of historical research that changing mores, and their effect on Jewish law, also register, despite rabbinic sensitivities to the problematic nature of the issue of public opinion *vis-à-vis* divine mandate. Nevertheless, while such well-known legal fictions as *prozbul*, *heter isqa*, and the like are clearly responses to economic needs, the role of changing values is much harder to pin down. Moshe Halbertal has recently made a case for the latter.<sup>28</sup> However, his examples are drawn from tannaitic literature, not directly from the Bavli. One problem in investigating this area is the difficulty of determining the state of public opinion in the Babylonian Jewish community. Still, measurable progress has recently been made, with the application of Middle Persian literature in measuring the acculturation of various segments of that community to Middle Persian norms. Thus, one problematic area for the Babylonian rabbinic elite seems to have been either a skepticism, or indifference to, rabbinic enactments. One response to the latter, in Pumbedita, on the part of the fourth-generation Pumbeditan authority Abaye, was the principle alluded to above: “better that they be inadvertent sinners than intentional ones [where they are currently ignorant of certain aspects of the law and

26 See for example J. Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary of America, 1986). Roth’s book is useful precisely because he is a relatively *conservative* Conservative rabbi.

27 The work of Haym Soloveitchik is paradigmatic in this area; see for example his *Halakhah, Kalkalah ve-Dimmuy Atzmi: Ha-Mashkana’ut bi-Ymei ha-Beinayim* (Jerusalem: Magnes Press, 1985).

28 M. Halbertal, *Interpretive Revolutions in the Making: Values as Interpretive Considerations in the Midreshei Halakhah* (Hebrew) (Jerusalem: Magnes Press, 1997).

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would disregard further information].” The implication is that they would not obey the rabbinic enactment even had they known of it. In the ensuing discussion, the Bavli’s redactors specifically relate this to matters of rabbinic enactment, though apparently giving way even in matters of biblical origin, so long as they are not explicit in the biblical text. In other words, apparently people would obey enactments they saw as explicit in the biblical text. On the other hand, within rabbinic circles, the heavy hand of various forms of excommunication was employed even in regard to rabbinic enactments, and one rabbinic disciple was disciplined for violating the rabbinic second day of the biblical festival.<sup>29</sup>

Some of the distinctions that Dworkin makes in regard to compartmentalization are *a priori* functions of the rabbinic system, such as the distinctions between *dinei mammonot* and *dinei nefashot*, roughly speaking, civil law and criminal law. While the distinction is attached to the expression in Deut 17:8 in Sanhedrin 87a, it is hardly “derived” from that verse, but is clearly taken as self-evident.

Nevertheless, the drive to coherence as a whole provides an explanation of an unusual feature of the rabbinic system to which Leib Moscovitz recently called attention: its tendency to transfer principles applicable to one area of law to other areas. Alan Watson seems to support such a suggestion when he notes in regard to Roman law that “the blocks of one institution or concept are kept rigorously separate, and even over a long period of time there is often no real movement toward integration or amalgamation. Thus, in a sense, it is entirely right that the Romans never developed a general theory of contract but only individual types of contract....Rarely are arguments drawn by analogy from one block to another – that is, say, sale to hire, or from acquisition of possession to acquisition of ownership.”<sup>30</sup>

29 Pes 51b-52a; for a discussion of the entire issue, see my “The Socio-economics of Babylonian Heresy.”

30 A. Watson, *The Spirit of Roman Law* (Athens, GA: University of Georgia Press, 1995), 169-70.

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In contrast, Moscovitz suggests that the Babylonian rabbis' concern with both ritual and civil law encouraged them to consider broader and deeper principles than would have served the relatively limited range of cases particular to one domain.<sup>31</sup> The absence of much ritual law on the Roman side hampers an examination of whether this theory applies there, though from Watson's remarks just quoted in regard to domains within civil law, the same would hold in regard to religious and civil law. Domains are generally kept separate in Sasanian law as well, even though our knowledge of Sasanian ritual law, as embodied in the Zand translation and commentary on the Avesta, the Zoroastrian Bible, is far greater than our knowledge of Roman ritual law, and resembles rabbinic discussions in certain respects. Again, however, unlike rabbinic law, this transference of rules from one domain to another is not characteristic of Sasanian law.<sup>32</sup>

If our analysis of the Bavli's approach to divine law may enable us to make peace with Dworkin's insistence that the law be seen to be fair in the court of public opinion, there is another aspect of "law as integrity" that is perhaps even more problematic, and that relates to the role that history plays in his system. While allowing precedent a larger say than does pragmatism, "law as integrity" nevertheless limits the place of history in legal adjudication.

Here is Dworkin on the matter:

History matters in law as integrity: very much but only in a certain way. Integrity does not require consistency in principle over all historical stages of a community's law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a

31 Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization*, 36, above, n. 7.

32 One exception that proves the rule is to be found in the ninth-century compilation *Šāyast nē Šāyast* 3.29, which contrasts two types of ritual pollution. See J. C. Tavadia, *Šāyast nē Šāyast: A Pahlavi Text on Religious Customs* (Hamburg: Friederichsen, de Gruyter & Co., 1930), 20.

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previous generation. It commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces....*Law as integrity, then, begins in the present and pursues the past only so far and in the way its contemporary focus dictates* [italics mine – Y.E.]. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it.<sup>33</sup>

This would seem to be the crux in any comparison between a divinely revealed and ordained law, which has some claim of infallibility, and one that is human in origin, and therefore mutable. “Law as integrity...does not aim to recapture...the ideals or practical purposes of the politicians who first created it.” Furthermore, it “pursues the past only so far and in the way its contemporary focus dictates.”

It is clear that we cannot take these words too literally, for if that were the case, the distance between Dworkin and pragmatism would be much narrower than he asserts. In contrasting the two, Dworkin remarks that “integrity might seem too narrow a basis for a conception of law, particularly in contrast to pragmatism, its most powerful rival....But once we grasp the difference between integrity and narrow consistency, the contrast becomes more complex. Integrity is a more dynamic and radical standard than it first seemed, because it encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle.”<sup>34</sup> He goes on to contrast a pragmatist approach to *Brown v. Board of Education* and an “integritist.” The former might be dissuaded from enforcing that decision by means of busing, because of qualms about its negative effects; the latter would not, because the sway of principle is greater.

