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ENTERING AN ANCIENT DIALOGUE:
A METHOD FOR THE UNDERSTANDING OF TALMUD

by Edward S. Boraz

Thesis submitted in partial fulfillment of
the requirements for Ordination

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DIGEST

The purpose of this thesis is to enhance the understanding and importance of the Talmud to modern Jewry. Despite the plethora of English translations by such luminaries as Rabbi Adin Steinsaltz and Jacob Neusner, the significance of the text remains illusive. This is due for two reasons. First, the methodology of these texts is philological which places heavy emphasis on the syntactical and logical flow of the text. As a result, underlying theological, ethical, and psychological issues are often absent from these works. Second, it does not account for one of the Talmud's most important assumptions: that its readers were familiar with Scripture, Midrash, Mishnah, baraitot, the Tosephta, and related talmudic passages. The Talmud's intended audience was rabbinic scholars where such a presumption was well-founded. Of course, the modern Jew, while possessing the intellectual capability, often lacks such a background. For these reasons, despite the growing interest in talmudic literature, it remains beyond the reach of many.

This work is intended to address the current gap which exists between a reader who seeks to understand the Talmudic process and the issues which it addresses, but is unfamiliar with these classic rabbinic texts.

Chapter 1 discusses the importance of the Talmud to modern Jewry and the limitations of the philological method. It concludes with a proposed scriptural methodology and an overview of the chapters to follow.

Chapter 2 explains the meaning of Torah and its study from both the rabbinic and the historic perspective. The rabbinic view, which rests on Scriptural, midrashic, mishnaic, and talmudic passages, suggests a definition of Torah which is both spiritual and metaphysical, yet is grounded in the realities of human existence. A "philosophy" of Torah is formed within this model. The chapter then describes the historical development of Scripture, Midrash, and Mishnah from the post biblical era, beginning with Ezra up to the editing of the Bavli.

One of the major difficulties which the reader encounters is the hermeneutics of the talmudic discourse. Chapter 3 explains the underlying theory and development of rabbinic hermeneutics in Jewish law. It furnishes a detailed explanation of only those hermeneutic rules which are used in the selected talmudic passage from Bava Metzia or from midrashim which explicate a related scriptural passage. Finally, the meaning of the hermeneutic process as an endeavor to engage the human intellect in the understanding of the Divine is discussed.

In chapter 4, a sugya from Bava Metzia is philologically analyzed in "bold" print. At appropriate intervals, an explanation of the passage, particularly as it relates to relevant scriptural, midrashic, and mishnaic sources, is provided. Certain themes, which occur repeatedly in different aspects of the dialectic, emerge. These motifs are the fuel of the dialectic.

This "essential fuel" is examined in its scriptural, midrashic, and mishnaic contexts in Chapter 5. The aim is to build a "scriptural foundation"[1] which equips the non-technical reader with the requisite knowledge that talmudic learning takes for granted.

This foundation is integrated with the sugya from Bava Metzia in Chapter 6. When the discourse is read within this framework, penetrating issues of theology, psychology, and human relationships are revealed.

Chapter 7 is a summary. It begins with a description of the benefits and limitations of the philological method. The scriptural approach, which builds upon this method, focuses on the underlying tensions of the dialectic. This methodology views Talmud as a rationale exegesis of Scripture and Midrash and that its function is to struggle with discerning the Divine Will within the paradox of the human condition.

The Talmud is ultimately symbolic literature. The dialectic nature of its discourse reflects an uncertainty in understanding God's Will in the particulars of life. Through a study of its literary antecedents, the nature of this doubt is explored and the "resolution" of the Talmudic passage

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1. The term "scriptural foundation" is used technically and defined in chapter 1. It refers to those literary antecedents which the Talmud built upon in the construction of its dialectic. These works include Scripture, Midrash, Mishnah, Tosephta, Baraitot, and even contemporaneous talmudic passages.

understood. Thus, this scriptural methodology enhances the Talmud as a viable resource for the modern Jew in the spiritual, ethical, and moral attributes of human life.

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Preface

Two summers ago, I had the privilege of studying privately with Dr. Ben Zion Wacholder, the distinguished holder of the Solomon J. Freehoff Chair of Talmud at the Hebrew Union College - Jewish Institute of Religion in Cincinnati, Ohio. He was trained in the yeshivas of Lithuania, a world which no longer exists.

We studied the Talmud Bava Metzia. He was and is a patient teacher; entertaining every question, every challenge to the text, that I could think of. (I have a law degree which qualifies me as one who is professionally trained in the art of asking questions). As we studied, it became clear that his vision of Talmud was that of a much larger work - an extension of the task that God began at Sinai. Scriptural passages, uncited in the text, clarified a Gemara which would have remained obscure, at least in my mind. The Talmud took on a metaphysical dimension that was exciting. An ancient dialogue became alive at his kitchen table as I read and he taught.

This book represents an attempt to give to you what was given to me that summer; an intellectual and spiritual adventure into the world of Torah; a meeting place where the human mind struggles to discern the Divine will.

Acknowledgments

I want to gratefully acknowledge the wonderful assistance that I received from Dr. Jeffrey Salloway, professor of medical sociology at the University of New Hampshire. His counsel, friendship, and guidance have been immeasurable in making this work possible.

I also want to thank Steve Ballaban for his help in the the development of the technical aspects of this book.

And finally, to Patricia Kuehn, a dear friend who helped to edit this work, all in good humour.

Dedication

This book is dedicated to my wonderful wife Shari, and to my two beautiful children, Joshua and Rebecca. Your patience, love and understanding, while I worked on this project, demonstrate that people's human attributes are indeed infinite.

CHAPTER I
UNDERSTANDING THE TALMUDIC DISCOURSE: PROBLEMS AND SOLUTION

INTRODUCTION

The purpose of this book is to enhance the understanding and importance of the Talmud to modern Jewry as a source for spiritual, ethical, and moral growth. Despite the plethora of English translations by such luminaries as Rabbi Adin Steinsaltz and Jacob Neusner, the Talmud Bavli[1] is still regarded by most as beyond the capability of those untrained in the study of rabbinic literature.

In this chapter, I will argue the following: First, the Talmud is an important resource for each of three main branches of Judaism. Yet, for the majority of Jews in the Diaspora, it remains unreadible despite the important contributions of Rabbi Adin Steinsaltz in his historic translation of the Talmud: The Steinsaltz Edition published by Random House. This work, however, has made it possible for those interested in talmudic literature to at least attain a philological understanding of the text. Of course, the Talmud's aims are much higher. Second, the Bavli's intended audience are rabbinic scholars and students. The editors assume that its readers already have a mastery of those literary antecedents (Scripture, Midrash, Mishnah, baraitot, and tosephta) which are embraced in the talmudic discourse.

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[1]. There are two Talmuds. One was compiled in Israel circa. 300 c.e. and titled Talmud Jerushalmi. The other was composed in Babylonia and is commonly refered to as simply "The Talmud", though its technically entitled the Talmud Bavli (aramaic for "of Babylonia"). The latter is thought to have been written between 427 c.e. and 600 c.e. This work is an analysis of the latter.

Most of all, its authors assume a thorough expertise in the rabbinic methodology of scriptural exegesis. The Steinsaltz Edition (and similar translations), by emphasizing philology, implicity makes this assumption as well. For this reason, the significance of the text remains ellusive. Third, a methodology will be proposed here that will provide the reader with a scriptural foundation upon which a talmudic discussion of a given theme (technically called a "sugya") is premised.[2] Such a foundation will address this assumption of the talmud's authors and thereby deepen the level of enrichment that the text affords.

The Importance of Talmud to Judaism

The Talmud is a cornerstone of Judaism. Jacob Neusner, in his work Invitation to the Talmud, writes:

> The Talmud is the single most influential document in the history of Judaism. It therefore must be read... as fundamentally and deeply religious literature.[3]

It has a powerful effect on each of the three major branches of Judaism. It is the heart of Orthodox Jewry. In Emet Ve-Emunah, the Statement of Principles of Conservative Judaism, the Talmud is regarded as part of God's revelation and thus

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2. The term "scriptural foundation" will be used throughout this work to refer to those literary antecedents which the Talmud built upon. These works include scripture, midrash, and mishnah.

3. Jacob Neusner, Invitation to the Talmud (San Francisco: Harper & Row, 1984), pp. 1-2.

indispensable[4]. While historically not a part of the central mission of the Reform Movement, this trend is changing as well. In the most recent issue of Reform Judaism, Rabbi Walter Jacob, president of the Central Conference of American Rabbis, confronts the historical objection to halakhah[5] with the need for standards which will govern the movement. He writes:

> When our founders rebelled against a stagnant Orthodoxy, they chose the high road of individual autonomy, selecting the best from our past to give Jewish content and meaning to our present-day lives. No one can fault this ideal, but it has not worked. We need direct, standards - *mitzvot* (ethical observances) - and *halachah* as we go beyond guidance to governance ... The Reform Movement will be open to new ideas, but if we must choose between a Reform Judaism that provides *guidance* and *governance*, the latter must be our path. Such a path requires that we adopt measurable religious standards for our leaders, board members, and all our congregants.[6]

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[4]. Emet Ve-Emunah: Statement of Principles of Conservative Judaism, Jewish Theological Seminary of America, Rabbinical Assembly, and The United Synagogue of America (United States of America: 1988) 20-21.

[5]. The term "halakhah" traditionally refers to laws, customs, or practices, which are considered binding upon the Jewish community. In traditional Jewish communities, the "halakah" is determined through an analysis of such sources as the Talmud, the Shulchan Aruk, Maimonides' Mishnah Torah, and the Tur. The latter works are codifications of the "halakhah" by rabbinic scholars who lived during the Middle Ages. Reform Judaism rejected a "binding halakhah" in the course of its history and developed the notion of "individual autonomy" regarding religious praxis. See Michael A. Meyer, Response to Modernity, A History of the Reform Movement in Judaism. New York: Oxford University Press, 1988), 393.

[6]. Walter Jacob, "Standards Now," Reform Judaism 21, no.1 (Fall 1992): 64.

If Jacob's standard is accepted, the Talmud will become an important factor in the growth of the Reform Movement as well. Thus, the influence of the Talmud is not merely one of historicity, but is manifest in the current development of all three major branches of Judaism.

One function of the Talmud is to engage a reader trained in rabbinic literature on multiple levels of analysis in every area of human thought and practice. The study of Talmud results in an existential view of the world that is rich in meaning and purpose. Rabbi Adin Steinsaltz writes:

> The ultimate purpose of Torah is ... to provide a comprehensive world view, bringing out both the essential relationship to Torah to every subject, but also the subjects' connections with each other.[7]

Thus, Talmud study provides an opportunity for the trained reader to develop an intellectual and spiritual understanding of a Jewish response to the existential and the Divine voice.

Impediments To Comprehending The Talmud

Unfortunately, the majority of diaspora Jewry, though possessing the intellectual capability, are untrained in the study of this work of rabbinic literature. Despite the availability of numerous English translations and commentaries to the Talmud, the untrained reader continues to experience difficulties when trying to engage this extraordinary work.

These obstacles may be generalized as follows. First,

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[7]. Adin Steinsaltz, The Talmud: The Steinsaltz Edition, a Reference Guide, (New York: Random House, 1989), 2.

the syntax of the Talmud is associative. This factor gives the appearance that the work lacks an inner order. Its discourse shifts from one subject to another in ways that are not readily apparent to the modern reader. In short, a talmudic passage seems scattered and diffused, rather than a well-reasoned dialectic inquiry.[8] Second, the majority of concepts throughout the Talmud are not defined. Its authors assume their readership to be familiar with the principles upon which the arguments are formulated.[9] Finally, the work requires a strong facility for logic and abstraction.[10] As such, it creates a "world of discourse" independent from the concrete realities of a given time, place or society.[11]

For these reasons, modern scholars have concluded that the intended audience of the Talmud's creators were rabbinic scholars and students.[12] These writers assumed the reader's thorough training in Scripture, Midrash, the hermeneutical principles of rabbinic exegesis, and Mishnah, as preliminary to its reading. Without this foundation, an attempt to study Talmud would be analogous to the study of calculus without a foundation in algebra. One is not possible without the other.

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8. Jacob Neusner, Invitation, 20.

9. Steinsaltz, The Talmud: A Reference Guide, 7.

10. Ibid., 3.

11. Jacob Neusner, Judaism: The Evidence of the Mishnah (Chicago, 1981), 245.

12. David Kraemer, The Mind of the Talmud, (New York: Oxford University Press, 1990), 1.

The Talmud has remained inaccessible to most, despite the growing level of interest and intellectual capability to study it. When literature is unreadable, it becomes immaterial.

Rabbi Adin Steinsaltz has begun a philological work of the Talmud, providing an English translation and commentary to its tractates, to remedy this concern. It is intended for a broad spectrum of users ranging from the beginner to those trained in the talmudic dialectic.[13] The work is principally philological and syntactical in order to allow the reader to understand the "surface-flow" of the text. It is a significant achievement in making the Talmud available to those untrained in its discourse. However, it fails to address two important issues. One is the importance of providing the requisite scriptural, midrashic, hermeneutic and mishnaic portions in order to render the work meaningful to the modern reader. Second, as a corollary, it fails to address the significance of the methodology the text employs.

Aharon Feldman, in a review essay the Talmud: The Steinsaltz Edition: Volume I Bava Metzia, criticizes this work on both counts.

> The serious question which arises from this analysis is whether Rabbi Steinsaltz has popularized the real Talmud or a grossly simplified version of it.... the Steinsaltz Talmud is unreliable once it ventures beyond simple peshat....Where a straightforward explanation is required, an excellent job is done. However, once

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13. Adin Steinsaltz, The Talmud: The Steinsaltz Edition, Vol I Tractate Bava Metzia, (New York: Random House, 1989), X.

> it ventures into the deeper waters of clarifying the subtleties of talmudic discourse and of its commentators, it runs out of strength and begins to flounder... It fails to explain those difficult passages which the reader would expect it to explain; and it confuses him with notes which are often irrelevant, incomprehensible and contradictory.[14]

The result is a work in which the novice is unable to probe the deeper levels of analysis that render the Talmud so significant to those who engage in its study. Feldman believes this to be the cardinal deficiency of the work.

> The major criticism so far registered against the Steinsaltz English Talmud has been that... it fails to transmit the true flavor of "learning" Gemara. This can be explained only by the fact that few if any of the reviewers to date have attempted to probe beneath the external aspects of the translation... They have not dealt with the actual "learning" of the Talmudic text, and it is in this cardinal aspect that this work is deficient.[15]

"Learning" Talmud, as practiced in the last millennia, has a flavor of its own. It immerses the reader in the dialectic of the sugya (a portion of the Talmud) which searches for a synthesis between the divine command and the human condition. The text, as it teaches, sharpens the mind. "Learning" Talmud has an excitement that mainstream, secular learning does not. The English reader of the Steinsaltz Talmud is deprived of this phenomena of "learning" which is unique to talmudic study.

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[14]. Aharon Feldman, "Learning Gemara in English: The Steinsaltz Talmud Translation," Tradition, 25(4), (Summer 1991), 50-51.

[15]. Ibid., 51.

Limitations of the Current Methodology:

These weaknesses are apparent when one analyzes a short passage taken from this work. For example, in the Steinsaltz Edition of the Talmud Bavli: Volume 1 Bava Metzia at 3(a), a *baraita* (a rule of law not included within the corpus of a Mishnah) is presented and explained. In order to illustrate these difficulties, the baraita[16] is fully set forth below as it appears in the translation (distginuished by bold type) and commentary section of the Steinsaltz.

> **Rabbi Hiya taught** the following baraita: In a case where one person claims against another, "You owe me a maneh (equal in value to 100 dinarim or zuz), that you borrowed from me and have not repaid," **and the other person says: "I owe you nothing," and witnesses testify that** the defendant owes the claimant **50 zuz (half a maneh), he** must pay the claimant 50 zuz in accordance with the testimony of the witnesses, **and take an oath regarding the rest** of the money asserting that he did not borrow the other fifty zuzim from the claimant. The premise upon which this ruling is based, is **that** a defendant's **own admission should not be more effective than the testimony of witnesses,** and this ruling can be proved by a **Kal vahomer** (a fortiori) **inference**. For the law is that if one person claims that another owes him a certain sum of money, and the defendant admits that he owes the plaintiff part of the sum, the defendant must take an oath that he does not owe the plaintiff any more

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16. In 200 c.e., Rabbi Judah HaNasi edited a collection of Oral traditions into a writing which became known as The Mishnah. The Talmud's primary purpose is to study these Oral laws which, from the rabbinic perspective, were originally give to Moses at Sinai. Rabbi Judah did not include every purported statement of this tradition in his work. Such statements are called baraitot (sing. baraita) and must be attributed to a rabbi of the tannaitic period (in our case, this is Rabbi Hiya, a disciple of Rabbi Judah HaNasi). The Talmud will often analyze the relationship between a baraita and a mishnah.

money. If an oath is required in the case of a partial admission, then here in Rabbi Hiya's case, where witnesses testify that the defendant owes the plaintiff part of his claim, there is even more reason that the defendant should be required to take an oath regarding the rest of the claim.

Rabbi Hiya continues by citing our Mishnah in support of his ruling: **The Tanna of our Mishnah taught along similar lines.**[17]

Three important features of this translation and commentary by Rabbi Steinsaltz will show the deficiency of the work for one untrained in classical rabbinic texts. First, the laws which are stated in the baraita pertaining to partial admissions and witnesses are not fully explicated as to both their derivation and their relationship to Scripture. Second, the hermeneutic rule of the kal v'chomer is neither explained in general terms nor is its significance amplified as a tool in early rabbinic literature (such as Midrash and Mishnah) to derive Jewish law from Scripture. Finally, by emphasizing a philological approach, the significance of the phrase "The Tanna of our Mishnah taught along similar lines" is lost. Each of these critiques are more fully developed below.

The baraita takes for granted that one knows that the torah has two rules which govern the imposition of a toraittic oath[18] in the case of litigation. One is where the defendant

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17. Steinsaltz, Bava Metzia: Vol.I, 23-24.

18. There are essentially two types of oaths. One is derived from the Torah. Such oaths are referred to as toraittic. The other type is imposed by the "Sages" of the tannaitic period (100 b.c.e to 250 c.e.) and are termed rabbinic.

admits to a part of a claim, but denies the remainder. In the absence of independent proof as to the disputed remainder, the defendant swears that he owes nothing further and is then released from any further liability. The Torah also provides that a defendant is prohibited from testifying on any matters attested to by two independent witnesses where no contradictory independent evidence is presented.