Still, as Posner notes, Dworkin himself has been labeled a pragmatist, and there are similarities between him and the pragmatists in

<sup>33</sup> *Law's Empire*, 227.

<sup>34</sup> *Ibid.*, 220.

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positions on the matter of precedent. In a response to Dworkin, Posner suggests the following description of pragmatism as he follows it:

What then is pragmatic adjudication? I do not accept Dworkin's definition: "the pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do." That is Dworkin the polemicist speaking. But if his definition is rewritten as follows – "pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past" – then it will do as a working definition of pragmatic adjudication."<sup>35</sup>

The difference is one of emphasis. According to Posner, Dworkin's judge is "centrally concerned with securing consistency with past enactments," while the pragmatist is concerned with this "only to the extent that deciding in accordance with precedent is the best method for producing the best results for the future." However, in light of our quote from Dworkin above, neither allows precedent to stand in his way when there are more inclusive or urgent goals to be achieved, and the consistency that Dworkin demands is not with precedent, but with principle. Thus, neither sees precedent as determinative.

On the other hand, while both Dworkin and Posner look to the judge to provide for the future in the "best" way possible, they define "best" differently. For Dworkin, best seems to be the best construction to be placed on the law in a moral sense. For Posner, the judicial pragmatist wants to come up with the best decision in regard to "present and future needs." In a further remark, he notes that Dworkin, "despite all his talk about keeping faith with the past, there is indeed a sense (though, as we shall see, only a loose one), in which he too is a pragmatist."<sup>36</sup>

35 R. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999), 241. The Dworkin quote is from *Law's Empire*, 161.

36 Posner, *Problematics of Moral and Legal Theory*, 242.

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When we turn to our rabbinic Hercules, it would seem that in a traditional society, and especially one that sees its legal code as divine in origin, we might expect respect to be paid both to precedent and to principle. The real question is whether such a legal system can foster the survival and flourishing of such a society without being in some sense pragmatic, while also conforming to the moral sense of its citizens.

Broadly speaking, rabbinic law is made up of an amalgam of divine legislation, rabbinic interpretation of that legislation, and rabbinic enactments. Many rabbinic enactments are “fences,” that is, enactments intended to expand the range of prohibited behavior in order to prevent inadvertent violation of a (rabbinically construed) biblical norm, or in rarer cases, the cancellation of the application of a biblical requirement in order to prevent such violation. An example of the latter is the suspension of various biblical requirements when certain festival days fall on the Sabbath. Thus, the shofar is not blown on Rosh Hashanah when it falls on the Sabbath, or the “four species” are not waved even on the first day of Tabernacles – all in order to prevent inadvertent carrying of these objects in a public domain. Thus, the rabbis could even set aside a biblical requirement on the possibility of an inadvertent violation of another requirement. The power to do this was derived from a reading of Lev 18:30.<sup>37</sup>

Nevertheless, the latter category of “fence” – despite its biblical warrant – is still considered a *rabbinic* enactment. Thus, when Rava expounds Eccl 12:12 in public in Mahoza:

Rava expounded: What [is the meaning of the verse] that is written, “And of more than these, my son, take heed, the making of many books” (Eccl. 12:12). My son, take heed of the words of the Scribes more than the words of the Torah, for [as to] the words of the Torah contain positive and negative commandments, while as to the words of the Scribes, whoever transgresses the words of the Scribes is worthy of death. Perhaps you will say that if they have substance to

<sup>37</sup> See M.Q. 5a and Yev 21a.

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them, why were they not written down? The verse [therefore] says: “Of the making of books there is no end” (Eccl 12:12).<sup>38</sup>

The assertion of the severity of violating rabbinic ordinances as against biblical commandments was considered paradoxical by later commentators, and the sixteenth-century Maharsha stipulated that Rava’s statement must have referred to rabbinic enactments which themselves protected biblical ones that involved the death penalty, for, if not, the “lesser degree is more stringent than the greater” (*tafel hamur min ha-iqqar*).<sup>39</sup>

However, while some rabbis were more “activist” than others, talmudic discussions are overwhelmingly interpretive and analytic and seldom policy-driven in any direct way.

These discussions are also pluralistic and multi-layered, and thus yield to both synchronic and diachronic analysis. Thus, differences in policy may be discerned between different rabbinic centers, such as Mahoza and Pumbedita, and also between different eras, in particular, between the earlier amoraic period (220-c430) and the period of the anonymous redactors (430-c530). In large part, Rava and Abaye represent different schools of interpretation and social policy.<sup>40</sup> Nevertheless, the personal element is unmistakable as well. However, the talmudic text does not hint at such a distinction, and elsewhere the

38 Eruv 21b.

39 Maharsha, *Hiddushei Aggadot*, *ad loc.*

40 For the second, see my “The Socioeconomics of Babylonian Heresy,” above, n. 5 and my “Ma’aseh be-Shtei Ayarot: Mahoza u-Pumbedita Ke-Metzayyot Shtei Tarbuyot Hilkhatiyyot,” in D. Golinkin, M. Benovitz, M. Akiva Friedman, M. Schmelzer, and D. Sperber, eds., *Torah Lishma: Essays in Jewish Studies in Honor of Professor Shamma Friedman* (Jerusalem: Schechter Institute of Jewish Studies, 2007), 3-38; for the first, see, for the moment, my “Rava ve-Darkei ha-Iyyun ha-Eretz Yisraeliyyot be-Midrash ha-Halakhah,” in Y. Gafni, ed., *Merkaz u-Tefutzah: Eretz Yisrael voha-Tefutzot bi-Ymei Bayit Sheni, ha-Mishnah voha-Talmud* (Jerusalem: Merkaz Zalman Shazar, 2004), 217-42, and my “Classical Rabbinic Interpretation,” *Jewish Study Bible* (New York: Oxford University Press, 2003), 1844-62.