The Steinsaltz edition accurately states these rules as part of its commentary to the baraita. However, one would search Scripture in vain to locate the verses in which these "toraittic" rules are stated explicitly. Both the Talmud Bavli and Rabbi Steinsaltz assume that the reader knows the actual source of these rules. For full understanding, one must be acquainted with sections of an early midrashic text that derives these rules from specific scriptural passages. The rabbis of the tannaitic period (10 c.e. to circa. 250 c.e.)[19] considered these rules implicit, not explicit, in Scripture. An understanding of the method as to their derivation and their rationale is critical to the problem which the Gemara[20] confronts in analyzing Rabbi Hiya's

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19. There are five periods in Jewish history which are significant in the development of the talmudic literature. Chronologically, these periods consist of the sopherim (400 b.c.e to 200 b.c.e), zugoth (200 b.c.e to 10 c.e.), tannaim (10 to 250), amoraim (250 to circa. 427). These periods are discussed more fully in Chapter 2.

20. The Gemara is a technical term. The main body of the Talmud is divided into two parts. The first part is a restatement of a Mishnah. The second is the analysis and amplification of the Mishnah with the form taking that of a

baraita.

Second, the same assumption of familiarity is apparent with regard to the appearance of hermeneutic rules of rabbinic exegesis. The methodology upon which Rabbi Hiya bases his ruling as derivative of Scripture is a kal v'chomer (a fortiori) inference. The rule is only explained in the limited context of the Gemara's analysis of the baraita. An understanding of both its use in Scripture, Midrash, and Mishnah and the factors which determine its validity and/or invalidity as a method of deriving Jewish law from antecedent sources are required if the reader is to fully appreciate and understand the significance of the talmudic discourse. It is one of the essential connective links that illustrate the underlying tensions between this passage and such earlier works as Scripture, Mishnah, and Midrash.

Finally, while the phrase "the tanna of our Mishnah taught along similar lines" (Aramaic "v'tanah tunah) is technically accurate, its rendering in the Steinsaltz edition does not capture the real meaning and its paramount importance to the theoretical nature of the Gemara. The Aramaic phrase v'tanah tunah is a signal to the reader that the tanna (lit. author, i.e. Rabbi Judah HaNasi) of the Mishnah with which this Gemara is fundamentally concerned, would accept Rabbi Hiya's ruling as consistent with it. The Steinsaltz edition never explains the importance of the need for Rabbi Hiya, a

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dialectic. This second part is referred to as the Gemara.

disciple of Rabbi Judah, to have the latter consider the rule to be part of the corpus of Jewish law. Significantly, the question is never posed that if such was indeed Rabbi Judah HaNasi's position, as Rabbi Hiya asserts, then why wasn't the baraita included in the Mishnah? Aharon Feldman's critique is justified in that the modern reader is never engaged in this important aspect of the Talmud "learning". Thus, the discussion, though based on precedent, leaves the precedent uncited.

The term "The Tanna of our Mishnah taught along similar lines" suggests one other important point which Steinsaltz does not address. Why does this baraita appear as part of the Gemara's analysis to the first Mishnah in Bava Metzia? One might argue that this baraita should have appeared in the tractate Shavuot which is principally concerned with toraittic and rabbinic oaths. The phrase v'tanah tunah is telling the reader that the locus of this baraita is appropriate within the context of this Mishnah of Bava Metzia for the latter is principally concerned with claims and denials in litigation which cannot be substantiated by independent proofs. The authors of the Bavli are informing the reader through this technical term that the real subject matter of the baraita is the competing demands for justice made by both litigants where there is an absence of independent evidence to determine the truth of the plaintiff's claim or the assertion of innocence by the defendant. This accounts for the baraita's appearance

in this tractate. Significant opportunities, like these, to concentrate on issues of methodology and talmudic theory are lost on one who lacks the appropriate foundation because the Steinsaltz edition focuses primarily on the philological meaning of the text.

Solution: A Methodology To Integrate Torah With Talmud

These criticisms can only be addressed by acknowledging the current gap which exists between the modern reader and the Bavli's intended audience, i.e. rabbinic scholars and students. In order to develop an appreciation for the underlying religious significance and ethical tensions of a talmudic passage, the reader must be provided with the following:

First, the theory of Jewish law must be fully explained. The reader must understand the hierarchy of Jewish classical texts, which begins with Scripture and its midrashic explication and extends to the Oral traditions embodied in the Mishnah, baraitot, and the tosefta[21]. Second, the relevant passages from these sources, which underpin the talmudic inquiry of a given passage must be made explicit. Third, an analysis of the appropriate hermeneutical principles which are employed by the talmudic passage to either justify or reconcile the elements of its dialectic inquiry must be

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21. A collection of additional halakhic teachings of the tannaitic period (not included in the Mishnah) which traditionalists and some modern scholars attribute to Rabbi Hiya amd Rabbi Hoshayah (circa. 225). See Chapter 2.

explained in the same fashion that one might set forth the basic axioms and corollaries in the study of higher mathematics. When put together, these elements would form a "scriptural foundation" upon which a penetrating reading of a sugya could be made possible. This "scriptural foundation" could then be integrated into the talmudic discourse at the appropriate points in the dialectic inquiry. The result would be a far more significant level of understanding and appreciation of the Talmud as a source for religious, spiritual, and ethical guidance for modern Jewry; an outcome which could give the reader the experience of "learning" Gemara.

Our task will be to integrate these religious literary antecedents with the talmudic discourse in the following manner. Chapter 2 will focus on the meaning of Torah and its study from both the rabbinic and the historical perspective. The former will concentrate on the essence and purpose of Torah in the context of the sinaittic revelation. The latter will detail the historical development of Scripture, Midrash, and Mishnah from the postbiblical era, beginning with Ezra (circa. 458 b.c.e) up to the editing of the Bavli (circa. 600).

Chapter 3 will explain the theory of rabbinic hermeneutics in the development of Jewish law, with a specific concentration on those rules that are explicitly used in the development of the selected sugya of this work.

Chapter 4 will provide a macro-analysis of a selected portion from Bava Metzia, specifically 3a through 4a. Rather than a linear translation, it will explain the flow of the text and isolate those terms which suggest an investigation into scriptural, midrashic and mishnaic sources.

Chapter 5 will examine in detail the issues raised in the macro-analysis of the sugya in the context of its scriptural, midrashic, and mishnaic precedents. The aim is to build a "scriptural foundation" (as defined above) which would respond meaningfully to Feldman's criticism; i.e. to provide the non-technical reader with the requisite knowledge which talmudic learning takes for granted.

Chapter 6 will then integrate this foundation with the sugya from Bava Metzia 3(a)-4(a). The non-technical reader will attain the experience of learning talmud by being provided with the requisite tools to make real "learning" possible.

The main purpose of this work is to give clarity to material that is difficult by stressing the underlying religious themes of the text. I hope that the reader will get a spark of the rabbinic struggle to discern the "Divine will". The student of the tradition will discern that the methodology of the Talmud illustrates a rejection of both dogmatism and fundamentalism on the one hand and ethics that respond only to the exigencies of the moment on the other. The study of the its process and assumptions will illustrate that the Talmud's

principal concern is with the dynamic and tension-filled relationship between the Divine standard and its imposition on a humanity which strives for perfection within the limitations of time and space. This fact alone, that our Sages struggled with the conflict between the ethical dilemmas of the human condition and the need to fulfill the "Divine teaching" of Torah, renders the study of Talmud a vital area of inquiry for our time.

CHAPTER II
THE DEVELOPMENT OF SACRED LITERATURE FROM THE RABBINICAL AND HISTORICAL VIEW

Methodology

There are two approaches to analyzing the literature that comprise the building blocks of the Talmud. One is to examine the philosophical treatment of these genres from the rabbinic perspective. By studying the rabbinic literature that preceded and followed in the tradition of the writing of the Bavli, a sharper and more detailed image can be seen of how the authors' perceived their task and their world. In literary terms, this approach would be considered intertextual.

The first part of this chapter will be devoted to creating this contextual framework of the authors by focusing on three aspects. First, the writers of the Bavli considered the study of Torah to be above all other pursuits in that it lead to real knowledge of God and the purpose of life.

Second, the definition of the term "Torah" encompassed the Written Law, the Oral Law, and their amplification. The imperative of Sinai was for humanity to embrace not only its teachings, but also to render the Torah viable in each generation. By making it vital, Torah becomes both significant and relevant. This has remained the sacred task of each generation of Jews ever since Sinai. Third, meaning and viability, however, existed within a continuum of time. Each succeeding generation preserved and enhanced the "meaning of Torah" such that a tradition of learning evolved over a period of at least a thousand years.[1] It is

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[1] Historical scholarship considered the Pentateuch to have been completed by the time of Ezra's return to Israel in circa. 428 b.c.e.. The Bavli was written over a period from

therefore necessary to explain the ingredients of this shalshelet hakaballah (the chain of tradition) for it provides the requisite authority for the rabbis in each era to explore the meaning of Torah and to amplify its significance in all aspects of human endeavor.

The second approach to an understanding of the Bavli is one of historical scholarship. This method examines the sources which the authors used in the writing of the Talmud from a historic perspective. These works consist of the written Torah, Midrash, Mishnah, Baraitot and the Tosephta. Much of this work is highly theoretical given the absence of solid, authenticating evidence. Nevertheless, it will serve as an aid in placing each of these prior sources within its respective historical context and will suggest the following: First, most modern scholars agree that the written Torah was completed by the time of Ezra (circa 428 b.c.e). Second, the interpretation of the Torah was developed in succeeding generations through the literary genre known as Midrash. Third, an oral tradition, consisting of laws, customs and practices developed during the postbiblical era (400 b.c.e. to 200 c.e.), was edited by Rabbi Judah HaNasi in 200 c.e. as a result of social, political, and religious exigencies. This work became known as the Mishnah. Finally, certain interpretations, customs, and practices, were excluded from the Mishnah during the editing process. These works were embodied in the Baraitot and the Tosephta and served as both an additional tool to the understanding of the Mishnah and to the

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427 to 600.

development of the talmudic dialectic.

THE RABBINICAL UNDERSTANDING OF TORAH

Torah as Pre-Existent to Matter

Torah pre-existed creation. It emanated from God's wisdom who then consulted with it to construct a perfect universe. This Torah, which served as a blue-print to God, was given to humanity at Sinai.[2] Through the study of the drawing, one could acquire knowledge of the mystery and purpose of the universe. It was a particular kind of undertaking which sought to comprehend the plain and metaphysical meanings of the design. Through this process, two vital truths could be discerned. One was the Divine intention for humanity with a particular emphasis on Israel. Second, Torah comprised the essential truths of human nature, God, and the universe. For these reasons, Toran study could unlock this mystery of God and render the creation of the universe an act of rationality. It thus became the religious act par excellence.

These concepts of Divine intention and rationality find support in the Mishnah.

> These are the things that have no measure: the four corners of the field, the bringing of the first fruits to the Holy Temple, righteous acts, and the study of Torah.[3]

This beautiful paragraph has a design of its own for it blends humanity with the Divine. The four corners of the field are

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[2]. Midrash Rabbah: Genesis, Volume I, trans. H. Freedman. (New York: Soncino Press, 1983), 1.

[3]. Mishnah Peah, 1:1.

for the poor and homeless. God commands us to care for one another. The bringing of the first fruits is an act that demonstrates on the human level the love for God by stressing spirituality as a priority over the material so that the use of the latter may be directed toward the former. Righteous acts are the creative expression of one's humanity and religiosity in the myriad of life's opportunities. And despite these wonderful imperatives which have no limitation, there is more to life than these forms of altruistic human enterprise. Humanity must also pursue an understanding of God's happiness which can be derived through Torah. Rashi[4], citing a Midrash, writes:

> All of those things which you delight in are not equal in value to it [Torah] and all things that are admired [by people] are not equal to it [Torah]. People admire precious stones and jewels. But "I delight in these" [words of Torah] (Jeremiah 8).[5]

The Divine Intent and its execution in the real world are through the vessel of Torah. Thus, Torah is more valuable to humanity than any material object of desire for it brings God into the real. But there is an exclusive metaphysical dimension to this Midrash which exists separate and apart from the Divine intention with regards to the physical. Humanity, through Torah study, temporarily removes itself from the

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[4]. One of the foremost biblical and talmudic commentators in Jewish history. He lived in Troyes, France from 1040 to 1105. The New Jewish Encyclopedia, edit. David Bridger. (New York: Behrman House, 1962), 399-400.

[5]. Peah, 2b.

material and enters the realm of God, the paramount reality. Just as God considers it a source of joy and delight, humanity may experience this spiritual vivacity through Torah.

When carried to its logical end, one could conclude that the ascetic life lends itself to an experience of God and is to be preferred to the material. But the preceding Mishnah has another paragraph which gently returns humanity from its spiritual quest for fulfillment through Torah study to the world of human endeavor.

> These are the things of which man partakes their fruit in this world while capital is stored for him in the world to come. Honoring one's parents, righteous acts, and bringing peace to humanity; but the study of Torah is the equivalent to them all.[6]

This teaching is based on a passage from the Book of Proverbs:

> Riches and honor belong to me [Torah], enduring wealth and success. My fruit is better than gold and my produce better than choice silver. I walk on the way of righteousness, on the paths of justice. I will endow those who love me with substance; I will fill their treasures. The Lord created me at the beginning of His course as the first of His works of Old...I was with Him as a confidant, a source of delight every day, rejoicing before Him at all times, rejoicing in His inhabited world, finding delight with mankind. (Psalms 8:18, et. seq.)[7]

Once again, spirituality as expressed through the teachings of Torah transcends the physical. The treasures and substances of Torah are better than gold or silver. However, this

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6. Peah, 1a.

7. Tanakh: The Holy Scriptures - The New JPS Translation According to the Traditional Hebrew Text. (Philadelphia; Jewish Publication Society, 1988), 1298.

metaphysical world is not actualized through the abstract temporal removal of self from the material. On the contrary, the fulfillment of humanity's pursuit of spirituality is through involvement in the tangible because Torah exists for the sake of a righteous and just world. It urges humanity to accept it as the guide for the messianic fulfillment of creation.

This bond between Torah study and its function in civilization is inseperable. A Mishnah from Kiddushin provides:

> Anyone who is learned in Scripture, Mishnah, and human interaction will not be quick to commit a transgression as it is stated: "and a threefold cord will not quickly be broken" (Ecclesiastes 4:12). But all not engaged in the [learning of] Scripture, Mishnah, or human interaction, are uncivilized.[8]

This Mishnah stresses "learning" as foundational to civilization. It precedes the human enterprise. One could construe that this Mishnah prefers the pursuit of knowledge as a virtue in and of itself. Indeed, many do pursue the metaphysical through an ascetic lifestyle. The scholar who studies the Divine word endlessly may become indifferent to the realities of the struggle for existence and fulfillment.

The Talmud, in its discussion of this Mishnah, reacts to this tension between the acquisition of knowledge and human circumstance in relation to the essence of Torah study. If

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8. Kiddushin, 40(b).

the function of Torah is to acquire knowledge of God's delight and desire, then knowledge has priority over the human enterprise. However, if the Torah's primary purpose is to instruct humankind on how to live in the material world, then the existential takes precedence over the quest for the Divine in the abstract. The Gemara resolves this dilemma:

> It once happened that Rabbi Tarphon and the Elders of the community were dining at the house of Nithza's in Lydda when this question was asked of them. "Is the pursuit of knowledge greater than the pursuit of living?" Rabbi Tarphon responded, "Human enterprise is greater." Rabbi Akiva answered, "Learning is greater." All of them answered, "The acquisition of knowledge is greater because it enriches human action."[9]

The Talmud thus resolves the dichotomy between knowledge and the pursuit of living by emphasizing the "this-world" application of Torah. Its study is not an esoteric exercise. Instead, contemplation of the Divine will is a part of living. When all the rabbis responded "The acquisition of knowledge is greater because it enriches human action," the Gemara was emphasizing the synergistic relationship between the pursuit of living and Torah scholarship, for the latter leads to the ultimate fulfillment of humanity as the expression of the Divine intention.

In summary, Torah pre-existed the creation of the universe. As such, its claim upon humankind should be of higher priority than other human pursuits. Torah becomes the perfect lens which allows for the light of the Divine

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[9]. Ibid., 40(b).

imperative to be refracted onto life's stage. This light, observed through the lens of Torah, allows a person to witness the Divine in the world and thereby fulfill the joy of creation.

The Definition of Torah

The rabbinic definition of Torah embraces two elements. One may be termed "spiritual-material." The Written Law, consisting of the Pentateuch, and the Oral law as embodied in the Mishnah, each given by God to Moses at Sinai, are real. We can see them, touch them, and read them. But there is an added dimension to Sinai. God explained the essences of these "torahs" to Moses and at the same time made it an imperative for humanity to search for and to amplify these principles. In other words, humanity should use the written words as a path which would lead to an encounter with the Divine. One could designate this component of Torah as "spiritual-God."

The Sinaittic event is the basis for the binding nature of Torah. It is axiomatic to the rabbis that the Written Torah was given at Sinai. But the Oral Torah is problematic for it seems speculative. Its existence is derived from the exegesis of scriptural passages as recorded in two works; the Sifra [a midrashic text on the Book of Leviticus] and the Sifre [a collection of midrashim on the Book of Deuteronomy] both compiled near the end of the third century.

The Sifre cites Deuteuronomy 33:10 as its scriptural proof for the existence of this Oral Law which emanated from

Sinai.

יורו משפטיך ליעקב ותורתך לישראל ישימו קטורה באפך וכליל אל-מזבחך:

And they shall teach Jacob your ordinances and your torah to Israel; and they shall put incense before you and the whole burnt-offering upon the altar.[10]

The Sifre states:

And your Torahs to Israel: To teach that two torahs were given to Israel, one which was oral and the other which was written. Agnitum the Gamon asked Rabban Gamliel, "how many torahs were given to Israel. He [Rabban Gamliel] replied, "two, one written and the other oral."[11]

The history of rabbinic literature has recognized the close, interdependent relationship between the Written and Oral law and that both originated at Sinai. The proof for the existence of the latter is derived from the former. Thus, in response to the question by the world, represented by Agnitum the Gamon, as to what is Torah, Rabban Gamliel, the leading authority of the Jewish people living under Roman rule during the second half of the first century, answered with a definition which included both forms of revelation.

The Sifra expands the sinaiitic event to include God's amplification of the Torah through Midrash and, as a corollary, extends this activity as an imperative upon humanity. It makes this finding on the basis of Leviticus 26:46.

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10. The Hebrew ותורתך could be read as a plural, "your torahs" or as a singular "your torah" because of the absence of the vowels.

11. Sifre debe-rav, 155.

אלא החקים והמשפטים והתורת אשר נתן ה' בינו ובין בני ישראל בהר סיני ביד-משה:

> These are the statutes, ordinances, and laws (the word "torah" in the Hebrew text is in the plural) which God gave between him and between the children of Israel at Mt. Sinai by the hand of Moses.