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Maharsha suggests, in regard to two other of Rava's statements, that he had a problem with "ignoramuses who were contemptuous of the sages."<sup>41</sup> He points to two talmudic passages that point to a skeptical attitude on the part of Mahozans to rabbinic enactments, one in which Rava calls those who rise in respect before a Torah scroll but not before a scholar as "idiots"<sup>42</sup> and one in which he derides a certain "household of Benjamin the Physician,"<sup>43</sup> who claimed that the rabbis were unable to decide anything against Torah law, and so they were unnecessary. In both cases he pointed to the rabbinic control of scriptural interpretation as an answer to this denigration of the rabbis. As I have demonstrated elsewhere, these passages are part of a pattern that indicates that certain circles in Mahoza were indeed skeptical of rabbinic authority.<sup>44</sup> The fourth-century Mahozan Jewish community was up-scale, cosmopolitan, well-versed in theological matters, and skeptical of rabbinic authority. As I have shown elsewhere, Rava successfully met the challenge, but was also very sensitive to the question of rabbinic authority. It is in this context that we must see his "exposition" – actually, sermon – to his congregation. This also accounts for the legal question raised by Rava to his teacher, R. Nahman, also of Mahoza, and later by his disciple R. Papa, as to whether the rabbis had the right to make their enactments as stringent as Torah ones.<sup>45</sup> Thus, despite its putative biblical warrant, rabbinic authority was still a matter of debate in fourth-century Mahoza, at least in the court of public opinion. Now we can also understand Rava's concern that rabbinic enactments not be seen as a "laughingstock." It may well be that Rava has something to teach the Bush Supreme Court!

The Pumbeditan rabbis faced a different problem in this regard. Theirs was a far more insular Jewish society, which did not mix with

41 Maharsha, *Hiddushei Aggadot*, Mak 22b.

42 Mak 22b.

43 Sanh 99b-100a.

44 See the references in n. 40 above.

45 See B.M. 55b.

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non-Jews, although eight centuries of peaceful coexistence with the Iranian/Zoroastrian overlords had its effect here too, some hundred kilometers from the capital. But at least one of the Pumbeditan rabbis, the third-generation Rabbah, had aroused a good deal of dislike among the populace, and had apparently died in flight because someone had slandered him to the government. Many Pumbeditans were simply indifferent to rabbinic enactments. The very alley-way in which Rabbah and his ultimate successor, Abaye, his nephew, lived, did not have either an *eruv* or a *shittuf*, that is, a rabbinic device to allow carrying in the courtyards and alley-way on the Sabbath. When asked how that could be when two prominent scholars resided there, Abaye answered, simply: “What can we do. For the Master [=Rabbah] [to collect the tenants’ contributions to the *eruv*] would not be seemly (lit., “his way”), I am busy with my studies, and other tenants do not care.”<sup>46</sup>

We can thus well understand why it is Abaye, when asked why he does not follow Rava’s activist policy in Mahoza in promulgating more rabbinic enactments to protect the sanctity of the Sabbath, who replies, “Better that they should transgress [rabbinic enactments] inadvertently rather than intentionally.”<sup>47</sup>

In part the reason for this seems to lie in the area of rabbinic relations with the laity. It is clear from the story alluded to above in Sanh 99-100, that Rava maintained relatively cordial relations with the household of Benjamin the Physician, even though in private he called them heretics (“Epicurians”). At most he used a certain ironic humor against them, both in private and even in public. There seems to have been a disinclination on the part of the Mahozan rabbinate to employ the various types of excommunication available to them – which could not be said of the Pumbeditan rabbinate.<sup>48</sup> But there is more. As noted above, Rava devised unusual, but rabbinically acceptable, solutions to one of the

46 Eruv 68b. See the bibliography in n. 40 above.

47 Bez 30a.

48 Once again, see n. 40.

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burning theological issues of the day, theodicy, for which, in the eyes of some Jews, Zoroastrianism's dualistic theology provided a better solution than the difficult monotheistic view of the world. He faced, and apparently faced down, the Manichaean attack on oral transmission of religious doctrine and law, an argument that was highly effective against the Zoroastrian priests, who still continued to transmit the Avesta, their Bible, in that manner. He undertook a systematization of rabbinic modes of scriptural exegesis, in part as a response to those who find them inconsistent. In other words, Rava was highly active in combating the heresies of his day, and did so not with force, but with persuasion.

He did more. Rava is mentioned almost four thousand times in the Bavli, which makes him the most quoted Babylonian authority in that compilation; by contrast, his older contemporary and usual disputant, Abaye, is quoted less than 2500 times.<sup>49</sup> These statistics give only an inkling of Rava's influence, since in many cases Abaye serves as a foil for Rava's innovations. In all but six cases, the law is decided in accordance with the view of Rava,<sup>50</sup> but his influence is even more far-reaching, since in a real sense he sets the terms of the debate. His views constitute the "cutting edge" of Babylonian halakhah, and Abaye often appears as a nay-sayer.

Of course, as with every traditional society, innovation must be presented as mere interpretation, and, indeed, there are times when Rava himself tends to demur from some of his master, R. Nahman's, own innovations, as when the latter adopts the Sasanian legal principle of temporary gifts, as a halakhic principle.<sup>51</sup> Still, on the whole, Rava

49 Amazingly enough, this statistic is modified in only a minor way when we eliminate references such as "as Rava said," "that Rava said," and the like; these amount to about 250 references. The equivalent statistic for Abaye is about 60.

50 Shamma Friedman has located this determination in the geonic period; I use it only for heuristic purposes. See his "Le-Talmudam shel Geonim: Qeta Qadum shel Talmud im Gilyonot Nusah," *Tarbiz* 51 (5742): 37-48.

51 See B.B. 137b and Qid 6b, and see my "Returnable Gifts in Rabbinic and Sasanian Law," *Irano-Judaica* VI (forthcoming).

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appears as one who broke new ground in this formative period of halakhic history.

I will examine one case that will shed light on many others, the instance of one who worships idols out of “love or fear,” but does not accept their godhood.