The Sifra then begins:

> These are the statutes, ordinances, and laws: The term "these statutes" refer to the midrashim. The ordinances refer to actual dinim (defined as laws which include the hermeneutical rules for the exegetical derivation of law).[12] And the term "hatorot" [since it is in the plural] teaches that two torahs were given to Israel, one written and one oral.[13]

Thus the meaning of Torah encompassed an understanding of law that went far beyond the written text. All the tools were given at Sinai to understand and fulfill the precepts of Torah on the human level. Midrash allowed for the continual expansion and derivation of the law in relation to the infinite wisdom of God. It is an integral feature of Sinai. True understanding of both the Written and Oral Laws and their interdependent relationship requires knowledge of Midrash.

But there was another component as well which enabled humanity to assist in the amplification of Torah; the hermeneutic rules for the derivation of Divine law in the context of each era and social setting. These rules provided the methodology for two activities. One was to derive law

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12. Marcus Jastrow, Dictionary of the Targumim, Talmud Babli, Yerushalmi, and Midrashic LIterature. (New York: The Judaica Press, Inc., 1985), 301.

13. Sifra Torat Kohanim, 172.

which was considered implicit in the sacred texts. The other was to measure human law against the Divine instruction of Torah. Thus, both the Divine word and the methodology for its implementation in the world were all part of the Sinaittic event.

You will recall that Torah was the opportunity to experience the rationality of the universe and the reality of God. The Talmud blends this concept as well into its definition of Torah.[14]

> Hezekiah states [that the term "learned"] means in halakhot (pl. of halakhah, see chptr. 1). Rabbi Yochanan states [that to be "learned" means schooled] in Torah.[15]
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> An objection is raised. Which is Mishnah? Rabbi Meier states it is halakhot. Rabbi Judah states it is Midrash.
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> What is meant by Torah -- the deep, penetrating, study [i.e. Midrash] of Torah.[16]

The Talmudic dialectic is struggling to answer the question: what constitutes the true learning of Torah? It begins with a very simple understanding. If one knows the

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[14]. The Gemara is analyzing a Mishnah which provides for conditions which effectuate a betrothal. The general rule of the Mishnah is that if one makes a material false representation which induces consent, such betrothal is ineffective. The case in the Gemara regards a person who represents to a prospective bride that he is learned. The Gemara is evaluating the level of knowledge to which this term applies.

[15]. The brackets were added by this editor for syntactical purposes. A literal translation would omit the terms enclosed within them, thus confusing the reader.

[16]. The Babylonian Talmud: Kiddushin. Transl. by Rabbi Dr. H. Freedman. Edit. Rabbi Dr. I Epstein. (New York: Traditional Press) 49(a).

"halakhot", the laws that were transmitted by God to Moses at Sinai, which includes both the Written and Oral, then such a person is regarded as "learned" within the Jewish community.[17] [18] Rabbi Yochanan's construction accepts factual knowledge of the law as sufficient and would not require a theoretical understanding of its formulation.

The passage then presses this issue of "what constitutes a learned person" by seeking a definition for the term "Mishnah." Rabbi Meier states it is sufficient to know the halakhot, i.e. to know the laws, regardless of their basis in Scripture. This position is consistent with R. Yochanan's. However R. Judah argues that the term "Midrash" includes both the written source from which the Oral Law is derived and the means of its derivation. Rashi's clarifies R. Judah's answer:

> Midrash: This refers to the Sifra and Sifre for they contain the laws which are derived from their Biblical sources.[19]

With this response, the Talmud arrives at a second level of "learning" Torah. It is to comprehend the interdependent relationship between the Oral and Written Law. The former is derivative of the latter and thus "learning" Torah is more than mere recitation of its laws. "Learning" is to apprehend the Oral and Written as an undivided whole, rather than

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17. Kiddushin 49(a), see Rashi.

18. Kiddushin 48(a), see Rashi.

19. Kiddushin, 49a. Rashi on תורה.

separate and distinct.

This process is analogous to the baking of a cake. One can understand the separate ingrediants; the sugar, flour, and eggs. But the purpose is to make a cake through the combination of the various ingrediants which are then comprised to make the whole. Learning is the understanding of the whole and how each unit operates to create it.

The Talmud, by answering the question "what is Torah" as "Midrash Torah" arrives at a third level of learning. Torah requires the deep penetrating study and elaboration of the sacred texts. The human intellect is capable of grasping Torah as the ultimate Divine expression of the rationality of the universe and the purpose of human existence. The meaning of "Midrash Torah" is to explore the Torah in order to uncover these truths and to expound them.

Though having lived five hundred years after the final redaction of the Talmud, Moses Maimonides (1135-1204), in his Introduction to the Mishneh Torah, incorporates this understanding of Torah by stressing that Sinai required humanity to vitiate the Torah in all of its diverse aspects through this mitzvah of amplification.[20]

> All the commandments and their explanations were given to Moses at Mt. Sinai, for it is said: "And I [God] will give to you the tablets of stone [the Decalogue], the Torah and the Mitzvah (Exodus

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[20]. Moses Maimonides lived centuries after the talmudic period. As a scholar of this genre, however, his description of the sinaittic event is useful to the rabbinic understanding of revelation.

> 24:12). The "Torah" is the written law (the Pentateuch). The term Mitzvah refers to its explication. And he commanded us to adhere to the law according to the Mitzvah -- i.e. interpretation. And this Mitzvah is referred to as the Oral law.

This mitzvah of interpretation upon which Maimonides centers the Sinaittic revelation is consists of two concepts. The first is the intellectual engagement of the text. Commandments require interpretation within the context and framework of a community. But there is an added dimension. The Oral Law must be understood as being entwined with Scripture. It is a unique form of pentateuchal expression and hence an expansion of the written text. Thus, the principle theme which runs through the event at Sinai was the duty to understand and to amplify the Written and Oral Traditions and to see both as undivided entity.[21]

In summary, there exists an inner dynamic within Torah which includes both Divine and human aspects. This vibrancy is reflected in both the duty to explore deeply and to amplify its teachings through the midrashic and interpretive enterprises. True knowledge of Torah implicitly accepts the Oral Torah as interdependent with Scripture. Yet, the literary genre of Midrash is devoted to providing coherancy to both traditions which radiated from Sinai. When coupled with the human imperative of amplification, it answers the question

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[21]. Maimonides may be including midrash halakhah as well in the term Mitzvah. This is evidenced by the use of the Hebrew word פרושיה.

"תורה אחד," what is the meaning of Torah.

The Chain of Tradition: The Oral Law and Its Embodiment In the Mishnah

There is an inherent difficulty with the authenticity and accuracy of the Oral law as redacted in the Mishnah. One could argue that it was not transmitted at Sinai, but instead arose subsequent to this seminal event. Even assuming it to be a part of revelation, the claim of accuracy of its oral transmission over a milenia is legitmately subject to skepticism.

The Talmud Avot addresses this second concern by providing a historic chain through which each succeeding generation from the time of Moses to Rabbi Yochannan ben Zakkai and his disciples (70 c.e. to 100 c.e.) received the Oral Law which had originated at Sinai.

> Moses received the Torah from Sinai and passed the tradition to Joshua who then transmitted it to the elders. From the elders, [it was transmitted] to the prophets. The prophets then passed it on to the men of the Great Assembly . . . the last survivor of whom was Shimon the Righteous [1:1]... Antigonous, leader of Socho, received the tradition from Shimon the Righteous [1:2]... Yose ben Yoezer (200 b.c.e), leader of Tzredah and Yose ben Yochannan, leader of Jerusalem, accepted the tradition from him [1:3]... Yehoshua ben Perachyah and Nittai of Arbel received the tradition from them [Yose ben Yoezer and Yose ben Yochannan] [1:6]...Yehudah ben Tabbai and Shimon ben Shatach received the tradition from them [1:7]...Shemayah and Avtalyon accepted the tradition from them [Yehudah ben Tabbai and Shimon ben Shatach] [1:10]... Hillel and Shammai learned the tradition from them [1:12]... Rabbi Yochannan ben Zakkai accepted the tradition from Hillel and Shammai [2:8] Rabbi Yochannan ben Zakai had five disciples.

> They were Eliezer ben Hyrkanos, Rabbi Yehoshua ben Chanania, Rabbi Yose the Kohen, Rabbi Shimon ben Nesanel, and Rabbi Elazar ben Arach.[22]

The chain of tradition recorded in these chapters established the authentic nature of the Oral Law over generations of time beginning at Sinai. It records a teaching by Rabban Gamliel who was the grandson of Hillel who lived shortly before the Second Temple was destroyed. In Chapter 2 Rabbi Judah HaNasi, the redactor of the Oral law, is described as a descendent of Hillel and the great grandson of Rabban Gamliel.[23] This שלשלת הקבלה (chain of tradition) is grounded principally on learning and accepting the oral teaching from one's predecessor. Thus lineage is an added dimension which strengthens the authenticity of the transmission of the Oral law from Sinai to the time of its editor, Rabbi Judah HaNasi.

The Embodiment of the Oral law into the Mishnah

The rabbinic perspective on the history of the redaction of the Oral Torah into the Mishnah is reflected in two sources. One is the famous letter by Sherira Hagaon to the Kairouan Jewish community. The other is by Maimonides who addressed this topic in the Introduction of his Mishnah Torah.

In 987 c.e., Sherira Gaon, the head of the Babylonian

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22. Avot, 3b-7b.

23. For a detailed analysis of the historical data of these figures, see Strack and Stemberger, Introduction to the Talmud and Midrash, transl. by Markus Bockmuehl. (Minneapolis: Fortress Press, 1992), pp. 69-91.

academy, received a letter of inquiry from the Jewish community of Kairouan. One of the questions raised was the gulf between Torah and Mishnah. Another was the process through which the Mishnah became a written document. This inspired him to respond in-depth. His answer to these inquiries was that prior to the redaction of the Mishnah, there was no homogenous formulation of the halakhah. Concerned that the teaching might be lost, "Rabbi" (the traditional reference to Rabbi Judah HaNasi) took up the project of redacting the Oral Torah. Sherira regarded the anonymous teachings in the Mishnah to be those of Rabbi Meier whose opinions are based on Rabbi Akiva who, in turn, received the tradition from his teachers.[24] The necessity for redaction grew out of the conflict between the disciples of Hillel and Shammai over the halakhah which had to be resolved out of the concern for uniformity, particularly in the post Temple era.[25]

In the introduction to his classic work the Mishnah Torah, Maimonides asserts that the primary concern which led to the redaction of the Oral Torah was the fear of it being lost due to changing social and political circumstances. Up

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24. Rabbi Meier was the disciple of Rabbi Aqiba. Aqiba belongs to the second generation of tannaim (c. 90-130), while R. Meier's prominence began in the third generation of tannaim (c. 130-160.) Strack and Stemberger, Introduction to the Talmud and Midrash, pp. 79-84.

25. Strack and Stemberger, Introduction to the Talmud and Mishnah, 139.

to the time of Rabbi Judah HaNasi, the Oral Torah was not written down. Each scholar, however, would write private notes from which the halakhah was taught. These notes, consisting in part of hermeneutical rules for the derivation of Oral Law from Scripture, provided the nexus between the Written and Oral Torahs. Rabbi Judah HaNasi, concerned that these teachings would be lost, redacted this tradition and taught the rabbis in public. Maimonides regarded this step as revolutionary and was necessitated by the decrease in the number of students in the rabbinic academies of Palestine, external pressures, and persecutions which resulted in the Jewish Diaspora. Unlike Sherira Hagaon, who attributed the redaction to rabbinic conflicts in the understanding and interpretation of the Oral Torah, Maimonides argues that changes in the Jewish social and political situations necessitated this radical innovation.[26]

In conclusion, the redaction of the Oral Torah by Rabbi Judah HaNasi was justified by the rabbinic communities on two different bases. One was that the continued accuracy of transmission from Sinai to the tannaitic period of Rabbi Judah HaNasi (200 c.e.) was threatened by internal disputes over its meaning. The Mishnah's authenticity rested upon demonstrating that each generation from the time of Moses through the post-second temple era had received the Oral Law and had understood

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[26]. Moses Maimonides, Commentary on Pirkey Avoth, trans. Paul Forcheimer (Jerusalem: Feldheim Publishers, 1974), 18.

its meaning and application. Both Sherira HaGaon and Maimonides acknowledge the conflicts that would invariably arise because of the inherent difficulties of learning law only through oral instruction. Nevertheless, through such literary works as The Talmud: Mesekhet Avot and Seder Tanaaim v'Amoraim, a detailed chain of authority is established to the satisfaction of the rabbinic community of the tannaitic period which addresses the problem of inheriting a verbal tradition of at least 1500 years.

The second concern was to justify the necessity for its redaction in 200 c.e. Here is where the two scholars depart. For Sherira Gaon, the need for reducing it to writing arises from the conflicts which begin to appear from the time of Hillel and Shammai as to what is in fact the law. The need for clarity as to the rules and regulations of a community is a precondition for its continued existence.

Maimonides, however, argues that the Oral Torah was in danger of being lost because of the drastic changes in the Jewish political and social structure which followed the destruction of the Second Temple, resulting in increased persecution and dispersion of the Jewish people. It became physically fragmented and needed a cohesive element to retain its identity as a people. These factors compelled the editors to redact the Oral law of Sinai to writing and this work became known as the Mishnah.

The Historical Method: An Analytical Approach to the Sources Which Comprise the Talmud

Introduction

The historical method is principally concerned with fixing a period for the redaction of the literary antecedents which form the foundation of the Talmud Bavli and to analyze their structures. These works include Scripture, Midrash, Mishnah, Tosephta, and Baraitot. In this section, we will provide an overview as to their development and nature as considered by scholars engaged in these enterprises.

Scripture

The term "Scripture" is defined as the Pentateuch, i.e. the five books of Moses. It is the core of the Biblical canon for all Jews. During the early Persian period (538 b.c.e. to 428 b.c.e.), a book emerged from the Jewish community referred to as the "Torah of Moses." While arguably the product of centuries of traditions, editorial activity ceased at the time of Ezra (circa. 428 b.c.e.).[27] When the Jewish people were allowed to return from their exile in Babylonia to Israel in the year 458 b.c.e., Ezra was charged with the task of reconstituting the Jewish community of Israel. Described as a scribal expert in the teaching of the law of Moses, Ezra was given the title "scribe of the law of the God of heaven" (Ezra

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[27]. Shaye J.D. Cohen, From the Maccabees to the Mishnah, (Philadelphia: Westminster Press, 1987), 183.

7:12).[28] Within the framework of the political stability provided by Nehemiah, who was appointed by Cyrus of Persia to oversee the return of the Jewish people from their exile in Babylonia to Israel, Ezra's task was to make Torah the organizing principle of the Jewish community during the early second temple period (428 b.c.e. to 70 c.e.).[29]

A reference is made in the Book of Nehemiah to a document which historians consider to be the "torah scroll." It provides:

> When the seventh month arrived - the entire people assembled as one man in the square... and they asked Ezra the scribe to bring the scroll of the Teaching of Moses with which the Lord had charged Israel. On the first day of the seventh month, Ezra the priest brought the Teaching before the congregation... He read from it from the first light until midday, to the men and the women and those who could understand; the ears of all the people were given to the scroll of the Teaching. .. Ezra opened the scroll in the sight of all the people..; as he opened it, all the people stood up. Ezra blessed the Lord, the great God and all the people answered, "Amen, Amen," with hands upraised.... [Certain ministering officials] and the Levites explained the Teaching to the people, while the people stood in their places. They read from the scroll of the Teaching of God, translating it and giving the sense; so they [the nation] understood the reading (Nehemiah 8: 1-8).[30]

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[28]. There is much debate over the exact time when Ezra returned. The range is from 458 b.c.e. to 398 b.c.e. John Bright, in his work A History of Israel Third Edition (Philadelphia: Westminster Press, 1981) suggests 428 b.c.e. which corresponds to the rule of Nehemiah.

[29]. John Bright, A History of Israel, Third Edition, 390.

[30]. Tanakh, 1519.

Such noted scholars as Julius Wellhausen, W.F. Albright, and John Bright, believe it probable that the completed Pentateuch was in Ezra's possession and that through his efforts, it became the core document of the second temple period through which faith and practice would be centered.[31] [32] [33]

Ezra's reading of the scroll is regarded by many as a watershed in the history of the Jewish people. Robert M. Seltzer writes:

> Many modern historians feel that it was at this moment when the Torah book, the Pentateuch in close to its final form, became the unchallenged norm of Israel's religion and when Judaism took its single most important step to becoming a religion of Scripture, indeed, the first scriptural religion.[34]

The Talmud's description of the importance of Ezra's work parallels the significance that historians have attributed to the completion of the Written Torah by the time of Ezra.

> It is taught in a baraita: Rabbi Yose said that it was fitting that Ezra transmitted the Torah to Israel for Moses foreshadowed him. Scripture states "and Moses went up to God" (Exodus 18). The Book of Ezra provides "and Ezra went up from Babylonia (Ezra 7). What was brought up? Just as Scripture refers in the [Exodus] passage to Torah, here also [in Ezra] the verse alludes to Torah.
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> [There is another parallel between Moses and Ezra].

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31. John Bright, A History of Israel, 390.

32. Julius Wellhausen, Geschichte Israels (Berlin: G. Reimer, 1878, 421.

33. W.F. Albright, The Biblical Period from Abraham to Ezra, (New York: Harper Torchbook, 1963), 94f.

34. Robert M. Seltzer, Jewish People, Jewish Thought: The Jewish Experience in History, (New York: Macmillan Publishing Co., Inc., 1980), 130.

> With regard to Moses, Scripture states, "and the Lord commanded me to teach you the hukim (laws which have no apparent rationale, e.g. the law of the red heifer) and the mishpatim (those statutes which human reason can comprehend, e.g. treating the poor fairly.) (Deuteronomy 4). With regards to Ezra, the Bible states for Ezra had prepared his heart to drash (to explore deeply, to investigate) the Torah of God and to do and teach Israel its hok (singular of hukim) and mishpat (singular of mishpatim).[35]

This passage from Sannhedrin establishes the centrality of Scripture for the Jewish people at the time of Ezra by comparing his teaching to the Revelation at Sinai. Ezra brought the same Torah when he went up to Israel from Babylonia that Moses received when he ascended Sinai. Furthermore, Ezra is compared to Moses as the appropriate lawgiver. This allusion to Moses is parituclarly significant in light of one of the concluding verses of the Written Torah.

> Never again did there arise in Israel a prophet like Moses.[36]

The baraita, while not equating Ezra to Moses, nevertheless analogizes the rabbinic task of studying and teaching to the prophecy of Moses. Ezra prepares himself in the rabbinic tradition through intense study in order to teach the Divine Will as expressed in the written Torah. The Hebrew term "lidrosh" (the infinitive of drash, i.e. to explore deeply, to investigate), ascribed to Ezra, connects his task to Sinai and thereby lays a foundation for further amplification of

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35. Sannhedrin, 21b.

36. Tanakh, 334.

Scripture in the second temple era through a new literary genre, Midrash.[37]

Thus, both the historical and rabbinic approaches acknowledge the importance of the Pentateuch as the central document through which subsequent generations of Jews would define their community and their sense of historic mission. It is for these reasons that the Pentateuch plays the foundational role in the construction of all subsequent rabbinic literature, including the talmudic dialect.

Midrash

The statement in the baraita that Ezra prepared himself through study to teach the divine word of Torah corresponds with the view of many historians that the Jews of the second temple period (428 b.c.e. through 70 c.e.) saw themselves living in an era where God no longer spoke to them directly. With a written text, the creative spirit was directed towards its explication resulting in new literary forms.[38]

One such genre is Midrash. The term is derived from the verb drash which is actually found in the Ezra passage quoted above (7:10). It refers to the study of God's law. Midrash then may be seen as a type of literature, oral or written, which stands in direct relationship to a fixed canonical text and is considered to be the authoritative and revealed word of

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37. The problem of transmission from Moses to Ezra is the dealt with in next passage of Sannhedrin at 22(a).

38. Cohen, From the Maccabees to the Mishnah, 193-194.

God.[39] Jacob Z. Lauterbach, in his classic work, Mekhilta de-Rabbi Ishmael (a translation of a collection of third century midrashim), defines Midrash as:

> "[the] study of the Torah, requiring a thorough investigation of its contents, a correct interpretation of the meaning of its words and a deeper penetration into the spirit and sense of its dicta with all their implications, is designated by the term Midrash or in its fuller form Midrash Torah.[40]

Since the entire Torah was considered to be the word of God, every word, phrase, and sentence contained Divine wisdom and instruction. Lauterbach theorizes that the legal segments of the Pentateuch may have been pursued more because of the need for normative standards to guide the Jews of the second temple period. The study of the legal portions of the Torah was referred to as midrash halakhah.[41]

Origin and Development of Midrash Halakhah

The law embodied in the Pentateuch was generally looked upon as the rule of Israel's life during the second temple period. However, with this Written Law (the torah sh'bichtav) there developed an Oral Law (the torah sh'baal peh). This latter consisted of religious and national customs which underwent permutations and revisions based on changing times

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39. H.L. Strack and G. Stemberger, Introduction to the Talmud and Midrash, trans. Markus Bockmuehl (Edinburgh: Harper Collins, 1991), 255.

40. Mekhilta De-Rabbi Ishmael, trans. Jacob Z. Lauterbach, (Philadelphia: The Jewish Publication, 1933) xv.

41. Ibid., xv.

and circumstances. The authority for such changes rested in the sophrim (scribes such as Ezra) and the Sanhedrin, the authorized religious and legal court of Israel during this time.[42]

Moses Mielziner, in his work Introduction to the Talmud, advances the theory that midrash halakhah developed as a Pharisaic response to the challenge of the Sadducees during the second temple period. The latter, a minority religious sect, believed that any law not founded on the Written Torah should be rejected.[43] This presented a serious challenge to the Pharisees who had adopted and developed the Oral law without an express connection to the Pentateuch. Because of the sadducean threat, some historians theorize that the Pharisees developed this literary genre to demonstrate the Oral Law as implicit in Scripture.

David Halivni, in his work Midrash, Mishnah, and Gemara, disputes Mielziner's account which presupposes an Oral Law having developed without reference to Scripture. Instead, he argues that Midrash grew out of the natural Biblical predilection for justified law. The Pentateuch in most instances will assert a reason or basis for its pronouncements. For example, Exodus 22:20 provides:

> And a stranger shalt thou not wrong, neither shalt thou oppress him; for ye were strangers in the land

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42. Moses Mielziner, An Introduction to the Talmud, (New York: Bloch Publishing Company, 1968), 120-121.

43. Ibid., 121.

of Egypt.[44]

Under this statute, the phrase "and a stranger shalt thou not wrong, neither shalt thou oppress him" is apodictic. Up to this point, no reason is given for the rule. The clause "for ye were strangers in the land of Egypt" is vindicatory. The rationale for treating the stranger justly is because of Israel's historical experience as a people who were once oppressed. Halivni concludes, on the basis of countless such expressions found in the Bible, that an essential aspect of the Jewish experience from the commencement of the second temple period in 428 b.c.e. up to the mishnaic period (70 c.e. to 200 c.e.) was this tendency toward justified law. Midrash was a literary form which allowed this core value to be creatively expressed.[45]

In support of Halivni, Midrashic exegesis of earlier scriptural texts are already contained within the Bible (e.g. Chronicles is considered by many to be a midrashic work on the books of Samuel and Kings).[46]. Halivni contends that Midrash already existed in the 2nd century b.c.e. and thus precedes the mishnaic form. He basis this assertion on realia from this period which reflects conditions that correspond to descriptions in later redacted midrashic literature and

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44. Tanakh, 119.

45. David Weiss Halivni, Midrash, Mishna, and Gemara: The Jewish Predilection for Justified Law, (Cambridge: Harvard University Press, 1986), 4.

46. Strack, Introduction to the Talmud and Midrash, 257.

mishnayot. The Temple Scroll, which also dates from this period, supports the conclusion that proto-rabbinic drashot existed in this period.[47] Halivni's conclusions concur with those of Lauterbach and Epstein.[48] Thus, an extended prehistory of the Midrash before the rabbinic period (100 b.c.e. through 427 c.e.) cannot be denied, given the above and the existence of such documents as the Targum [an early Aramaic translation of Scripture which has midrashic overtones] and the Pesher texts of the Dead Sea Scrolls.[49]

Nature of Midrash

As mentioned above, the Pentateuch may be artificially divided into two areas. One is narrative. The Book of Genesis is a good illustration for it essentially recounts creation and the patriarchal development of Judaism through their migration into Egypt. Midrashim that creatively enhance the Biblical narrative are referred to as midrash aggadah.

The other area of midrashic activity are the legal portions and are referred to as midrash halakhah. We are principally concerned with the development of this form since the talmudic portion of this book (chapters 4 & 5) focuses on the imposition of toraittic and rabbinic oaths.

Midrash Halakhah is technically defined as exegetical

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47. Halivni, Midrash, Mishnah, and Gemara, 34.

48. Ibid., 21.

49. Strack and Stemberger, Introduction to the Talmud and Midrash, 258.

midrashim on the legal portions of the Pentateuch from Exodus through Deuteronomy.[50] Modern scholarship characterizes midrash halakah as fundamentally concerned with deriving or basing law on a scriptural passage.[51] [52] This description is supported by its redacted structure in which a phrase or a verse is first cited and then followed by its explication.[53]

Halivni divides midrashei halakhah into two distinct forms; simple and complex. When nothing beyond the text is necessary to obtain the drashah (the understanding of the text), the result is a simple Midrash. In contrast, where a specific hermeneutic device is required (such as a kal v'chomer, i.e. an a fortiori inference or gezarah sheva, a verbal analogy, (see Chapter 3)), then it is complex Midrash. Hillel (30 b.c.e. - 9 c.e.) is considered to have developed these analytical tools to derive law from Scripture or to utilize these tools in order to provide scriptural support for an already existing practice. Simple Midrash preceded complex Midrash.[54]

While generally Mishnah does not cite Scripture as support for its law, there are such references in a minority

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50. Ibid., 269.

51. Encyclopedia Judaica, s.v. Midreshei Halakhah (Jerusalem: Keter Publishing House, 1972).

52. Compare to the rabbinic view which sees midrash halakhah as part of the Sinaittic event.

53. Mekhilta de-rabi Ishmael, ed. Lauterbach, xv.

54. Halivni, Midrash, Mishnah, and Gemara, 34.

of mishnayot (pl. for Mishnah). This form, which Halivni terms mishnaic midrash, begins with a law and then proceeds to the scriptural verse which supports it. It is recognized by the formula "as it says" [in Scripture]. In contrast, midreshei halakha is characterized by such phrases as "it comes to teach" or "it declares."[55] Simple Midrash may be either mishnaic or midreshei halakhah and is believed to have existed as early as the second century b.c.e..

Modern scholars have examined the redacted midrashim collected in four major works: Mekhilta of R. Ishmael on Exodus, Sifra on Leviticus, Sifre Numbers and Sifre Deuteronomy. D. Hoffman has divided these works of Midrash halakhah into type A and type B. Type A midrashim consists of the Mekhilta and the Sifre on Numbers. Type B is comprised of the Sifra on Leviticus and the Sifre on Deuteronomy. (The former is thought to have originated in the school of R. Ishmael, a rabbi from the tanaittic period (c. 90-130 c.e.). They are characterized by extensive use of hermeneutical rules and principles. These midrashim are quoted in both Talmuds in the name of R. Ishmael. Third, the name of the tannaitic authority often cited in these works was a known pupil of R. Ishmael (130 to 160).

Type B midrashim are thought to have been developed by the school of Rabbi Aqiba (90-130). They are characterized by the use of other rules attributed to Aqiba such as "general to

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[55]. Halivni, Midrash, Mishnah, and Gemara, 34.

detail" and "detail to general" and "inclusive-exclusive" (see chapter 3).[56]

In practical terms however, one should not regard the demarcation between Aqiba and Ishmael as factual. Instead, as Albeck suggests, the differences between these two groups of midrashim are actually the work of later redactors who were familiar with both schools. Each of these works included a good deal of material of the other. Thus, as Strack concludes, the nomenclature is purely pragmatic and not historic.[57]

Both types were foundational in the development of the Talmud. The reader will recall that the sugya is concerned with determining whether the defendant, after completely denying the plaintiff's claim and then witnesses testifying conclusively that he owes part of it, should be permitted to take an oath on the disputed remainder.[58] The dialectic emerges in part because of two scriptural passages and their midrashic explication. The rule of law, which allows the defendant to testify as to a disputed remainder where the defendant confesses to a portion of the plaintiff's claim, is based on the Mekhilta's (type A Midrash) explication of a scriptural passage. However, the rule which prohibits a

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56. Encyclopedia Judaica, p. 1522.

57. Strack and Stemberger, Introduction to the Talmud and Midrash, 272.

58. The reader may refer to Chapter 1 which details the talmudic passage which this book will focus on.

defendant from testifying as to any portion of a claim which is established by the testimony of witnesses is derived from Sifre Deuteronomy (type B Midrash). There does appear a certain equivalency betweem the two concepts in that both an admission and the testimony of two witnesses are conclusive as to the substantive issue to which each pertain to. In the former, the plaintiff is permitted to testify on the remainder. Since there is a remainder in the baraita, one could argue that the defendant there be allowed to take an oath as well. We will see, however, that each rule is based on certain assumptions which the dialectic will analyze in determining whether the defendant in the baraita be permitted to swear. The point here is that the dialectic emerges in significant part because the two midrashim are analyzing different scriptural passages which, when appropriately applied to the baraita, yields contrasting results.

I have provided a general overview as to the dating and nature of Midrash as it developed initially from the post-biblical period up to the tannaitic period. The midrashim which comprise the most significant components of this thesis are taken from three sources: Mekhilta de-rab Ishmael, Sifra on Leviticus, and the Sifre on Deuteronomy. The next three sections are devoted to a specific examination as to the redactional history and nature of these works.

Mekhilta de-rabi Ishmael:

The term "mekhilta" is an Aramaic word which signifies

the derivation of halakhah from Scripture according to certain rules. Specifically, the Mekhilta is a commentary on Exodus 12,23:19; 31:12-17; and 35:1-3. Its principle concerns are the legal narratives of the second book of the Pentateuch.[59]

During the Roman occupation, Rabbi Ishmael (circa. 110-135) was made a captive and brought to Rome where he was later redeemed. Upon his return to Palestine, he became a member of the Sannhedrin. He is credited as having expanded the seven hermeneutical rules of Hillel to thirteen (see Chapter 3).[60]

These rules have been incorporated into the daily liturgy of the traditional prayerbook which supports the theory that the study of midrash halakhah is part of "torah study", which is regarded as a religious act.[61]

Jacob Lauterbach and Jacob Neusner both believe the work to have been edited between 135 and 150 c.e. Indeed, Lauterbach considers it to be the oldest tanaittic exposition. The Mekhilta reflects the point of view of the older halakhah, though it underwent considerable changes.[62] Even its first redactor added material from the school of Rabbi Aqiba. The rabbis who are cited in it, the form of the individual

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[59]. Strack and Stemberger, Introduction to the Talmud and Midrash, 275-276.

[60]. Mielziner, Introduction to the Talmud, 29.

[61]. Siddur Rinnat Yisrael: Ashkenaz Diaspora Version, edited and annotated by Shlomo Tal. (Jerusalem: Moreshet Publishing Company, 1982), 38-39.

[62]. Mekhilta, 23.

traditions, and the historical allusions, suggest a final compilation in the second half of the third century.[63]

Sifra

This work is also known as the Torat Kohanim (the law of the priests). The style is generally more argumentative than the Mekhilta and its essential parts are ascribed to Rabbi Yehuda bar Ilai (135 to 170), a disciple of Rabbi Akiva.[64] This midrashic collection originated in the middle of the second century, but additions were made later by Abba Areca (also known as Rav: 220 c.e. to 250 c.e.) and is therefore called Siphra debe Rav.[65]

This attribution is subject to debate among both traditional and modern scholars. Maimonides, in his introduction to the Mishnah Torah, states that Rav composed the Sifra and Sifre in order to explain and make known "the foundations of the Mishnah." The modern scholar A. Weiss also supports this view that Rav was the author of the work.[66]

The challenge to this theory stems from the fact that Rav often appears unaware of or even contradicts the solution of a problem found in the Sifra. For these reasons, D. Hoffman

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63. Strack and Stemberger, Introduction to the Talmud and Midrash, 279.

64. Sannhedrin, 86a.

65. Mielziner, Introduction to the Talmud, 19.

66. Strack and Stemberger, Introduction to the Talmud and Midrash, 286.

and Albeck regard R. Hiya (200 C.E. to 220 C.E.) to be its author, while H. Strack considers that the work was originally authored by Rabbi Yehuda, but that its final redactor was R. Hiya. While this may be an oversimplification, its numerous literary references to the Mishnah do provide a factual basis that the work may have been originally authored by Rabbi Yehuda HaNasi.[67]

The Sifra's emphasis on connecting Mishnah to Scripture, unlike that of the Mekhilta which emphasized the derivation of halakhah from Scripture, is commented on by Jacob Neusner.

> The pronounced tendency of the Sifra is to insist that the Mishnah's laws -- commonly cited verbatim -- not only derive from Scripture ... but can only derive from Scripture and cannot be based upon reason. Sifra turns out to be a massive, integrated, and coherent critique of the Mishnah, insisting that the Mishnah's laws are true only because the Mishnah's laws derive from the written Torah ... Sifra's polemic is pointed and explicit.[68]

Neusner's literary analysis of the Sifra suggests that its authors recognized the potential challenge to the Mishnah due to its absence of scriptural references. Unlike the Mekhilta, which is explicit in deriving halakhah from Scripture, the Sifra is a work which attempts to provide the foundational support of the Pentateuch for the Mishnah. Thus, each work recognizes the central importance that halakhah, whether

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67. Ibid., 287.

68. Jacob Neusner, "Method and Substance In The History of Judaic Ideas, An Exercise," in Jews, Greeks, and Christians eds. R. Hamerton-Kelly and Scroggs. (Leiden: Brill, 1976), 94.

embodied in a Midrash or Mishnah, is bonded to Scripture.

Sifre

The Sifre comprises traditional interpretations consisting of both the Book of Numbers and Deuteronomy. Its contents and structure are the exegetical midrashim on Deuteronomy 1:1-30; 3:23-29; 6:4-9; 11:10-26; 31:14-32; and 34.[69] The Sifre on Deuteronomy is generally brief and in this regard bears a resemblance to the Mekhilta.[70]

There appears to be a difference of opinion regarding its attribution. In one section of the Talmud, the work is ascribed to Rabbi Simon b. Jochai, a disciple or Rabbi Akiva. However, at Sannhedrin 86(a), the anonymous portions of the Sifre are attributed to Rabbi Simeon, a Shammite. On this basis, the noted scholar Louis Finkelstein argues that this work was later amended by Akiva to reflect the opinions of Hillel. In its present form, it appears to be a combination of both types of midrashim, though most scholars assign it to the type B category.[71] The final redaction is estimated in the late third century.[72]

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69. Strack and Stemberger, Introduction to the Talmud, 295.

70. Mielziner, Introduction to the Talmud, 20.

71. Strack and Stemberger, Introduction to the Talmud and Midrash, 296.

72. Ibid., 297.

Mishnah

According to Rabbi Adin Steinsaltz, the Talmud's essential task is the explication and expansion of the Mishnah. It accepts the Mishnah as incontrovertible.[73] The term "Mishnah" designates the "Oral Law" as compiled by Rabbi Judah Hanasi and his colleagues circa. 200 c.e.

In this section, four elements will be considered: (1) the etymology of the term "Mishnah" and its organizing (2) the historical setting which gave rise to the necessity for redaction; (3) the Mishnah's claim of authority; (4) its nature and relationship to both Scripture and Midrash.

Mishnah Defined

The term "Mishnah" is defined in two contrasting fashions which has implications in terms of its level of authoritativeness within rabbinic literature. Some consider it to be the feminine form of the hebrew word " mishnah", meaning second in rank. Under this definition, the Oral Law as reflected in the Mishnah would take a second position in to the Written law contained in the Pentateuch. Others consider it to be derived from the Hebrew verb "shanah" meaning to transmit or teach orally. According to Mielziner, "Mishnah" may be defined as the instruction in the traditional oral teaching in contrast to the term "mikra" which refers to the laws of the Bible. This reflects a view of Mishnah as

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73. Rabbi Adin Steinsaltz, The Talmud: A Reference Guide, 3.

independent and thus on equal footing to its written counterpart.[74]

H. L. Strack defines the Hebrew verb "shanah" in a more technical sense. It refers to "repetition" in the sense of learning or teaching of the oral tradition by repeated recitation. It also means to study.[75] Mishnah is thus given both an analytic and memorization component. It is analytic in that it stands as an independent source of law. Its structure, however, is designed to facilitate oral transmission.

Historical Setting

Two important events provided the impetus for the redaction of the Mishnah. The first was the destruction of the Second Temple in 70 c.e. The other was the failed Bar Kochba rebellion in 135 c.e. against the Roman empire. In a span of 70 years, Jerusalem suffered devastation. Hundreds of thousands of Jews were killed or enslaved and their property confiscated by the Romans. The country was renamed from Judea (which meant "land of the Jews") to Palestine ("land of the Philistines").[76]

The breakdown of national and religious structures after the destruction, coupled with official restrictions and

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74. Moses L. Mielziner, Introduction to the Talmud, 6-7.