It was taught: If one engages in idolatry through love or fear [of man, but does not actually accept the divinity of the idol], Abaye said: He is liable, but Rava said: He is free of penalty. **Abaye ruled: He is liable, since [after all] he worshipped it, and Rava said: He is free of penalty; he is liable only if he accepts it as a god, but not otherwise.**

This statement of the basic dispute is followed by no fewer than three arguments supposedly adduced by Abaye for his position. There are a number of problems connected with the very existence of such proofs. First of all, while the Bavli contains 33 cases in which a proof is preceded by “From where do I say it?” on the part of Rava,<sup>52</sup> and 23 for Abaye,<sup>53</sup> there is no other passage in the Bavli in which a disputant provides three arguments for his position, although there are three cases in which Abaye presents two (Git 34a, Qid 66a, A.Z. 34b), and one where Rava presents two (Nid 37a). Again, no such proof is provided for/by Rava, and when we consider the innovative nature of his position, we may well wonder why that is so. Indeed, Abaye’s proofs against Rava’s position are in reality only one: tannaitic material does not recognize the distinction that Rava is making. And, indeed, that is so, since, as noted, Rava’s position is the innovative one and presumably requires proof.

52 See Ber 50b, Shab 66a, 72b, Eruv 9a, Pes 26a (twice), 107b, Suk 22a, 36b, 37a, Meg 19a, Yev 69b, 70a, 115b, Git 34a, Qid 12b, 66a, B.Q. 73b, B.M. 48b, B.B. 173a, Sanh 61b, A.Z. 66b, Zev 31a, Men 12a, 46b, Hul 38a, 95b, 125b, Bek 31b, Ker 25a, Nid 37b (twice), 42b, 51a.

53 Ber 25a, Shab 11b, 66a, Eruv 5a (twice), 9a, 99a, Pes 26a, Yev 37b, 115b, Git 34a (twice), Qid 66a (twice), B.B. 173a, Sanh 61b (3x), A.Z. 66a, Nid 37b (twice), 42b.

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Another question is whether the issue, presumably raised by Rava, reflected an actual case. As far as we can tell from both the Bavli and Middle Persian literature, while there may have been sporadic and local outbursts of Zoroastrian pressure on minority religions, such as attempts to end burial of the dead, which was an abomination in the Zoroastrian view, or aid in tending the sacred fires, there was no instance of forced conversion. Rather, Rava's concern with motivation is part of his own rereading of rabbinic sources, reflected in a series of disputes between himself and Abaye, regarding the role of intention as a component in transgression, as here or Shab 72a-b and 73a, where in three cases Rava requires the transgressor to have intended to perform the prohibited action in exactly the prohibited manner, while Abaye required only a generalized intention. Likewise, in Sanh 27a, Rava allows a court to accept the testimony of a *mumar lehakh'is*, one who disregards a mitzvah on principle (lit., "to anger [his Maker]"), but not one who does so to satisfy his appetite, the reason being that the one is susceptible to being bribed, while the other, who would seem to be guilty of a greater sin, is still reliable as a witness.

This emphasis on intention extends to other areas as well, even areas that do not involve moral issues. Is a board which was not erected specifically to permit carrying within an alleyway on the Sabbath to be considered valid? Once again, Rava requires intention, while Abaye does not (Eruv 15a).

In each case, and others like them, there is no clear precedent. In none of these cases is Rava's opinion accompanied with a reason prefaced with "From where do I say it?" That does not mean that reasons are not given. For example, in the case of testimony, both Abaye and Rava rely on Exod 23:1, "do not accept the wicked as a witness;" Abaye there, as in the matter of idolatry in Sanh 61b, makes no distinction as to motive, while Rava takes the last word of the verse, *hamas*, 'violence,' to refer to one who is wicked in pursuit of some benefit for himself, thus excluding a *mumar lehakh'is* from the prohibition. But this is a matter of Rava and

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Abaye's interpretations; it is not a precedent. Presumably these interpretations began with them.

Let us return to the case of the debate over the sin of idolatry out of love and fear. Rava's lenient stance is hardly a permissive one; *ab initio* it is forbidden to engage in idolatry even out of love and fear. The leniency is that one who does so does not merit the death penalty, but he or she should sanctify the Name of God rather than perform any act of worship.<sup>54</sup> In the following debate, note that while Abaye presents his proofs, the responses provided for Rava's position are hypothetical, provided by the anonymous redactors: "Rava *can* say to you." However, we shall concentrate on the second proof and response, because there is evidence from elsewhere in the Bavli that Rava took Haman's status into consideration.

**Abaye said:** From where do I say it? Because we have learned [in the mishnah on 60b=mSanh 7:6]: [As to one] who engages in idol worship, it is all one whether he serves it, etc. [sacrifices, offers incense, makes libations, prostrates himself, accepts it as a god, or says to it: 'you are my god.'] Surely it means: Whether he serves it through love or fear, [or whether he sacrifices to it as a god – it is all forbidden].

**But Rava can answer you:** That is not so, but as R. Jeremiah resolved the difficulty [i.e., whether he serves it in its normal way, or sacrifices, makes libations, offers incense, or prostrates himself, even if these acts are not the normal mode of worshipping that particular deity – is liable for his idolatrous act, but not someone who does so out of love or fear.]

**Abaye [further] said:** From where do I say it? For it has been taught: "You shall not bow down yourself to them" [Exod 20:5] – you may not bow down to them, but you may bow down to a human being like yourself. I might think that this applies even to

54 This is thoroughly discussed by the medieval commentators; see Tosafot and Tosafot ha-Rosh *ad loc.*, Nahmanides *ad loc.*, Meiri *ad loc.*, Ran *ad loc.*, Yad Remah *ad loc.*, and Maimonides' Code, Avodat Kokhavim 3:6.

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one who is worshipped like Haman, but Scripture adds, “nor serve them” [ibid.]. But Haman was served thus through fear [and thus serving through fear is forbidden].

**And Rava?** Like Haman, but not altogether like Haman; [To bow down to one] like Haman [is forbidden], since he set himself up as a divinity, but not altogether so, for Haman was worshipped through fear, while the prohibition of this verse refers only to voluntary action.