75. Strack and Stemberger, Introduction to the Talmud, 123.

76. Cohen, From the Maccabees to the Mishnah, 214.

economic hardships imposed by Roman authority, made life for the Jew one of near despair. Nevertheless, the first post-temple academy was founded at Yavneh by Rabbi Johanan ben Zakkai. There, he was authorized by Rome to "teach his pupils" and to "perform the commandments." He reconvened the Sannhedrin and proclaimed the New Moons and leap-years. His religious approach laid a foundation for generations of Jews to follow. One was the elevation of memory to a sacred act by recalling, through ritual, Jerusalem during the Second Temple period. The other was to provide ways of adjusting to new circumstances by discarding Temple practices which interfered with the course of a new Jewish life.[11]

Near the end of R. Yohannan's life, the academy was run by Rabban Gamliel who enjoyed the widespread support of the Jews in both Israel and the Diaspora and the authorities in Rome. Roman toleration was evidenced by the fact that Rabban Gamliel was given the title and political office of Nasi. The Nasi was the central political office of Palestinian Jewry after the fall of Jerusalem. Its power increased substantially from the second to the end of the fourth century. Through this office, Rabban Gamliel unified the religious leadership and attracted many of the leading tannaim of the period to study at Yavneh, including Rabbi Akiva.

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11. Shmuel Safrai, 'The Era of the Mishnah and Talmud' in A History of the Jewish People, ed. H.H. Ben-Sasson, trans. by George Weidenfeld and Nicolson ltd. (Cambridge, Mass: Harvard University Press, 1976), 320

This led to the development of a halakhah which appeared more definitive than in the Temple period. The necessity for uniformity, given the social and political climate of Roman rule, led the rabbinic leadership to establish the rulings of Hillel as the authority for halakhah. This was a significant development because of the continuing debates among both schools on the majority of religious practices.[78]

After the devastating loss to the Romans in the Bar Kochba revolt (135 c.e.), the center for Jewish learning and leadership shifted to the Galilee. R. Meier became one of the leading authorities following the martyrdom of Rabbi Akiva and was the teacher of Rabbi Judah HaNasi. Because Rabbi Judah was the grandson of the Nasi (Rabban Simeon ben Gamliel), and the great grandson of Rabban Gamliel, he possessed a broad-based background in the varying trends of this Oral tradition and of the political and social climate of the Jewish people living both in Israel and in the Diaspora. Thus, he was eminently qualified to edit the redaction of this anthology of Jewish law.[79]

The historical factors which influenced the redaction of the Oral Law may be summarized as follows. The political climate of Roman rule coupled with the social instability of Jewish life in Israel made the continuity of rabbinic scholarship difficult. It became onerous to maintain this

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78. Ibid., 324.

79. Ibid., 340.

tradition of oral transmission which resulted in confusion over both its meaning and application. The advantages to redacting this tradition to writing would be to protect and preserve it in light of an increasingly unstable and hostile political climate. It would simplify its transmission because no longer would memorization be a prerequisite to its study and usage. Preservation and accessibility to this tradition were paramount. For these reasons, scholars such as David Halivni, David Kraemer, and Jacob Neusner assert that the predominant literary form of the Mishnah, essentially apodictic without an explicit foundational basis in Scripture, was dictated by the social conditions of the era.

The Nature of the Mishnah

The Mishnah in its present form could not have been the sole work of its redactor, Rabbi Judah HaNasi. Numerous additions were made over time and there are teachers mentioned who lived after Rabbi. Thus the term "redactor" must be broadly understood, i.e. that Rabbi was the main figure under whose authority the Mishnah essentially took shape.[80]

While the express purpose of the Mishnah is the written redaction of the Oral Law, it often records minority opinions and cites majority opinions with which its editor disagrees.[81] This raises the issue of its essential nature. There are

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[80]. Strack and Stemberger, Introduction to the Talmud and Mishnah, 149-150.

[81]. Eruvin, 38(b).

three divergent views in this regard.

Albeck considers the Mishnah an academic exercise. It was not to organize halakhic decisions for "practical applications." Instead, Albeck assumes that the redactor made no changes or cuts in the material before him, but wrote the Mishnah in the form that he had received it.[82] This would correspond to the notion of transmission from Sinai and the necessity for its preservation in the most pristine form possible. Intelligibility and readability were not its principal concerns. Instead, the preservation of God's word as expressed at Sinai was its organizing principle.

The most widespread view, as expressed by J.N. Epstein, is that the Mishnah is a legal canon in which the anonymous decisions respectively represent the current state of halakhic understanding. Rabbi Judah edited the existing halakhot and combined various sources, but preferred the majority opinion to his own. Thus, the Mishnah was created through consensus. This would account for Rabbi Judah's divergent opinion which is sometimes cited in either the Mishnah or the Talmud. It also renders it more plausible to regard the Mishnah as a group project, consistent with the established academies in the Galilee and Yavneh, with Rabbi Judah HaNasi as the overseer of the work. Furthermore, the Mishnah does not show any evidence of a personal style. And finally, there is

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82. Strack and Stemberger, Introduction To Talmud and Midrash, 151.

evidence that the Amoraim (the rabbis who lived in the period which followed the tannaim, circa. 250 to 427) regarded the Mishnah as an internally consistent legal code.[83]

Finally, the Mishnah is regarded by some as a collection of sources which included laws which were no longer valid (e.g. the laws pertaining to purification and temple ritual). As such it would account for the internal contradictions and anonymous decisions which would, by necessity, diverge from the Rabbi Judah's view.[84]

As to its style, the essential difference between Mishnah and Midrash is the Mishnah's lack of explicit citation to Scripture. It is on this basis many scholars conclude that the Mishnah is self-authoritative. The Mishnah had as its first order task to provide the essential basic definitions of the early rabbinic community. To this end, the Mishnah created a crises because in response to change, it never justified its response. For this reason, Jacob Neusner considers this form to be inherently lacking.[85]

A selection from the Mishnah of our sugya illustrates this feature:

> Two men are holding onto a garment. This one claims "I found it" and the other claims "I found it." This one claims "all of it is mine" and the other claims "all of it is mine." This one swears that he own less than a one-half interest in it and

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83. Ibid., 152.

84. Ibid., 154.

85. Kraemer, The Mind of the Talmud, 117.

> the other one swears that he does not own less than a one-half interest in it and they divide it.[86]

Several items illustrate the varying views which describe the nature of this work. First, there is no citation to any scriptural passage. Second, the terseness and abbreviated nature of the language is evidence that the work may have been the subject of memorization and then oral transmission. Certain terms which would render the work more intelligible without resort to commentary would include the contextual setting. Under what circumstances did the men come upon the garment? Where is the claim being presented (presumably in a rabbinic court)? The text itself does not make explicit the nature of the oath (what is the formula for swearing) nor does it state the precise manner in which the garment is to be divided. Is the item to be cut in-half or sold and then the proceeds divided? For these reasons, many scholars argue that the style suggests a work which was subject to memorization and intended for a select audience because it omits important elements which would be known only to a limited community, such as rabbinic scholars.

An example of minority opinions recorded in a Mishnah cited in the sugya of our Gemara:

> "... One witness said, he ate [of the forbidden fat pertaining to an offering]. And he responds, I did not eat [of it]. He is exempt [from bringing a guilt-offering]. Two said [presumably witnesses], he ate [of the forbidden fat]. And he replied: "I did not eat [of it]. Rabbi Meier would obligate

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86. Bava Metzia, 2(a).

> him [to bring an offering]. Rabbi Meier stated: "If two [witnesses] [through their testimony] have the power to impose the stringent penalty of death [in an appropriate case], should they [through their testimony in this case] compel him to make the less stringent penalty of an offering? They [the Sages] responded, what if he wishes to state: "I did it deliberately."[87]

Once again, the terseness of the style is illustrated by the number of parenthetical expressions added by the author of this book in order to facilitate the reader's basic understanding of the text. The theory that the Mishnah was essentially an oral tradition which contained mnemonic devices to facilitate memorization is illustrated by the abbreviated nature of the literary form.

However, this Mishnah points to two additional features of Rabbi Judah's enterprise. First, the minority opinion of Rabbi Meier is recorded. Explicitly, the Mishnah acknowledges a conflict in the transmission process such that there is, at least in some instances, a debate as to what the law actually is. Rabbi Meier states that the defendant is obligated to bring an offering when two witnesses testify against him. On the other hand, the Sages state he is not liable for such an offering, at least where he states in response that he commited the transgression deliberately. Finally, Rabbi Meier derives his ruling based on a hermeneutic principle of kal v'chomer, an a fortiori inference. Unlike the first Mishnah,

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87. The Mishnah: Seder Kodashim, commentary by Hanoch Albeck. (Tel Aviv: Dvir Publishing Co., 1988), 254. (transl. provided by author of this thesis.)

the ruling of Rabbi Meier is vindicatory (i.e. based on the reasoning of an a fortiori inference).[88] If the power of testimony can compel a court to invoke the death penalty, then how much the more so should the testimony of two witnesses be sufficient to compel the defendant to bring a guilt-offering. The majority dispute R. Meier's reasoning by stating what if he responded that he did it deliberately. Albeck comments:

> "I did it deliberately": --- He would be exempt from bringing an offering and since he would be able to exempt himself in this type of claim, even when he says "I ate it" (despite the testimony of two witnesses), he is believed.[89]

This Mishnah is an example of mishnayot which attempt to justify their opinion either through Scripture, reason, or other mishnayot which are analogous to them. It would fit the category of a complex mishnaic midrash because of its use of a hermeneutical principle, in this case a kal v'chomer. Furthermore, knowledge of Scripture is a pre-requisite to the understanding of this Mishnah since the former details the nature of guilt-offerings and the circumstances under which they are required. Thus, the opinion represented by many scholars, such as Dr. Ben Zion Wacholder and Dr. Eugene Mihaly of the Hebrew Union College-Jewish Institute of Religion, that Scripture is implicit in Mishnah, (one could argue even explicit in this case) as evidenced by this illustration.

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88. For a more thorough treatment of the hermeneutic rule of Kal v'chomer, see Chapter 3.

89. The Mishnah: Seder Kodashim, commentary by Hanoch Albeck. (Tel Aviv: Dvir Publishing House, 1988), 254.

The Baraitot and Tosephta: Evidence that the Mishnah was an Edited Version of the Oral Law:

Throughout both sections, it has been assumed that the Mishnah was a redacted work. The term "redacted" carries with it the notion that certain parts of the original work may not have been included. The origin of these works and their intended purpose is the subject of much scholarly research, though no definitive conclusions may be drawn.

Tosephta

Literally, the term means "addition" or "supplement" in the sense of an additional halakhic teaching which supplements the Mishnah.[90] According to Mielziner, it consists ofearlier compilations of halakha made by R. Aqiba, R. Meier, and R. Nehemia which, for whatever the reason, were not included in the Mishnah. It also includes additions by one of R. Judah HaNasi's disciples, Rabbi Hiya.[91]

Strack asserts that the common features between the Tosephta and Mishnah indicate that the works were contemporaneous with a final redaction occurring in the late third or fourth century in Palestine.[92]

The Tosephta was considered of inferior authority and thus non-halakhic by the final editors of the Mishnah. This

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[90]. Strack and Stemberger, Introduction to the Mishnah and Midrash, 168.

[91]. Mielziner, Introduction to the Talmud, 17.

[92]. Strack and Stemberger, Introduction to the Talmud and Midrash, 176.

view has been maintained throughout subsequent generations of rabbinic scholars. Alfasi, an 11th century Spanish codifier of talmudic law, holds to this opinion as well.[93]

Baraitot

As previously discussed, a baraita is a law extraneous to the Mishnah. It is distinguished in the Talmud by the phrase tannah and is subordinate to the Mishnah to which it is often juxtaposed. Often, these baraitot conflict with either other baraitot or the authorized Mishnah.[94] Because of the fragmentary nature of these statements, the dating of their origin by scholars is considered speculative.

Summary

The historical approach recognizes the inherent difficulty in deriving an accurate dating of the sources which comprise the Talmud. Clearly, such approaches cannot substantiate the rabbinic claim of Sinaittic authority for either the Written or Oral law. However, certain tentative conclusions may be drawn. First, the return of the Jews from the first exile in 458 b.c.e. was accompanied by the adoption of the Mosaic law. This Written Law became the central document through which the postbiblical Jewish society in Israel would define itself.

Second, accompanying the return of the Written Law, two

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93. Ibid., 175.

94. Mielziner, Introduction to the Talmud, 20-21.

new literary genres arose. One was Midrash which addressed the necessity to explicate the Pentateuchal Law. But certain laws or customs, some of which may have predated the exilic return, were independent of Scripture or at best made no attempt to justify their authority through a written text. This form became known as the Mishnah. Halivni suggests that Midrash predated the mishnaic form because of the Jewish predilection for justified law as evidenced in the written Torah, while other scholars remain uncommitted. In any event, most agree that the redaction of these midrashim was completed by the middle to the end of the third century. However, both historians and traditionalists would concur that the Mishnah was redacted in 200 c.e. under the supervision of Rabbi Judah HaNasi. Both groups would further submit that exigent social and political circumstances necessitated the shift in the mode of transmission from a verbal to a documentary form.

Regardless of the approach, the Talmud's antecedent sources consist of Scripture, Mishnah, Midrash, Baraitot and Tosephta. These form the building blocks of the talmudic dialectic which is the methodology for discerning the Divine will. Given the authoritativeness of Scripture in the rabbinic model and the theory of unity between it and the Oral law, knowledge of the former, which would include its midrashic explication, would be a prerequisite toward an understanding of the Talmud's treatment of a Mishnah.

Thus, in order to understand the rabbinic treatment of

the legal narratives of Scripture, one must possess the knowledge of the methodology which they utilized to derive halakha from it and/or to provide a scriptural underpinning to the Mishnaic enterprise. With this in mind, we now turn our attention to one of the basic methodological features of this process, the rules of hermeneutics which establish the parameters of these endeavors.

CHAPTER III
THE HERMENEUTICS OF THE TALMUD

Introduction

Our task now is to examine the rules of logic upon which the Torah is expounded. These rules constitute the modes through which both the midrash and the talmudic dialect speak. Through these midot (principles of interpretations; literally measures) laws are derived and talmudic arguments formulated, thus preventing capricious explanations of the Biblical text. These rules are technical and require a level of mastery in order to appreciate the Gemara. In Rabbinic Hebrew, these rules are referred to as המדות שהתורה נדרשת בהן, "the principles through which the Torah is expounded.[1]

Three sets of hermeneutic rules are attributed to different sources. The first was ascribed to Hillel (30 b.c.e to 9 c.e) and consisted of 7 rules.[2] Rabbi Ishmael (circa. 120) expanded these rules to 13.[3] Since Torah study was considered a religious act, R. Ishmael's principles of hermeneutics became part of the traditional daily liturgy beginning in the 9th century. Finally, R. Eliezer b. Yose the Galilean (circa. 170) expounded 32 such rules, which included those developed by Hillel and Ishmael.[4] The latter are

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1. Sifra, 3.

2. Tosephta Sannhedrin, Zuckermandel edit., 7.11.

3. Sifra, 3-6.

4. Strack and Stemburger, Introduction to the Talmud and Midrash, 19-25; Aryeh Carmell, Aiding Talmud Study, 5th edition. (Jerusalem: Feldheim Publishers, 1988), 89 (attached appendix titled "Order of the Tannaim and Amoraim).

chiefly aggadic and their redaction is considered to be post-talmudic.[5]

Four of the thirteen rules of R. Ishmael apply here. Each of these rules is utilized in either the sugya (chapter 4) and/or the midrashic sources contained in the scriptural foundation (chapter 5). These rules are:

> 1. *Kal v'chomer* (קל וחומר): an argument from a minor premise (kal) to a major premise (homer). It is commonly referred to as an a fortiori inference.
>
> 2. *Binyan Av Mishnei Ketuvim* (בנין אב משני כתובים): A construction - בנין - of a scriptural passage or rule drawn from two separate sources which then serves as an underpinning upon which a third ruling will be based.
>
> 3. *Gezera shavah* (גזרה שוה): a comparison of similar expressions: If the same word occurs in two Pentateuchal passages, then its construction and usage in one should be applied to the other.
>
> 4. *Kelal u-ferat u-khelal i attah dan ella ke-ein ha-perat* (כלל ופרט וכלל אי אתה דן אלא כעין הפרט): The logical sequence runs general, particular, and then general. Where a general rule is first stated, then followed by a series of specific illustrations, concluding with a restatement of the general, then the general rule may only be applied to an item which shares the common characteristic of the specific articles contained in the passage.[6]

Origin and Development

The earliest mention of hermeneutical rules is a baraita cited in the introduction to the Sifra.[7] However, the Talmud

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5. Encyclopedia Judaica, 367-368.

6. Encyclopedia Judaica, 368-369.

7. Sifra, 3.

Pesachim (which treats the subject of Passover) and the Tosephta Sannhedrin (concerned with judicial topics) record incidences in which only three of these rules are attributed to Hillel.[8] These were not actually invented by Hillel, but constituted a collation of the main types of argumentation used during the early tannaitic period (50 b.c.e to 90 c.e.).

The Sadducees, a Jewish sect which existed during the second temple period, rejected this "science" of Biblical hermeneutics. Instead, they preferred a more literal construction of scripture. Judah Hadasi, an 11th century Karaite author[9], argued that these principles of logic were borrowed from Hellenistic sources and therefore an inappropriate mode for deriving law from Scripture.[10] However, from a historical perspective, there does not appear a direct adoption of these rules from the Greek world, even

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[8]. Pesachim, 66(a). The Talmud relates an incident involving Hillel's explication of the rule which permits the slaughtering of the paschal-offering on Shabbat. He derives this rule through one of the principles known as a "gezarah shavah," a verbal analogy. (See topical heading in this chapter "gezerah shavah." Tosephta 7.11 two additional rules are ascribed to Hillel. These are the "kal v'chomer", an argument from analogy, and heqesh, an argument of equivalency pertaining to two topics and not relevant for our discussion.

[9]. The Karaites were a religious sect which began in the middle of the eighth century. Like the Sadducees, whom they considered their predecessors, they rejected the pharasaic claim of the "Oral Torah." See Robert M. Seltzer, Jewish People, Jewish Thought, 341.

[10]. Encyclopedia Judaica, 367.

though there may be some correlation between hellenistic and rabbinic rules of logical construction.[11]

These rules provide a common ground upon which to interpret Scripture and thereby fulfill the commandment to explore, discover, and to amplify the various layers of the Divine plan. Without an agreed upon methodology, the scholarly communities of the tannaitic amoraic, and saboraic periods (100 b.c.e to 600), could not develop halakhah in an orderly and discernable fashion. The Bible would become the written equivalent of tohu vavohu (darkness and void) for it would be relativistic instead of seeking the universal through a disciplined study. Arguably, divine insight into earthly affairs would be left to mysticism. The hermeneutic rules of construction, while justified through Scripture, are a uniquely human invention; a function of man's rationalism.

Kal V'Chomer (KV): An A-Fortiori Inference

A KV is a type of analogy usually formulated as a syllogism. The Hebrew word "kal" means "light in weight." From a legal point of view, it is regarded as being less significant. The word "chomer" means heavy and connotes a matter of great weight or importance.

The rationale of the KV rests on the assumption that laws operate in proportion to the seriousness of the case. In matters that reflect underlying values considered less

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[11]. Strack and Stemburger, Introduction to Talmud and Midrash, 20.

significant to the community, a lenient rule is applied. However, where the act under consideration is regarded as a greater threat to society, at a minimum the same penalty should apply, while usually a greater stringency will be invoked. For example, assume two persons A and C. A accidently strikes B in order to cause B harm. C intentionally strikes D in precisely the same manner as A did to B causing D the identical injuries which B suffered. Even though their acts are identical, we would expect A to be treated more leniently under the law than C because the latter's act was intentional.[12] Thus, C will receive a harsher penalty because the severity of the law increases in relation to acts which increase danger to a community. This rationale underlies the KV, with one modification, can be formulated as follows. If a legal stringency is applied to a matter of minor importance (the kal), then in a related matter of major import (chomer), at a minimum, the same penalty should apply. The rule operates in reverse as well. If the law is lenient in a significant matter, then one may conclude the same leniency will apply in a similar case, but which is of lesser importance.[13]

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[12]. In talmudic terminology, the KV might be phrased as follows. If A, who accidently struck B, suffered the penalty of having to pay damages in the amount of $100, then how much the more so should C, who intentionally struck D, pay at least $100.

[13]. Mielziner, Introduction to the Talmud, 131.

An Illustration of the KV from Scripture; The Story of Miriam

A story is told in the Book of Numbers in which Aaron and his sister Miriam speak against Moses to the Israelites because the latter had married a Cushite woman. Their argument is a pretext to challenge Moses's leadership.

> Has the Lord spoken only through Moses? Has He not spoken through us as well.[14]

God became enraged, as it were, at this outburst and suddenly appeared as a pillar of cloud at the Tent of Meeting. There, the Almighty confronts them:

> Hear these My words. When a prophet of the Lord arises among you, I make Myself known to him in a vision, I speak with him in a dream. Not so with My servant Moses; he is trusted throughout My household. With him I speak mouth to mouth and not in riddles, and he beholds the likeness of the Lord.[15]

Immediately, the pillar withdrew from the Tent. Aaron turned to his sister who had suddenly developed leprosy. Aaron repented and pleaded with Moses that she should not die with half her flesh eaten away. Moses cries out for God to heal her. God replies:

> If her father spat in her face, would she not bear her shame for seven days? Let her be shut out of camp for seven days, and then let her be readmitted.[16]

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14. Tanakh, 227.

15. Ibid., 227.

16. Ibid., 227.

This is the biblical derivation for the KV. If a father humiliated his daughter after her repulsive act such that she would bear shame for seven days, then how much the more so God humiliate one of his children who has committed the respulsive act of challenging God's judgment in selecting Moses as his vessel to Israel, at a minimum, bear shame for seven days.

From this incident, the Talmud derives a basic principle of the KV which limits its effect and serves as an additional tool for understanding its operation. The Gemara in the tractate Bava Kamma provides:

> The principle of dayo [a limitation on the KV that the law derived from such an inference cannot go beyond the source from which it is based] is derived from Scripture for a baraita teaches: "God said to Moses, if in a case where a father justifiably spits before her, surely she would suffer embarrassment for seven days." How much the more so, in the case involving the Divine Presence [which would be a far greater offense] should she suffer embarrassment for [a greater period than] seven days. Nevertheless, it is sufficient for the law to be the same as the law found in the source from which the inference is made.[17]

In this baraita, two principles are shown. First, there must exist a sufficient level of similarity such that the law in one should apply to the other. The baraita suggests that the nexus between the two is the act of embarrassment suffered by the daughter which is caused by the latter's challenge to authority. Second, despite the similarity of the two cases, one would normally expect the punishment against Miriam to be more severe because it involves the Divine. However, since

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17. Bava Kamma, 25(a).

God justifies the necessity for punitive action from the case of the father-daughter, we learn that the punishment cannot exceed that of the original source from which the analogy is made.

An example from our sugya will serve to illustrate the KV in the talmudic process. Recall from Chapter 1 R. Hiya's rule which would require a defendant to take an oath denying the remainder of the Plaintiff's claim where witnesses have testified to only a part. R. Hiya argues that the foundation for his ruling rests on the principle that the effect of admissions (which results in an oath) does not have any greater impact than the testimony of witnesses. This axiom, he asserts, is derived from a KV.[18]

The Gemara will then try to formulate in three separate instances this KV. One such instance is as follows:

> And what is this KV? If admission which does not render the defendant obligated for monies, yet nevertheless requires him to take an oath, then how much the more so should witnesses, who do render him liable for monies, compel him to take an oath on the disputed remainder.[19]

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[18]. Bava Metzia, 3a. An admission to any issue in a lawsuit dispenses with the necessity for any further proof. In this sense, it is considered a "lighter" case. Nevertheless, an oath, which is a stringent condition, is administered against the defendant despite his apparent honesty. But where a defendant has denied a claim in its entirety such that the plaintiff has been forced to produce independent evidence, the former's honesty cannot be presumed. In such a case, at a minimum the same stringency of the oath should be administered on the remainder.

[19]. In Jewish law, once two witnesses have testified on a particular aspect of a lawsuit, in the absence of two contradictory witnesses, it is considered res judicata (a

In this case, the source of the KV is the rule of law pertaining to a partial admission ("ADM"). A defendant who admits to a part of the plaintiff's claim is not responsible for monies.[20] Nevertheless, the defendant must take an oath. In the more severe case where witnesses ("WS") have obligated the defendant for monies, how much the more so should the same requirement of the oath be imposed be on the disputed remainder.

Moses Mielziner summarizes the application of the KV as containing three elements. The first premise is that case A and case B have a relationship of minor and major importance. Second, A contains a certain restrictive or permissive law. Third, this same law is even more applicable to B.[21] Applying this formulation to the above-example, the law of ADM is of lesser significance than that of WS in that the former does not oblige the defendant for monies, while the latter does. Nevertheless, an ADM also has the stringency of the oath as to a disputed remainder. At a minimum, this demand should be applied to the case of WS who do oblige the defendant for monies.

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final determination as to that issue) and the defendant is barred from testifying on that particular aspect.

[20]. The reader may seem confused because an admission does oblige the defendant for the sum which he admits. The Gemara will challenge the KV on this basis. See "Refutation of the Kal V'Chomer" immediately following this section.

[21]. Mielziner, Introduction to the Talmud, 130.

Refutation of the Kal V'homer

A KV is refutable by two means. The most common is to demonstrate that the premise in the antecedent (the A element), which was considered to be of minor importance, is in some other respect of major importance. Then, one must show that B is not as important in the same respect. In other words, the respective cases are distinguishable such that the analogy and the inference drawn are unsuitable. In effect, element A, which implies the relationship between the two terms of the syllogism, is a false assumption.

Returning to the above example, the Gemara challenges this KV by using this approach.

> Is it possible to maintain that an admission does not oblige the defendant for the payment of monies. Surely, the admission by a litigant is equivalent to the testimony of one hundred witnesses![22]

An important distinction between these two rules exists. Once a litigant has admitted to something, he becomes obligated. No further testimony is necessary. Second, Jewish law considers a single admission to be as powerful as countless witnesses. Thus, admissions and witnesses do not stand in a relationship of minor to major importance and thus no

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[22]. Bava Metzia, 4(a).

inference may be drawn.[23] The Gemara will then suggest a new KV.

Another refutation of a KV is to demonstrate that the peculiar law in A cannot be transferred to B for the following reason. There exists a case C which is legally equivalent to B. The peculiar law in A does not apply to C. As a result, this same law cannot be utilized in B.[24]

The Importance of Preserving a Refuted KV

One might argue that, given the ease with which the Gemara refutes the first KV formulation, little value is gained from including it within the talmudic dialectic. Since the Talmud's primary purpose is to discern the Divine Intention, it is confusing to include such material.

In response, the Talmud emphasizes the unique role of humanity in the process of understanding Divine law. The rabbinic communities of this period believed that the creation of the universe and its continued existence was an act of rationality. A nexus between God and humanity is intelligence and thus the engagement of the human intellect (not the

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23. If one examines R. Hiya's formulation, it is clear that he does not require that the law of witnesses be of major importance in relation to the law of admissions. Rather, the effect of an admission, in relation to the oath, should not be any more efficacious than that of witnesses. Therefore, the baraita would hold true if one could even demonstrate a legal equivalency between them. The significance of this formulation will be developed more fully in Chapters 5 and 6.

24. Mielziner, Introduction to Talmud, 6.

intellect itself) must be accorded revered status, even if the resulting formulation is refuted. This reverence for the deliberative process is reflected in the following passage from the Talmud Berachot (a tractate dealing with blessings):

> R. Judah said in the name of Samuel: If someone awoke to study before reading the Shema he must bless. . . . R. Huna said: For [the study of] Scripture one must bless, but for Midrash one need not bless. R. Eleazar stated: For Scripture and Midrash, one must bless, but for Mishnah one does not have to bless. R. Yochanan said: even for mishnah, one must recite a blessing. And Rava said: Even for Talmud, one must bless.[25]

This citation illustrates the development of sacred literature to include that of the Talmud. This sugya began with the requirement of reciting a blessing only for the study of Scripture. It concluded with Rava, traditionally considered the author of the Babylonian Talmud, who held that the talmudic process was a holy endeavor. Rashi, in a parallel allusion to a Midrash, comments:

> Even for [the study of] Gemara[26] it is necessary to [recite] a blessing: For it is a principle of the Torah that Divine instruction emanates from it [the Gemara].[27]

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[25]. Talmud Berachot, 11b.

[26]. Rashi may be citing a different manuscript than the Vilna edition for he uses the word gemara (גמרא) instead of talmud (תלמוד) in his initial reference. It is also possible that Rashi is suggesting that the terms are synonymous. The significance of this latter interpretation is brought out above.

[27]. The hebrew is important to establish Rashi's allusion to a midrash from Genesis Rabbah.
אף לגמרא צריך לברך. שהוא עיקר התורה שממנו הוראה יוצאה.

The phrase "that Divine instruction emanates from it" is found in Genesis Rabbah. The Midrash is exploring the meaning of Genesis 22:2 when God first tells Abraham to sacrifice his beloved son Isaac.

> And He [God] said, "Take your son, your favored one, Isaac, whom you love, and go [for your benefit] to the land of Moriah, and offer him there as a burnt offering on one of the heights that I will point out to you.

The Midrash comments on the phrase "and go [for your benefit] to the land of Moriah":

> R. Hiya Rabbah and R. Yonai: One [rabbi] said, <u>to a place where Divine wisdom will emanate from the world</u>.[28]

Rashi writes:

> [The Divine instruction went out] from the Sannhedrin that would sit in the Temple courtroom as it says in Scripture "that the Torah will go forth from Zion."[29]

The historical institutions of the Temple and the Sannhedrin are linked to the mystical relation between God and Abraham at Mt. Moriah. Abraham submits to the Divine Will

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[28]. <u>Genesis Rabbah</u>, p.224. The identical phrase שהוראה יצאה is found in this midrash. This suggests that Rashi is equating the writing of the Talmud with the Temple Mount which was considered the dwelling place of the Almighty from where Divine teaching emanated. The term "הוראה" is ambiguous in the rabbinic literature of this period. It can represent <u>Divine Wisdom</u> or human, but inspired teaching. This latter understanding is reflected by allusion to the Sannhedrin which was empowered to issue <u>takanot</u>, halakhic rulings, which were not explictly derivative of Scripture. In contrast Mt. Moriah symbolizes a direct encounter with the Divine for the purpose of demonstrating the submission of the human will to God's directives.

[29]. <u>Berachot</u>, 11b.

wholeheartedly. Yet, midrashim on the story of the binding of Isaac reflect an Abraham who examines closely the humanity of what God has called upon him to do. All of this occurred at Mt. Moriah. Likewise, this same place should be later identified in tradition as the site of the Temple and the Sannhedrin where humanity would again meet with the Divine in order to discern God's will, to submit to it, and to integrate it in the world. With the Temple destroyed and the institution of the Sannhedrin dismantled for centuries, the seat of Divine wisdom where humanity and the Divine would once again encounter one another would be through the Talmud, a symbol of the rational endeavor to discern God's intention.

Rashi comments on the nature of the Gemara.

> The Gemara's purpose is to establish the rationale of the Mishnah; to harmonize contradictory mishnaic passages, and to determine where a relation [in law through analogy] is defective.[30]

Therefore the process of argumentation, even if refuted through the dialectic, is a sacred task and each assertion is worthy of consideration. For these reasons, Rava ruled it necessary to recite the following blessing before engaging in talmudic studies:

> Blessed are you, Lord our God, king of the universe, who has sanctified us through his commandments and has commanded us to engage in words of Torah.[31]

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30. Ibid., 11(b).

31. Ibid., 11(b).

An "engagement in the words of Torah" includes all the various modes of intellectual processes. It involves formulation, analysis, criticism, and often a new assertion of the law. The task is sacred and therefore even arguments which are refutable must be recorded and carefully weighed. It is an enterprise worthy of human blessing.

In summary, a KV allows for the engagement of the rational faculty with scriptural and oral legislation. On the basis of analyzing certain passages, relationships between legal circumstances may be established from which inferences may be drawn. However, these inferences are challengeable by examining the assumptions which provide the basis for the KV syllogism. This examination by the Talmud continues the chain of הוראה (Divine Instruction), which began with Abraham and God at Mt. Moriah, continued with the Sannhedrin, and is now revealed in the pages of the Gemara.

Binyan Av Mishnei K'tuvim

This rule of interpretation is based on induction. Its structure is somewhat complex and a few readings may be required to understand its operative effect. However the following syllogism may prove helpful as a foundation for understanding its application in the sugya.

1. Case A is analogous to Case B.
2. Therefore, an assertion is made that the law of A should apply to B.
3. An objection is raised regarding the analogy so as to render it non-viable.

4. Case C is introduced which is similar to A. The same law applies in each case.
5. C is analogous to B.
6. Therefore, since C is analogous to both B and A, the same law should apply to C as well.
7. A challenge is made to the analogy of C to B.
8. This challenge is then minimized by showing that A and C share a common factor which causes a certain rule to be invoked.
9. B shares this common factor as well. Therefore, the same law of A and C should apply to B as well.[32]

Applying these steps to an example from the passage in Bava Metzia will clarify this hermeneutic rule:

Case A: The law of partial admission (ADM): defendant admits to part of the plaintiff's claim --- Oath is imposed on the remainder.

Case B: Testimony of two witnesses establishing partial validity to plaintiff's case ----- R. Hiya rules that an oath is imposed (WS). [The Gemara attempts to clarify R. Hiya's reasoning which supports the ruling through this hermeneutic principle of binyan av mishnei ketuvim].

Case C: The law of one witness (SW): Where one witness testifies to a part of the claim, the defendant is required to take an oath rebutting the witness's testimony. This oath is then rolled over to compel the defendant to swear on the remainder.

1. A is analogous to B: In both cases, the partial validity of the Plaintiff's claim is established. There is also a disputed balance. One would normally expect that the harsh requirement of an oath would not be dictated since the defendant has voluntarily admitted to owing a partial. He should be believed without an oath as to the remainder. Nevertheless, an oath is enjoined.

2. The assertion that the law of A should apply to B: How much the more so then in Case B, which is more stringent since the plaintiff has been forced to bring witnesses in light of the defendant's denial, compel him to take an oath.

3. The objection which makes the analogy invalid: The case of PA is distinguishable from that of WS in that the former is not subject to contradiction. Once an admission is made, no witness may refute it. In the case of WS, the

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[32]. Steinsaltz, The Talmud: A Reference Guide, 150.

defendant may bring other witnesses to testify on his/her behalf. Therefore, the law of A should not apply to B.

4. C is introduced which is analogous to A: The plaintiff may bring a single witness which causes the Defendant to take an oath on that portion of the claim which the single witness has testified to. Once the defendant takes an oath on that portion, it is "rolled-over" to apply to the unsubstantiated segment of the Plaintiff's claim. Thus, the oath is applied in both SW and PA. C is analogous to A.

5. C is analogous to B: Both are subject to the law of contradiction. In B, the defendant may bring witnesses to testify against the plaintiff's. Likewise in C, the defendant may produce other witnesses to contradict the plaintiff's proof. Thus C is similar to B.

6. Since C is analogous to both A and B, the same law should apply to B as well: As shown above C is similar to A and B. In A and C, an oath is imposed on the remainder upon which no evidence has been proffered. C is analogous to B in that the defendant can produce other witnesses to contradict the testimony of the plaintiff's witnesses. Since in C, the defendant is obliged to take an oath, likewise in B, the same requirement should be imposed.

7. The challenge to the analogy between C and B: C is distinguishable from B. The only reason the oath is imposed on the remainder in C is because the defendant must give testimony refuting the single witness. But in B, the defendant is barred from taking an oath and contradicting the testimony of the two witnesses. Thus, no oath may be dictated on the remainder based solely on the analogy of the SW to WS.

8. This challenge is minimized by showing that both A and C share a common factor: Both A and C evolved through a claim and denial by the respective litigants. It is this factor that allows the oath to be imposed on the disputed remainder in these cases.

9. B shares this common factor as well: B arises because of a claim and denial. Therefore, an oath should be imposed on the disputed remainder.

To summarize: A <u>binyan av</u> is similar to an algebraic equation. If A = C (in an important aspect) and B = C (in the same respect), even though A and B may be significantly

distinguishable, nevertheless A = B such that the law which applies to both A and C, can now be applied to B.

Gezera Shava

Literally, a gezera shava means "a similar decision." If a word or phrase is found in separate Biblical passages and defined in one of them, then its interpretation may be applied in the other verse.[33]

The gezera shava is also used to apply a rule of law found in one scriptural passage to another. If a term is contained in a section of Scripture along with a rule of law, then if the same term is found in a separate passage but no rule provided, one may infer the rule's application to this passage as well.[34]

There are restrictions for its use. First, the identical expression must at least be undefined in one of the verses and appear superfluous. Second, no one is permitted to reason from a gezera shava on his own strength. Rather, a gezera shava must be learned from a rabbinic authority within the chain of tradition.[35]

An example taken from the Mekhilta de-rabi Ishmael illustrates its use. Exodus 22:6-7 provides:

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33. Moses Mielziner, Introduction to the Talmud, 150.

34. Steinsaltz, The Talmud: A Reference Guide, 150.

35. Strack and Stemburger, Introduction to the Talmud and Midrash, 21.

> (6) When a man gives money or goods to another for safekeeping, and they are stolen from the man's house - if the thief is caught, he shall pay double; (7) if the thief is not caught, the owner of the house shall depose before 'Elohim' (lit. God) that he has not laid hands on the other's property.[36]

The phrase "the owner of the house [i.e. the bailee] shall depose before 'Elohim'" is ambiguous. The Mekhilta turns its attention to verses 9 and 10 of the same chapter.