**Abaye said:** From where do I say it? For it has been taught: [As for] an anointed High Priest’s [liability to a sacrifice] for [unwitting] idol worship – Rabbi said: It holds good even if the inadvertency was in respect of the action only. But the sages say: There must have been forgetfulness of the [principal] law itself. They agree, however, that his sacrifice is a she-goat, as that of a private individual [who committed idolatry inadvertently as in Lev 4:3, where a young bullock is prescribed for an anointed high priest’s inadvertent sin, yet in the case of idolatry even the sages agree he is treated as an ordinary person, who offers a she-goat, as in Num 15:27]. They also agree that he is not bound to bring the guilt offering of doubt. Now, how can the act of idol worship be committed unwittingly? If he [saw an idolatrous shrine], thought it to be a synagogue, and bowed down to it, surely his heart was to heaven [and he has not even sinned unwittingly]. But it must mean that he saw a royal statue and bowed down to it; now, if he accepted it as a god, he is a deliberate sinner; [62a] while if not, his action was not idolatrous at all. Thus, it must surely mean that he worshipped it idolatrously, through love or fear [without knowing that this was idol worship. This constitutes inadvertency in regard to the action, but not in regard to the principle, thus supporting Abaye’s contention.]

**But Rava can say to you:** His inadvertency arose through his declaring that idolatry is permissible.

But if he declares it permissible, is it not forgetfulness of the law? – It refers to a declaration that it is entirely permissible; while forgetfulness consists of partial confirmation and partial annulment

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[that is, if the priest declares that sacrificing and offering incense to idols are forbidden, but prostration is permitted, that is called ignorance of the law. If he declares that idolatry is not forbidden at all, it is, in Rava's opinion, regarded as inadvertency of action].

The baraita quoted by Abaye as his second proof simply states the prohibition of idolatry without any qualifications. Rava's (hypothetical) response is that while Haman was himself considered a god, one who worshiped him at the king's command was not liable to the (halakhic) death penalty because it was done out of fear. While this is simply an eisegetical reading of this text, Rava deals with the question of prostration before Haman in several aggadic statements in Megillah 12b-13a. In it he describes the less than positive reaction of Mordecai's contemporaries to his refusal to prostrate himself before Haman.

“There was a certain Jew in Shushan the Castle, etc. a Benjaminite” (Esth 2:5)....

**R. Nahman said:** He was a man of distinguished character.

Rabbah b. Bar Hanna said in the name of R. Yehoshua b. Levi: His father was from Benjamin and his mother from Judah; the Rabbis however said: The tribes competed with one another [for him]. The tribe of Judah said: I am responsible for the birth of Mordecai, because David did not kill Shimei b. Gera, and the tribe of Benjamin said: He is actually descended from me.

**Rava said:** The Community of Israel explained [the two designations] in the opposite manner: See what a Judaeon did to me and how a Benjaminite repaid me! What a Judean did to me: [13a] that David did not kill Shimei from whom was descended Mordecai who provoked Haman [unnecessarily], and how a Benjaminite repaid me: that Saul did not kill Agag from whom was descended Haman who oppressed Israel.

Given Rava's restriction of the prohibition of idolatry to cases that involved the acceptance of the idol as a god on the part of the worshiper, the question arises as to why, according to Rava, Mordecai

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did not rely on that interpretation, especially in a matter that involved the possible extinction of the Jewish people. The Tosafists suggest that Haman wore idols around his neck, and so if Mordecai had prostrated himself before him, even out of fear, this would have constituted true idolatry, regarding which one must rather sanctify the Name at the expense of one's life than make use of Rava's leniency. However, in making this suggestion they rely on a late midrash, one which is totally absent from the Bavli.<sup>55</sup>

However, the answer to this riddle may come from an examination of Rava's comments on the book of Esther; the Bavli preserves no fewer than nineteen of Rava's comments on the book, presumably because the Babylonian Jews were still under Persian rule, and looked to that biblical book for guidance in dealing with the government. Rava's criticism of Mordecai's contemporaries is to be found in Meg 12a:

“They gave them drink in vessels of gold, the vessels being diverse one from the other” (Esth 1:7). It should have said: “In different vessels” – Rava said: A heavenly echo went forth and said: Your predecessors met their end on account of vessels, and yet you use them again!

Rava utilizes the word *shonim*, which can mean ‘diverse,’ but also (in Middle Hebrew) ‘to repeat, do again.’ He thus criticizes the Babylonian Jews of Ahasuerus’ time for partaking in his feast, a feast in which (he hints) the Temple vessels were employed, as they were in Daniel’s time.

He goes still further, though. Later on, in the same passage, he comments on Esth 1:8.

“That they should do according to each man’s [*ish ish*] will.” That means that they should do according to the will of Mordecai and Haman [who both served as butlers at the banquet]. Mordecai [is called a ‘man’ – *ish*], as it is written, “a Judean man” (Esth 2:5), and Haman [as it is written], “a man, an adversary and an enemy” (Esth 7:6).

55 It appears in Esther Rabba 7.

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Thus, not only does Rava criticize Mordecai's contemporaries for taking part in the feast, but he criticizes Mordecai as well! Mordecai took an active role in organizing Ahasuerus's feast, along with Haman. Apparently, then, he was a court official of a rank equal to Haman's before the latter was raised to prime minister by Ahasuerus. As such, Mordecai was presumably an important personage in the Jewish community as well, and it ill behooved him to make use of such leniencies, especially at a time when assimilation was a real threat.

Later still, in an exchange with his teacher, R. Nahman, on the question of why Hallel, a text of praise and thanksgiving, is not recited on Purim, R. Nahman suggests that the reading of the Megillah substitutes for it. Rava, on the other hand, points out that "we are still slaves of Ahasuerus" (Meg 14a). His attitude to the Persian regime was thus much less positive than his teacher's, who was, as I have shown elsewhere, perhaps the most Persianized rabbi in the Bavli.<sup>56</sup>

At any rate, the question still remains: How did our Rava-Hercules arrive at his leniency; how could he have redefined the prohibition of idolatry in such a radical way. One possibility is that he derived it from the Mishnah itself. Sanh 7:6 adds a prohibition of one who accepts an idol as a god – even without worshipping it. That, however, is the problem, since this clause is intended as a stringency, and not a *condition* that applies to other forms of idolatrous worship; how could Rava convert it into a condition that leads to a leniency? Nevertheless, since, as we have seen, a consideration of motive is an essential part of Rava's program in many other instances, he may not have felt the need to reinterpret this clause in the mishnah. Alternatively, since such considerations figured into his legal decisions, he may well have employed this clause for his own purposes. The reason that such a possibility is not mentioned in our passage is that it was composed from Abaye's point of view, for reasons that can no longer be retrieved.