> (9) When a man gives to another an ass, an ox, a sheep or any other animal to guard, and it dies or is injured or is carried off, with no witnesses about, (10) an oath before God shall decide between the two of them that he has not laid hands on the other's property.[37]

The phrase he has not laid hands on the other's property is found in both sections. Therefore, the law which applies in 22:9-10 pertaining to negligent bailment may be applied to 22:6-7 relating to stolen property. In the former, the individual is brought before "Elohim" which the Mekhilta interprets to be a court of law. Since the alleged negligent bailee is brought before judges and is made to swear that he has not misappropriated the item, then the bailee in the stolen property case must be brought before a tribunal and swear that he has not made use of the item for his own benefit. Thus, an entire body of law may be transferred from

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[36]. Tanakh, 119.

[37]. Ibid., 119.

one scenario to another on the basis of an identical expression found in each passage.[38]

K'lal U'Phrat Uk'lal

Where a scriptural passage contains a general statement of law, followed by a list of details, and then a restatement of general principle, the rule of law applies only to the common element found in the specific items.[39]

A good illustration is taken from the Mekhilta. Exodus 22:8 provides:

> In all charges of misappropriation - pertaining to an ox, an ass, a sheep, a garment, or any other loss whereof one party alleges "this is it" - the case of both shall be brought before God: he whom God declares guilty shall pay double to the other.[40]

Dissecting each of the phrases will demonstrate how the rule operates:

1. In all charges of misappropriation: This is a general statement. If a rule was then stated, it would apply to any item.

2. Pertaining to an ox, an ass, a sheep, a garment: These are specific items and thus far the rule would operate to include only these specific articles.

3. Or any other loss: This is a general statement indicating once again any item which is alleged to have been misappropriated by another.

The Mekhilta analyzes the common factor of the specific items because of the general phrase "or any other loss." It

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38. Horowitz and Rabin, Mekhilta de-rabi Ishmael, 300.

39. Mielziner, Introduction to the Talmud, 167.

40. Tanakh, 119.

notes that each of them are personal property and are capable of being moved. In common law, they are referred to as chattels. Thus, the rule that is subsequently formulated will not apply to real property, i.e. land.[41]

This law may be stated as follows. In any matter involving a charge of misappropriation of personal property where the defendant states "this is it" and the plaintiff disagrees, the case shall be brought before a court of law. Each will have to take an oath and the Court will determine the guilt of the respective parties. If the defendant is found guilty, then he must pay double damages to the plaintiff.[42]

CONCLUSION

Moses L. Mielziner characterizes these rules as artificial because their aim is to provide a methodology which would justify the oral law with the written law.[43] R. Isaac Unterman argues that these rules evolved as a response to the Sadducees who undermined the legality of the Oral Torah since its basis in scripture was not apparent. He concludes that in

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41. Horowitz and Rabin, Mekhilta de-rabi Ishmael, 300-301.

42. As will be shown in Chapter 5, the phrase "this is it" is the scriptural basis for the rule of invoking an oath on the remainder where the defendant admits to a part of the plaintiff's claim. The phrase "this is it" constitutes an admission of at least a minimum level of liability. Since the remainder is in dispute, an oath is mandated based on this passage.

43. Mielziner, Introduction to the Talmud, 186.

order to extend scripture to embrace the oral tradition, a logical method was employed which established a strong connection between the two in order to meet the sadducean challenge.[11]

We may argue an added dimension to these rules. The rabbis of the tannaitic, amoraic, and saboraic periods were scholars. Their area of expertise was the understanding of sacred texts and traditions which they considered an expression of the Divine. Consistent methodology for amplification would have been an important factor, for it brought humanity's most distinguishing features, intelligence, reflection, and logic into the process of discerning the meaning of Sinai. These hermeneutic rules were a concrete expression that just as the act of creation was a purposeful act, its rationality could be understood only through a disciplined system of logic and reason.

This view of hermeneutics takes issue with the argument formulated by Dr. David Kraemer in his important work The Mind of the Talmud: An Intellectual History of the Bavli. Dr. Kraemer suggests that because Divine revelation ceased after Sinai and the prophetic period, knowledge of God's intention could only be discerned through the intellectual engagement of the sacred texts. As such, the interpretive enterprise itself was regarded as sacrosanct.

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11. Isaac Unterman, The Talmud: An Analytical Guide to Its History and Teachings. (New York: Bloch Publishing Company, 1952), 106

> The point that emerges from the "Talmudic" form common to the Yerushalmi and the Bavli is the same: the most important concern may not be truth, but the process by which that truth is approached.[45]

Granted, hermeneutics and the talmudic dialect were the processes through which the rabbinic communities approached the sacred texts. But these tools, uniquely human but regarded as a blessing from the Divine worthy of a daily prayer of thanksgiving, were not the center of the endeavor.

A simple analogy might illustrate the difference. Materials and tools are necessary for the carpenter to build a house. Under Kraemer's analysis, the builder's most important concerns are the building materials and skill, not the finished product. Kraemer's theory suggests that the hermeneutic rules and their application were more valued than the Divine Truth represented by the sacred texts. Extending the argument one step further, human reason and argumentation would be more important to the rabbinic communities of this period than the sacred literature which they viewed as their mission to comprehend.

While the structure of the Gemara reflects the importance of man's rational faculty in comprehending the Divine, Kraemer's conclusion is not convincing. The hermeneutic rules and the talmudic dialect, the products of the human intellect, were significant tools and building materials, but were not regarded as the heart of the enterprise. Instead, the

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[45]. Kraemer, The Mind of the Talmud, 122.

utilization of these devices provided a common language and methodology. These instruments, like the tools and materials in the hands of skilled carpenters, allowed the rabbis of this period from 100 b.c.e. to 600 c.e. to engage these texts as a community of scholars. The ultimate goals were to discern the Divine intention and to implement it in the world. They were building a home for the Divine will on earth.

However, it would take generations, perhaps an eternity, to complete this dwelling place of God on earth. Human understanding of the Divine found in the endless pages of the sacred literature became God's abode. Therefore, a common methodology would afford them the opportunity for cross-generational dialogue and continuation of the building process. A scholar from the amoraic period (250-425 c.e.) could engage in a dialogue with a rabbi from the tannaitic period (100 b.c.e to 250 c.e.). Ultimately, in the hands of the Talmud's authors, a rabbi from any one period could debate, argue, or reason with a scholar from another generation whether earlier or later in time. However, this genius of human creativity was always subordinate to its goal; the building of God's design from the blueprint of Torah into the realities of human existence and growth.

A consistent methodology and common language were the human imperative. With this in mind, we now enter a small section of this still incomplete abode by examining the <u>baraita</u> of R. Hiya from Bava Metzia.

CHAPTER IV
THE TALMUD'S RESPONSE TO THE BARAITA OF RABBI HIYA

Introduction

We now turn to an analysis of the baraita of R. Hiya as engaged by the Gemara in the Talmud Bava Metzia 3(a)-4(a). The writing will appear at times legalistic and syllogistic because of the abbreviated nature of the language and the style of the text. While not a literal translation, an attempt has been made to capture the "flavor" of a direct reading.[1]

Another aim is to furnish the necessary antecedent materials which, though cited in the text, are not fully explicated. For example, the authors assume that the reader comprehends the Mishnah under which this topic is presented, for one of their goals is to test whether the baraita is consistent with the Oral Tradition edited by R. Judah HaNasi. Wherever appropriate, such texts and their analysis will appear in order to clarify the text.[2]

From this process, certain theological issues and their role in the development of the talmudic dialectic will emerge. For example, when one disengages from the text and examines its thematic structure, one of the central concerns which

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[1]. These segments will be delineated by appearing in bold print in order to distinguish the text from the analysis segments of this work. The appearance of words enclosed in "[]" were inserted to provide syntax and clarity for the reader.

[2]. These remarks will appear triple-spaced from the revelant text, in normal print, double-spaced, and designated by the symbol "*" both at the beginning at end of each segment.

emerges is the imposition of an oath. This oath injects the Divine element in a legal endeavor to resolve a dispute; a procedure adopted in Anglo-American jurisprudence without hesitation. Yet the Gemara's exhausting analysis suggests that the decision to adopt R. Hiya's rule as part of the corpus of halakhah was heavily debated. This fact points to underlying religious themes more fully developed in such antecedent works Scripture, Mishnah, and Midrash. These are the sources that provided the necessary fuel for the dialectic of the Bavli. These topics will be highlighted and then analyzed in Chapter 5.

I. THE RULE AND RATIONALE OF R. HIYA

The baraita of R. Hiya states the following. The plaintiff claims that the defendant owes him $100 which the defendant completely denies. Witnesses then testify that the defendant owes $50. In such a case, [in order to be relieved of any further liability], the defendant [must pay the $50 in the absence of independent witnesses] and swear that he does not owe anything on the remainder. The rationale for this rule is that a defendant's admission should not have any greater effect than the testimony of witnesses and is derived by a KV.

*This baraita assumes the reader's familiarity with two scriptural principles. One provides that when two witnesses testify to any matter on behalf of a litigant and the opposing

party fails to offer both contrary and independent evidence, those matters are considered concluded and the defendant is barred from testifying.[3] This rule has already been referred to in Chapter 3 and will be designated by the symbol "WS" (witnesses) throughout this chapter.

The other is with regard to admissions. When a litigant admits to a part of the plaintiff's claim, but there is no independent evidence to support the balance, the defendant may take an oath disavowing liability on the remainder. This rule, also already referred to in Chapter 3, will be designated by the symbol "ADM" (admissions).

R. Hiya's argument rests on the assumption that ADM and WS stand in a legally analogous relation of either minor to major importance or at a minimum are legally equivalent in their impact on litigation. Both have the effect of conclusively establishing disputed issues. When a defendant admits liability, no further proof is necessary. Likewise, when two witnesses testify on a matter and the defendant lacks contradictory, independent evidence, then their testimony is conclusive. Since ADM permits an oath on a disputed remainder, then under this case where witnesses testify and there remains an issue of further liability, R. Hiya argues that an oath should be imposed as well.*

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[3]. See Deuteronmy 19:15. In modern law, this would be referred to as res judicata, i.e. the matter fully adjudicated. Obviously, the defendant in a modern court may testify regardless of the lack of independent proof in his defense or the number of witnesses a plaintiff may produce.

The baraita harmonizes with the Mishnah "where two are holding onto a garment and this one states 'I found it, etc.

*The baraita refers to the Mishnah found at the beginning of this Talmud:

> Two [litigants who have come before a court] are [literally] holding onto a garment. This one states 'I found it' and this one states 'I found it.' This one claims 'all of it is mine.' And this one claims 'all of it is mine.' This one swears that he does not have less than a one-half interest in the garment and the other swears that he does not have less than a one-half interest. They divide the article [in accordance with their oath] and each acquire a one-half interest in it.[4]

The Mishnah assumes that both have actual possession of a part for if only one had it in his control, then the other would have to furnish independent proof through witnesses in order to acquire any interest in it. The reason is that sworn testimony by a litigant in the absence of any other evidence is legally insufficient to take property which is in the possession of another.*[5]

In the Mishnah, the court acts as a witness because it can see that each party is holding a part while claiming the entire article. In such a case, [where there is a dispute with no independent evidence to resolve it], the Mishnah determines that liability and entitlement are resolved through an oath. [Likewise, the baraita's issue is the resolution of

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4. Bava Metzia, 2a.

5. Rashi, Bava Metzia, 2a.

a disputed remainder in the absence of independent evidence. The mechanism to settle the dispute should be the oath. Thus, R. Hiya's ruling is consistent with the Mishnah.]

II. THE NECESSITY FOR THE KV

[The Gemara's first examines R. Hiya's need for a KV.] **What then is the necessity and meaning of the statement that an admission does not have a greater effect than the testimony of witnesses and that this rationale is supported by a KV?**[6]

*In the case of an ADM, the Torah imposes an oath upon the Defendant to deny the balance of the claim. The rationale for this rule, provided by Rabbah, is derived from the following. A loans B a certain sum of money (interest-free) to which B admits owing only a part. B then swears that he owes nothing on the remainder. The psychological tension in the borrower is evident for part of him wishes to deny the entire claim. Yet, he is not so arrogant as to repudiate it altogether. Paradoxically, another part of him wants to admit the entire claim, but he lacks sufficient funds. Thus, in order to "buy time", he admits to only a portion. The Torah therefore imposes an oath to relieve the anxiety that results from the half-truth and half-lie of the defendant.

However, this psychological tension, which forces an oath, is absent in the baraita. There, the defendant denies everything, forcing the plaintiff to produce witnesses.

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6. Bava Metzia, 3(a).

Without an admission, there is no extrinsic evidence of the defendant's desire for honesty sufficient to impose a toraittic oath. Therefore, the case of an ADM is not legally equivalent to the baraita.[7] For this reason, R. Hiya must provide, through a rule of hermeneutics such as a KV, a basis for requiring an oath on the remainder in the case of WS.

III. KV No.1:
A. Admissions and Testimony Are Legally Analogous And Stand In A Relation Of Minor to Major Importance

An admission to a part of a claim does not obligate one for payment of monies. Nevertheless, it does require him to take an oath as to the remainder. However, WS do oblige the defendant to pay. Thus, if an admission, which does not require payment nevertheless enjoins the defendant to take an oath, how much the more so should witnesses, who do render a litigant liable for monies, compel an oath as to the remainder.

B. Challenge to KV No. 1: ADM Is Legally More Powerful Than WS

The Gemara rhetorically asks, "admissions do not obligate one for the payment of monies?" Citing a baraita from the Tosephta of Bava Metzia, the Gemara asserts 'surely the

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7. In modern jurisprudence, the principle of stare decisis dictates that where a current case is sufficiently similar to a case which has been previously decided, then the law of the latter is applied to the former. However the case under deliberation must be "on all fours" factually for this principle to be invoked.

admission of a litigant is the equivalent to the testimony of one hundred witnesses.'

Once a litigant admits to the plaintiff's claim, no further proof is required. Thus, the laws of ADM and WS do not stand in a relation of minor to major importance. Instead an admission is more powerful than the testimony of witnesses.

C. Response and KV No. 2: WS Impose The Severe Penalty of Fines While ADM Do Not: Thus They Do Stand In A Relation Of Minor to Major Importance

This conflict is resolved by defining the term "mamon" (money) as a fine. [While both may conclusively determine liability], where the defendant admits to the claim of the plaintiff, no fine is levied on account of the defendant's overt act of honesty in open court. Nevertheless, an oath as to any disputed balance is imposed if the defendant wishes to be relieved of further liability. In contrast, where witnesses are required because of the defendant's denial, a fine may be assessed because of the defendant's apparent dishonesty. Since an oath is required in the case of an ADM despite the defendant's truthfulness and the absence of a fine, how much the more so in the case of WS, where the defendant's integrity is in question and a fine charged, should the oath be imposed.

IV. The Relationship Between Admissions and Witnesses

A. Challenge: An Admission Charges A Litigant With Greater Religious Obligations Than The Testimony of Witnesses

The distinguishing characteristic between ADM and WS, so as to preclude a KV, is that the former requires a sin-offering, while the latter does not.

> *Its argument is based on Leviticus 5:4:
>
> Or when a person utters an oath to bad or good purpose-whatever a man may utter in an oath-and, though he has known it, the fact has escaped him, but later he realizes his guilt... he shall confess that where he has sinned... and he shall bring as a penalty to the Lord, for the sin of which he is guilty, a female from the flock... as a sin-offering.[8]

The Torah requires two psychological elements in order for a vow to be atoned for; self-acknowledgment and confession. The person must have an inner-awareness of his sin. Second, there must be the overt act of confession, i.e. an admission of the sin. When a person's actions are congruent with his conscience, he is authentic. Only in this ontological state may a person commune with God vis-a-vis the sin-offering.[9]

A wrongful vow may be taken negligently and thus a person may incur guilt. Even then, Scripture requires that the individual realize the wrongfulness of the act itself and then, to be relieved of this guilt, bring an offering:

If any person from among the populace unwittingly

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8. Tanakh, 158.

9. Bava Metzia, 3b (Rashi).

> incurs guilt by doing any of the things which by the Lord's commandments ought not to be done, and he realizes his guilt - (28) or the sin of which he is guilty is brought to his knowledge - he shall bring a female goat without blemish as his offering for the sin of which he is guilty. [Leviticus 4:27][10]

In both instances, the essential characteristic of an admission is an overt act which reflects the conscious awareness of wrongdoing. Confession and offering are the behaviors that represent contrition for this state-of-being.*

But this condition is absent in the defendant where the plaintiff has been forced to produce witnesses.

> *"Where witnesses have contradicted his denial in court, he does not bring an offering for it is written "that the information is brought to him." [This means] an offering is not made where others inform him of his mistake. [Instead, he must realize his mistake and admit it.]"[11]

Thus, the assumption of legal equivalency between an ADM and WS so as to support a KV is refuted. Instead, an ADM does have a more powerful effect than WS for the former imposes the added requirement of an offering.*

However, R. Hiya relies on the minority opinion of R. Meier as recorded in the following Mishnah.

> **"Two witnesses stated to an individual that "you [accidently] ate of the forbidden-fat [of an offering]. He denies it. R. Meier would obligate him [to bring an offering] while the Sages would**

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10. Tanakh, 157.

11. Bava Metzia, 3b. See Rashi.

> exempt him. R. Meier argues that if two witnesses can impose the death penalty by their testimony, then how much the more so should their statements impose the lighter penalty of a guilt-offering. The Sages respond, "what if he did it deliberately"!

*If his response to their testimony was that he knowingly ate of the forbidden fat, then all would agree [including R. Meier] that he would be exempt from such an offering. A sin-offering means that the individual acknowledges wrong-doing. A response such as "I did it deliberately" in the presence of witnesses is defiant and reflects an inappropriate mental state to perform a religious act.

The area of disagreement between R. Meier and the Sages is negligence. If witnesses testify that he actually ate the forbidden-fat, though not deliberately, then R. Meier holds that their testimony can compel an offering based upon the KV of the death penalty, even if he doesn't admit wrong-doing.

The Sages reject this position and argue that an inconsistency would result from R. Meier's position. 'A defendant could maintain, after witnesses have testified that he acted negligently, that he deliberately ate it in order to exempt himself from bringing an offering. The authenticity and integrity of the theocratic system would be compromised for even if he acted negligently, the law would encourage him to state that he ate deliberately for it would then relieve

him from the added religious obligation.[12] Therefore, the Sages state that only an admission in the case of negligence can compel a guilt-offering.*

Two additional rules are cited in support of the Gemara's challenge to R. Hiya's assertion. First, only an admission obligates one for a guilt-offering (one which distinct from the sin-offering). The other is that it renders him liable for an additional one-fifth penalty (in Hebrew termed a "chomesh") as part of the plaintiff's damages.