56 See my "Middle Persian Culture and Babylonian Sages."

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This brings us to an essential problem in our comparative study. More than half of the text of the Bavli is anonymous, and current scholarship considers it to be mostly or almost entirely redactional in origin. That would mean that much of the dialectic that we find in the Talmud is the invention of these later editors, and does not necessarily reflect the views of the amoraim themselves. This is clearly the case here, where the redactors provide us with a hypothetical reconstruction of how Rava *could* have responded to Abaye's objections to his view. In reality, however, this is not as problematic as it seems, since the body of opinion that has been preserved in the names of Rava and Abaye is so large, both in legal, theological and ethical matters, but also in terms of events of their own lives, or their reflections on them, that we can indeed see them "in the round," as it were. This is particularly true of Rava.<sup>57</sup> In addition, Rava seems to rely so little on precedent for his more innovative opinions, that his principles of adjudication must be sought elsewhere than in formal grounds. The fact that these "formal grounds" – the interpretation of a biblical verse, or a tannaitic, or purported tannaitic text – all result in an innovative understanding of the case in terms of intention indicates the primacy of the insight over the precedent. This is all the more so when no formal precedent is even adduced on the part of Rava, as in Sanh 61b or B.M. 21b or Yev 54a. This is not to say that earlier texts do not concern themselves with matters of intention; rather, Rava is particularly interested in refining borderline cases that are not dealt with earlier. It is also noteworthy that, for example, the verb *nitkavven*, "he had intention," appears only six times in the Mishnah and 18 times in the Yerushalmi (=the "Jerusalem Talmud") but 90 times in the Bavli.

57 See the opening observations of my paper, "He in His Cloak and She in Her Cloak': Conflicting Images of Sexuality in Sasanian Mesopotamia," in R. Kern-Ulmer, ed., *Discussing Cultural Influences: Text, Context, and Non-Text in Rabbinic Judaism: Proceedings of a Conference on Rabbinic Judaism at Bucknell University* (Lanham, MD: University Press of America, 2007), 123-69, especially those in n. 3, which includes *mina amina lah!*

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Still, the Mishnah at mYev 6:1 states that a levir who consummates his levirate marriage<sup>58</sup> even unintentionally – “whether in error or in presumption, whether under compulsion or of his own free will, even if he acted in error and she in presumption, or he in presumption and she in error, or he under compulsion and she not under compulsion, or she under compulsion and he not under compulsion,...he acquires her [i.e., the marriage is considered consummated].” The Bavli, on the other hand, stipulates that intention is required for the ceremony of *halitzah*, which frees the woman from levirate marriage, a text that does not appear in the Yerushalmi.<sup>59</sup>

Rava goes a step further and considers the following case: what happens when the levir had intended to commit bestiality but happened to have sex with his sister-in-law? While the case may seem grotesque to modern ears, the principle is the stuff of legal theory: how specifically oriented to the obligation involved must the intention be?

Rava said: If the levir’s intention was to “press”<sup>60</sup> against a wall and he accidentally pressed at his sister-in-law, no “acquisition” is constituted thereby [i.e., the marriage with his widowed sister-in-law has not been consummated]; if, however, he intended to “press” at a beast but accidentally “pressed” at his sister-in-law, “acquisition” is thereby constituted, since some sort of intercourse was intended.

This is exactly parallel to the following question considered by Rava in connection with the rabbinic Sabbath law of cutting or “harvesting,” as in Shab 72a-b:

It was stated: [72b] If one intended to lift up something detached, but cut off something attached [to the soil], he is not culpable. [If he intended] to cut something detached, but cut something attached

58 That is, in accord with Deut 25:1-5 the brother of a deceased, childless husband is obligated to marry his widowed sister-in-law in order to carry on the brother’s part of the family estate.

59 For the Bavli, see bYev 102b.

60 A euphemism.

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[instead], Rava ruled that he is not culpable, since he had no intention of a prohibited cutting, [while] Abaye maintained [that] he is culpable, since he had the intention of cutting in general.

Rava said: How do I know this? Because it was taught: [In one respect] the Sabbath is more stringent than other precepts; [in another respect,] other precepts are more stringent than the Sabbath. The Sabbath is more stringent than other precepts in that if one performs two [prohibited labors] in one state of unawareness, he is culpable on account of each separately; this is not so in the case of other precepts. Other precepts are more stringent than the Sabbath, for in their case if an injunction is unwittingly and unintentionally violated, atonement is made; this is not so in respect of the Sabbath.

The talmudic discussion goes on to compare the Sabbath case to that of Sanhedrin 61b, discussed above, where idolatry is committed “through love or fear,” and again the two disputants disagree on the same grounds. Rava exempts the violator since he had not accepted the idol as a god, while Abaye contends that worship of some sort was actually carried out in a physical sense, even though the worshiper had no intention of accepting the idol as his god.

The key phrase in the tannaitic teaching cited by Rava in support of his position, *shagag belo mitkavven*, “unwittingly and unintentionally,” appears only in this baraita, which itself appears only in the Bavli, and only in the parallel discussion in Sanhedrin.

This is not to say that the issue does not appear in tannaitic literature; it does, but only in conjunction with murder, as in Mekilta de-R. Ishmael Neziqin 8 on Exod 21:14, where a number of tannaim disagree on whether one is liable for murder if one kills with a mistaken intention. The anonymous view is that he is guilty of murder, while Rabbi (Judah the Patriarch) holds:

If he intended to kill a particular enemy and killed someone else (who was) also his enemy, he is not liable. If he intended to kill his enemy and killed his friend, he is not culpable. But this verse came

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to teach you that the injury to the woman is the husband's [i.e., in the biblical case, when two men are arguing and one accidentally strikes the pregnant wife of his antagonist and she miscarries], and the worth of the (aborted) embryo is the husband's....<sup>61</sup>

The Mekilta goes on to record another opinion, that of R. Yitzhak:

R. Yitzhak says: Even one who intended to kill [one person] and killed [another] is not liable, until he admits (lit., "says") I am killing (that is, I intend) to kill so-and-so, as [Scripture] says: "He lay in wait for him and sprang upon him and killed him" (Deut 19:11)....

A roughly similar tannaitic disagreement appears in several places in the Bavli in the name of a Tanna de-Be Hezekiah (Ket 38a, B.Q. 35a, Sanh 79a). It is clear from these sources that Exod 21:14 was interpreted by some as declaring guilty a person who intended to kill one person but instead killed another, though at least one authority disagrees in this case. That is, according to R. Eleazar, one who intended to murder someone but mistakenly killed someone else is nevertheless guilty of a capital crime (thus agreeing with the anonymous opinion in the Mekilta), while Rabbi (Judah the Patriarch) holds that in the biblical case, at least, where two men are fighting and the pregnant wife of one of them is accidentally struck, and the blow causes a miscarriage, the assailant must pay for the miscarriage. In essence, then, the view of Rabbi as represented in these two sources is similar.

Finally, the Mishnah at Sanhedrin 79a (mSanh 9:2) seems to record the views of an anonymous authority who disagrees with the anonymous authority of the Mekilta, and one (R. Shimon) who seems to agree with R. Yitzhak.

<sup>61</sup> Mekilta de-R. Ishmael, ed. Horovits-Rabin, 274-75. See editors' notes, and see bB.Q. 42b, where it is apparent that, according to others, the compensation for the injury belongs to the wife. That issue is not germane to the current discussion.

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If he intended to kill an animal but killed a man, or a non-Jew and killed a Jew, or a prematurely born infant and killed a viable one, he is not liable. If he intended to strike him on his loins, where the blow was insufficient to kill, but smote the heart instead, where it was insufficient to kill, but he died; or he intended to smite him on the heart, [79b] where it was enough to kill, but struck him on the loins, where it was not, and yet he died, he is not liable. If he aimed a blow at an adult, whom it was insufficient to kill, but caught a child, whom it was sufficient to kill, and he died, he is not liable. If he struck a child with sufficient force to kill him, but it caught an adult, for whom it was insufficient, and yet he died, he is not liable. But if he intended to strike his loins with sufficient force to kill, but caught the heart instead, he is liable. If he aimed a blow at an adult hard enough to kill, but struck a child instead, and he died, he is liable. R. Shimon said: Even if he intended to kill one but killed another, he is not liable.

Here Rava goes a step further in commenting on the relationship between the Mishnah and the dispute conducted by Rabbi and his interlocutor:

Rava said: The following Tanna of the School of Hezekiah differs from both Rabbi and the Rabbis. For a Tanna of the School of Hezekiah taught: “And he that kills a beast [shall pay for it] and he that kills a man [shall be put to death]” (Lev 24:21). Just as in the case of one who kills an animal, you draw no distinction between an unwitting or deliberate act, an intentional or unintentional blow, a downward blow or an upward one [see Makkot 7a], not acquitting him thereof, but imposing monetary liability; so in a case of killing a man [where there is no monetary compensation] you must draw no distinction between an unwitting or deliberate act, an intentional or unintentional blow, a downward or upward thrust, not imposing monetary liability, but acquitting him thereof [since one liable to the death penalty is free from paying compensation]. Now, what is meant by ‘unintentional’? Shall we say ‘entirely unintentional’? But

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that is identical to 'unwitting'! Hence it means not intending to kill the one but another, and for such a case it is taught: 'not imposing monetary liability', but acquitting him thereof. But if he is liable to death, it is surely unnecessary to teach that he is not liable to pay compensation! Hence it follows that he is liable neither to the death penalty nor to pay compensation [thus differing from the Rabbis, who rule that he is liable to the death penalty, and to Rabbi, who holds him liable to pay compensation].

Rava, by calling attention to this teaching, threw his weight behind the view of R. Shimon, who requires specific intention, and that is how Maimonides rules in *Hilkhos Rotze'ah* 4:1.

Can Hercules' principle of comprehensive interpretation aid us in elucidating Rava's own understanding of the sources of his innovations? I think so. According to the rabbis, the Torah contains all wisdom within itself, including the wisdom inherent in folk sayings, medical knowledge, etc. This idea is encapsulated in a well-known mishnah in *Avot* 5:22: "Turn it over and turn it over, for everything is in it." Thus, *B.Q.* 92a-93a contains a list of thirteen proverbs, nuggets of popular wisdom, which the rabbis felt the need to locate within a Scriptural context, that is, to show that they were already hinted at in Scripture. Likewise, the rabbis are considered to be privy to information unknown to others, as in the following incident recorded in *Nid* 20b:

...A woman once brought some blood before R. Eleazar when R. Ammi was sitting in his presence. He smelled it and said to her: "This is the blood of desire [and not menstrual blood, which would be polluting]." After she went out R. Ammi joined her and she told him: "My husband was away on a journey and I felt an intense longing for him." He thereupon applied to [R. Eleazar] the verse: 'The secret of the Lord is with them that fear Him' (*Ps* 25:14).

Elsewhere (*Sotah* 10a), the verse is used to describe the origin of information which is otherwise gained either from one's own experience or learned from one's teacher. In that case the information

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concerns the exact nature of the illness that befell the biblical King Asa of Judah in 1 Kings 15:23.

Such a doctrine allows for the introduction of new insights and interpretations within the already existing corpus of Babylonian law and lore. In the end, the decision to rule like Rava was not made on a case by case basis. The halakhah follows his view in all but six cases. In two of these cases (B.Q. 73a, Sanh 27a), the discussion ends with the comment that R. Papa, Rava's disciple, followed his view in an actual case that came before him, but R. Ashi, two generations later, decided against Rava. If present texts are to be relied on, he also enunciated the general rule that the halakhah follows Abaye in six cases. One Geniza fragment indicates that the decision may have been reached much later, perhaps in gaonic times.<sup>62</sup> In any case, in most instances there is no indication that the decision rests with Rava. In our case, where Abaye presents three objections to Rava's position, and Rava responds with forced readings of tannaitic texts, the principle that we rule against the view that must rely on such forced interpretation was apparently not followed, presumably because Rava's authority was already unquestioned.

I suggest that this was done because of Rava's creativity and charisma; his work really does constitute the "cutting edge" of rabbinic analysis. That in turn suggests that his own self-confidence regarding his introduction of new parameters into the analysis of rabbinic law carried the day.

I would therefore suggest that the reason that Abaye's point of view is the prime mover in the discussion in Sanh 61b is simply that the redactor(s) did not have Rava's "proof-texts" in the sense that they would have expected them. Instead, Rava's analysis of the nature of idolatry led him to conclude that idolatrous worship without concomitant belief was not true idolatry, and the fact that this point had not been made clear in earlier sources was of no moment. In other

62 But see S. Y. Friedman, "Le-Talmudam shel Geonim" (see above, n. 50).

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words, in this decision, and in others of the same ilk, Rava is Hercules writ large.

At the opening of this essay I suggested that two aspects of Dworkin's theory may be particularly useful for an understanding of rabbinic literature as embodied in the Bavli. "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice,"<sup>63</sup> and again, "it is both the product of and inspiration for comprehensive interpretation of legal practice."<sup>64</sup> By reinterpreting authoritative texts in a more profound, sophisticated, and nuanced way, I submit, Rava did just that. And that was why his decisions were accepted.

A legal system that takes a tortfeasor's or criminal's intention into account is intuitively "better" than one that does not. I suspect that the force of Rava's innovations derived – at least in the long run – less from his charisma than their persuasive power. Indeed, since we find a similar development in Sasanian law, though in more embryonic form, it may be that Rava was responding to the *Zeitgeist* of the capital district, and thus illustrates Dworkin's principle, as set forth above:

The boundaries between departments usually match popular opinion; many people think that intentional harm is more blameworthy than careless harm, that the state needs a very different kind of justification to declare someone guilty of a crime than it needs to require him to pay compensation for damage he has caused, that promises and other forms of explicit agreement or consent are a special kind of reason for state coercion, and so forth.<sup>65</sup>

Inadvertently, as it were, Dworkin has provided us with an explanation of Rava's program, which lent depth and nuance to the rabbinic understanding of the divine law, an understanding that became

63 *Law's Empire*, 225.

64 *Ibid.*, 226.

65 *Ibid.*, 252.

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normative. Here is where another aspect of Rava's influence becomes important, and that too has been prefigured by Dworkin's integrist view.

As noted above, Rava is mentioned almost four thousand times in the Bavli. While we cannot say that he has a hand in every discussion, or even a decisive hand in most, he does have a deciding hand in a significant number of them. But Rava is not a lone-wolf, but a brilliant product of a school whose progenitors stretch back to the beginnings of Babylonian rabbinic society. On the one hand, he is the primary disciple of R. Nahman of Mahoza, a major disciple of Samuel of Nehardea, and who also transmits the statements of Rabbah b. Abuha. On the other, he is the son-in-law of R. Hisda, who was himself the grandson-in-law of Rav, one of the founders of that society. On both sides he represented the acculturated elements of rabbinic society.<sup>66</sup> His work in a sense represents the confluence of four generations of study in three of the amoraic currents: Sura, Nehardea, and Mahoza. The work of these schools, but especially that of Mahoza, makes the Bavli what it is: cosmopolitan, engaged, and sharp-eyed as to the foibles of human nature. Rava represents, then, the dominant approach of the Bavli, an approach that then provides a large-scale, *consistent* reading of rabbinic sources. Or, to repeat one of the quotes with which we began:

Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a *single, coherent scheme of justice and fairness in the right relation*. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.<sup>67</sup>

Thus, in the end, but for six instances, Rava's view carries the day against Abaye, while R. Nahman's carries the day in matters of civil law

66 Evidence for these assertions is presented in my "Middle Persian Culture and Babylonian Sages," above, n. 8.

67 *Law's Empire*, 219.

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(*dinei*),<sup>68</sup> as it was in regard to his master Samuel's disputes with Rav,<sup>69</sup> and finally, according to Rav in matters of ritual law (*issura*). This is how a "single, coherent scheme" has been put together: the Bavli as Hercules!

Perhaps the most important monograph published on the Bavli in recent years is Leib Moscovitz' study of rabbinic conceptualization.<sup>70</sup> In summing up his wide-ranging analysis of rabbinic conceptualization, Moscovitz identifies Rava as the earliest major proponent of what he calls "ontological status abstraction" – "does designation count [legally or ritually – Y.E.], is change significant, is retrospective determination of reality valid."<sup>71</sup> According to Moscovitz, "[t]his sort of abstraction is first attested implicitly, during the fourth generation of Babylonian amoraim, mainly (exclusively?) Rava, and is formulated explicitly in the anonymous stratum of BT [=Bavli]."<sup>72</sup> In other words, Rava's teachings stand at the core of much of the most creative work of the redactors of the Bavli.

Intellectual history is perhaps the last resort of the "great man theory of history," and this is because ideas are created by creative thinkers, though they may be articulated by others. This is true even of traditional societies that seek to deny, or play down, individual initiative or the role of creativity.

In the end, the redactors did what they could to restore the rule of precedent, as they also worked to provide a conceptual underpinning for some of the Bavli's discussions, somewhat in the spirit of the post-

68 Ket 13a.

69 Bek 49b.

70 See Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization*, esp. 353-54, above, n. 7. See also idem, "Designation is Significant: An Analysis of the Conceptual Sugya in bSanh 47b-48b," *AJS Review* 27 (2003): 227-52, which illustrates the infirm foundations upon which the conceptual structure was erected.

71 *Talmudic Reasoning*, 353-54.

72 *Ibid.*

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classical jurists who contributed to Justinian's Digest. Indeed, R. Papa, Rava's major disciple, when faced with a question of what version of a prayer to recite, suggested reciting both, rather than having to choose between them.<sup>73</sup> However, the redactors of the next century seem to have regained some of this self-confidence; it is difficult to conceive of undertaking such a task as producing the Babylonian Talmud, more than half of whose 1.8 million words may be laid to the redactors' door, without a large measure of self-confidence.

At any rate, this conceptual underpinning does not cohere with the sources upon which they were predicated, as Leib Moscovitz has demonstrated. But the primacy of tradition and text in a traditional – or neo-traditional – society was thereby restored.

73 See Ber 59a, 59b, Tan 7a, Meg 21b, Sot 40a.