*The guilt-offering and the one-fifth penalty are stated in Leviticus 5:20, et.seq:

> The Lord spoke to Moses saying: When a person sins and commits a trespass against the Lord by dealing deceitfully with his fellow in the matter of a deposit or pledge, or through robbery, or by defrauding his fellow, or by finding something lost and lying about; if he swears falsely regarding any one of the various things that one may do and sin thereby - when one has thus sinned and, realizing his guilt, would restore that which he got through robbery or fraud, or the deposit that was entrusted to him, or the lost thing that he found, or anything else about which he swore falsely, he shall repay the principal amount and add a fifth part to it. He shall pay it to its owner when he realizes his guilt. Then he shall bring to the priest, as his penalty to the Lord, a ram without

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12. The term "theocratic" system requires explication. Rabbinic Judaism has strong elements of democracy within it. Halakhah is determined by the majority. Dissent as to the nature of Halakhah is permitted and strongly encouraged. The Talmudic justice system has many parallels to anglo-american jurisprudence. But at the heart of this process, is the Torah (as defined in chapter 3) and in this sense, it is theocratic. No individual, however, has the authority to claim personal access to the Divine in contravention of the Torah. One only has the right of its interpretation.

blemish from the flock, or the equivalent, as a guilt offering.[13]

The phrases "or from anything else about which he swore falsely" and "when he realizes his guilt" means that he must make atonement through restitution, admission, and offering.

The Sages argue that guilt in the religious context has a characteristic of self-acknowledgment often absent in litigation. In a legal proceeding, an individual may be found guilty, but still maintain innocence as in the case of witnesses. In this situation, he remains exempt from the guilt-offering because authenticity before God, as represented by confession and offering, is absent. Only when one actually admits guilt can these conditions be religiously required. Thus, ADM do have a greater impact than that of WS. *

R. Meier argues that WS would also render a defendant liable for the guilt-offering and for the one-fifth penalty even though no admission has been made. Just as he held in the Mishnah from Keritut that witnesses could render the defendant liable for a sin-offering, so too could they require a guilt-offering. Likewise, a one-fifth penalty would be necessary on the basis of the previously stated KV, i.e. since witnesses can bring about the death penalty, how much the more so should their testimony enjoin this requirement as well. Therefore, R. Hiya's baraita is supported by the precedent of R. Meier.

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[13]. Tanakh, pp. 159-161.

B. An Admission is Not Affected by Evidence Which Contradicts or Refutes It.

[The Gemara has weakened the basis of the KV. Nevertheless, R. Hiya's position is supported by R. Meier and therefore the discussion continues.] **An admission, in contrast to testimony, is not subject to contradiction or refutation.**[14]

If a person admits liability and then testimony is presented which exonerates him, the defendant remains liable because the admission of a litigant is the equivalent to the testimony of one hundred witnesses.[15]

In contrast, witnesses are subject to these legal challenges of contradiction and refutation.

* If plaintiff's witnesses testify and then contradicted or refuted by other witnesses, then the defendant is innocent of the claim brought against him.[16] This presents a serious challenge to R. Hiya's premise, for an admisión

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14. Contradiction and refutation are two different concepts in Jewish law. Witnesses are contradicted when independent evidence is presented which disputes their version of the facts at issue. In such an event, neither testimony is accepted. In contrast, refutation impeaches the credibility of the witness. For example, A testifies that a certain event occurred. B discredits A by swearing that A was somewhere else when the event took place and thus A could not possibly have witnessed the occurrence.

15. Rashi, Bava Metzia, 3(b).

16. Ibid., 3(b).

results in the payment of monies even where other witnesses contradict or refute him. In contrast, the independent evidence proffered by WS is subject to impeachment. When this occurs, no liability accrues to the defendant. Thus, the law of ADM is more powerful than that of WS because it is irrefutable. This suggests that a KV cannot be derived from the former as a basis for the rule in the baraita.*

V. The Law Of the Single Witness As A Basis For A KV

A. A Single Witness ("SW") May Compel a Defendant To Deny Under the Oath the Substance of the Former's Testimony

Since a KV may not be based on the law of admissions, the rule of the SW might be the foundation for R. Hiya's KV. It provides that the testimony of a single witness, while not having sufficient force to impose liability, nevertheless may compel the defendant to disavow such evidence.

*The factual scenario of this rule is identical to that of the baraita except that the plaintiff is only able to produce one witness to substantiate a part of the claim. The court is then empowered to impose an oath not only on that portion of the claim which is attested to by the witness, but also on any unsubstantiated remainder. Deuteronomy 19:15 provides:

> A single witness may not validate against a person any guilt or blame for any offense that may be

committed; a case can be valid only on the testimony of two witnesses or more.[17]

The Talmud Shavuot, based on this passage, provides the corollary law. Though not sufficient to impose liability, the testimony of a single witness does force the defendant to support his denial under oath.[18]*

This rule furnishes support for the KV. If, in the SW case, where his testimony cannot render a defendant liable for payment but may nevertheless compel an oath, how much the more so should the testimony of WS, which does result in liability, oblige an oath.

B. Challenge: The Single-Witness Rule Is Not Comparable To That of the Baraita

There is an important distinction between the law of the SW and the baraita. The defendant in the SW case must take an oath denying the substance of the testimony. In contrast, the defendant is precluded from testifying on any issue(s) attested to by WS.

* Rashi comments: 'As if to say, how can you derive the oath of two from the oath of one. Surely, in the latter, the defendant contradicts the testimony of the SW. But where two witnesses are involved, he cannot taken an oath on those issues which they have substantiated. He could only testify

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17. Tanakh, 304.

18. Shavuot, 40 (a).

on those matters which are not attested to and are denied.' Rashi is leading us to the Talmud's basis for the oath on the unsubstantiated claim of the plaintiff in the SW setting.

C. The Oath Imposed By The Single Witness Is The Basis For The Oath On the Remainder

R. Pappah explains that the initial oath in the SW case is "rolled-over" to compel the defendant to swear on any remaining claim brought against him by the plaintiff.

*Under Jewish law, if a person is obligated to swear on account of one witness and there exists yet another claim upon which he would not otherwise be required to take an oath, the court is empowered to "roll" the oath onto any additional matters in dispute.[19]

This legal concept of a "rolled-over" oath is scripturally mandated. It is derived from the biblical passages which concern a husband's suspicion of adultery. In such a case, the wife is required to appear before the priest, who then proclaims:

> If no man has lain with you, if you have not gone astray in defilement while married to your husband, be immune to harm from this water of bitterness that induces the spell. But if you have gone astray while married to your husband and have defiled yourself, if a man other than your husband had carnal relations with you --- may the Lord make you a curse and an imprecation among your people, as the Lord causes your thigh to sag and your belly to distend; may this water that induces the spell enter your body, causing the belly to distend and

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[19]. Rashi, Bava Metzia, 4a.

> the thigh to sag. And the woman shall say, "Amen, amen![20]"

The Talmud Kiddushin derives the law of the "rolled-over" oath based upon the prescription found in this passage.

> Ulla said: How do we derive the law of the superimposed oath from the Torah. And the woman shall say Amen, Amen. To what does she say Amen?.... Amen that she was not unfaithful by this man. Amen that she was not unfaithful by any other man.[21]

The significance of the term "amen" is derived from the religious setting. She is before the priest and God and so her words are the equivalent of an oath. There is a suspicion regarding her integrity which can only be removed by swearing in the name of the Almighty. The Talmud derives two oaths from the doubling of the "amen." One relates to the specific charge of adultery. The other is a general affirmation of her chastity. Her oaths and actions before the High Priest and God fully resolve the distrust that exists within the sanctity of the marriage. Likewise, once one oath is administered ín the SW case, it compels him to deny liability on other claims in order to resolve all issues between them.*

However the "superimposed oath" of scripture, mandated under the SW rule, cannot serve as a basis for the KV of the baraita because WS only render the defendant liable for

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[20]. Tanakh, 213-214.

[21]. Kiddushin, 27(a).

monies. Their testimony does not cause the defendant to take an oath.

The effect of the SW is to compel an oath. Once employed, the Torah allows it to cover all other concerns. But in the case of WS, their testimony only obligates the defendant to make payment. There is no oath in the first instance to "roll-over" onto the remainder of the plaintiff's claim.[22] Therefore, the law of the SW cannot be utilized as the basis for a KV to support the baraita.

VI. A KV DERIVED FROM TWO RULES: ADM AND SW[23]

A. A KV Based On The Common Element of Claim And Denial

The laws of ADM and SW together serve as a basis for the KV of the baraita. An ADM permits the defendant to deny any remainder and thus be relieved of further liability. The problem with this rule, as previously stated, is that an ADM, unlike the testimony of WS, is not subject to impeachment. Therefore, since ADM and WS do not stand in relationship of minor to major importance, the former alone cannot serve as a basis for a KV.

However, if this is the objection, then the SW case can serve as a partial basis for the KV for even though a single-

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[22]. Ibid., 4a.

[23]. The reader is urged to reread Chapter 3 relating to the hermeneutic rule of binyan av mi'shnei k'tuvim before commencing this section.

witness may be contradicted (even by the defendant's own testimony), nevertheless the defendant is still permitted to swear that he does not owe anything on the remainder.

But, an objection may be raised to this argument as well. A defendant may testify to contradict a single witness under oath. Because he is allowed to take an oath regarding the attested portion of the plaintiff's claim, the oath is "superimposed" upon all other issues in dispute. But where two witnesses are involved, he alone cannot refute their testimony and thus there is no oath to "roll-over."

Each law is insufficient by itself to form a basis for the KV for R. Hiya's rule. Nevertheless, they share a common element. Both in the SW and partial ADM setting, the situation arose through the plaintiff's claim and the defendant's denial. In each instance, the defendant was permitted to take an oath on the disputed remainder. This same element is found in the baraita. Witnesses testify because the defendant denied the plaintiff's claim. Just as in the cases of the SW and the partial ADM where the defendant is permitted to testify because of a claim and denial, so too in the case of WS should he be allowed to disavow the remainder.

B. Challenge: A Presumption of Truthfulness Distinguishes Both The Single-Witness and Partial Admission From The Baraita

There exists a common factor between both the SW and the partial ADM which is absent in the baraita [that would render

this analogy invalid]. In each, there is no presumption that the defendant is a liar and for this reason he is permitted to testify in those cases. In the baraita, witnesses have contradicted the defendant's denial such that he lacks credibility to take an oath denying the remainder of the claim.

Rashi explains that there is no presumption [in the cases of the single witness or partial admissions] that the defendant is a liar based on his denial. One might have [erroneously] thought that he cannot rebut the SW for he is not believable and is presumed a liar.[24]

C. But The Defendant In the Baraita Is Presumed Truthful So As To Testify In Other Cases

R. Idi Bar Avin cites R. Hisdah for the rule that one who denies a claim brought by his lender remains a suitable witness [in other cases]. Only a bailee, who denies possession of the bailment and then witnesses establish the bailor's claim, is unfit to act as a witness [in a different case].

*Prior to the taking of any oath, the borrower remains an appropriate witness. This holds true regardless of whether he has denied the claim in its entirety or has admitted to a portion of it. Jewish law does not ascribe the legal status

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24. Rashi, Bava Metzia, 4a.

of a thief (who is unfit to testify) to the borrower. The scriptural basis is taken from Exodus 23:1:

> You must not carry false rumors; you shall not join hands with the guilty to act as a malicious witness.

The phrase "you shall not join hands" is understood to mean that those who rob cannot serve as witnesses.[25] Since the purpose of a loan is for the borrower to utilize it, he probably has spent it out of necessity. He then rationalizes that until I have the funds, I will delay him for if I admit to him now, I will become destitute.[26] Therefore, the concern for economic preservation pressures the borrower into an untenable position. Selfishness and greed are not the motivating factors in the baraita. The borrower, despite his initial denial, remains a "kosher" witness to testify in other cases.

But the distinction made by R. Idi with regards to the bailee being unfit to take an oath must be explained for one might think that his attempt to delay results from having lost the bailment. Just like the borrower, he seeks to delay, not because of fraud or misappropriation, but rather because of

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[25]. J. Lauterbach, Mekhilta de-Rabbi Ishmael, 162. The rabbinic understanding of this phrase is that those who are wicked shall not testify. This would include robbers and men of violence. For further explication of this verse, see Chapter 5.

[26]. Rashi, Bava Metzia, 4a. The word יחבענ' has the root בע (to be empty, bare) in the itpael (reflexive) with a cs suffix. A literal translation might be "I will lay myself bare immediately." (See Jastrow, Dictionary of the Targumim, Talmud Babli, Yerushalmi and Midrashic Literature, 181.

embarrassment over having misplaced it. Thus, he rationalizes that until he finds it, he'll deny having received it. This, however is not the case to which R. Idi is referring. Instead, witnesses are prepared to testify that during the time the defendant was entrusted with the bailment, he made personal use of it.[27] Because of his initial denial and the presence of witnesses he is the equivalent of a robber and thus unfit to testify in other cases. Therefore, the borrower's credibility should be sufficient to permit an oath.*

D. ADM and SW Are Not Subject To The Law of Retaliation

[The Gemara continues its attack on this new formulation of the KV derived from two separate laws.] **The element that both the ADM and SW share [unlike that of WS] is that neither are subject to the law of retaliation.**

*This rule provides that where witnesses have knowingly given false testimony, a penalty is imposed upon them. This consists of charging them with the same damage that the defendant would have been required to sustain had their testimony not been refuted. For example, if two witnesses testify that the defendant owed the plaintiff $2,000, and the charge was refuted and it was shown that these witnesses

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[27]. Rashi, Bava Metzia, 4a.

intentionally deceived the court, their penalty would be a fine of $2,000 payable to the defendant.

As stated in Deuteuronomy 19: 16-19.

> If a man appears against another to testify maliciously and gives false testimony against him, the two parties to the dispute shall appear before the Lord, before the priests or magistrates in authority at the time, and the magistrates shall make a thorough investigation. If the man who testified is a false witness, if he testified falsely against his fellow, you shall do to him as he schemed to do his fellow. Thus you shall sweep out evil from your midst; others will hear and be afraid, and such evil things will not again be done in your midst.

Of course, a finding of malice is a prerequisite for the penalty to apply and thus precludes any fine for testimony which is merely impeached. (Otherwise, as a practical matter, who would ever testify as a witness in a case and risk such a loss.)

This rule does not apply in the case of the SW because such testimony alone cannot conclusively establish any issue at trial. [With an admission, the rule has no application at all.] Consequently, the common element which both ADM and SW, unlike the case of WS, is that the law of "hazamah" (retaliation for false testimony) is inapplicable.*

But this element is obviously not present in the case of WS.

*If witnesses testify that the defendant is obligated to pay fifty and it is determined that their testimony was maliciously motivated and false, then they must pay the amount

to the defendant as restitution.[28] Since the baraita does not share this feature, a KV cannot be supported by the two rules of ADM and SW.*

E. The Law of Retaliation Is Not A Sufficient Distinction So As To Render This KV Invalid

R. Hiya maintains that the law of retaliation is an insufficient basis to refute the KV based on the hermeneutic principle of binyan av mishnei k'tuvim.

* R. Hiya regards this distinction based on "hazamah" between the SW and the partial ADM on the one hand and the baraita on the other inadequate to mount a challenge to his KV. First, the cases of the SW and the witnesses in the baraita are both subject to the law of retaliation. In the case of the SW, the form of retaliation is that his testimony is voided. In addition, the defendant does not have to testify at all. Likewise in the baraita, if other witnesses establish that the plaintiff's witnesses had falsely and maliciously testified, their testimony is cancelled, a penalty imposed, and the defendant relieved from having to testify. Second, the status of all three cases share a more important element; that there exists a remainder which is subject to dispute. In both the SW and the partial ADM cases, the defendant is permitted to testify, thus resolving all issues before the court. Likewise, in the baraita, where there

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[28]. Rashi, Bava Metzia, 4a.

exists a disputed remainder, the defendant should be allowed to take an oath and deny liability and thus settle all disputes between the parties.[29]

CONCLUSION

The rationale of the baraita is derived from the laws of the SW and ADM by the hermeneutic tool of binyan av mishnei ketuvim based on the laws of the SW and ADM. A defendant may take an oath and testify on a disputed remainder where witnesses have confirmed only a part of the plaintiff's claim.

The Fuel Of The Dialectic

Clearly, the richness of the Talmud's approach reflects a holistic approach in integrating scriptural and mishnaic sources within the context of its dialectic. In this aspect, the human characteristics of rationality and logic encounter that which is regarded as Divine. The oath, the laws of partial admission, witnesses, and single-witness, are all grounded in the Torah. But the baraita is not explicitly covered by any of them. And so, the baraita becomes the symbolic arena between the reality of society, of the every-day struggle between people, and Torah. And just as people struggle with one another in court, so too did the Sages struggle to discern and to apply what God intended in a small, but significant aspect of his blueprint for creation.

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[29]. Steinsaltz, The Talmud: The Steinsaltz Edition, Vol I, Bava Metzia, 34.

This striving to discern the divine intention must begin with an analysis of the central issue of this text, the oath, for it is essential fuel of this dialectic. It underlies most every argument, analysis, and formulation. Therefore, its scriptural treatment and its analysis in the corresponding literary rabbinic genres of the Midrash, Mishnah, and Talmud must be considered in order to fully appreciate the arguments of this passage from Bava Metzia.

The context of the dispute involved a lender and a borrower. The scriptural treatment of this relationship is relevant to our discussion. Exodus 22:24 characterizes it in the following manner:

> If you lend money to My people, to the poor among you, do not act toward them as a creditor: exact no interest from them. If you take your neighbor's garment in pledge, you must return it to him before the sun sets; it is his only clothing, the sole covering for his skin. In what else shall he sleep? Therefore, if he cries out to Me, I will pay heed, for I am compassionate.[30]

Deuteronomy 15:7-8 adds to the richness of the mitzvah:

> If however, there is a needy person among you, one of your kinsmen in any of your settlements in the land your God is giving you, do not harden your heart and shut your hand against your needyu kinsman. Rather, you must open your hand lend him suffucient for whatever he needs.

These two verses require a person to remain sensitive to the needs of those who may require help. The duty to lend is an imperative. The midrashic exegesis of these verses will enrich the understanding of the theological and ethical

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[30]. Tanakh, 120.

underpinnings contained in this passage from the Talmud.

The law of an admission played a critical role in this sugya. Early in the passage, the Gemara asserted that the right to swear on a disputed remainder in the case of an admission was provided by Scripture. However, no citation to Scripture in support of Rabbah's argument is made by the Gemara. Instead, its derivation is based on the phrase "this is it" found in Exodus 22:8:

> In all charges of misappropriation - pertaining to an ox, an ass, a sheep, a garment, or any other loss, whereof one party alleges, "This is it" - the case of both parties shall come before "Elohim"; he whom "Elohim"declares guilty shall pay double to the other.[31]

The midrashic literature relating to this verse, as well as those immediately preceding and following it, focus on issues of honesty and trust, suspicion and doubt, and God's role in resolving disputes and promoting harmony between people.

Finally, the law of witnesses plays an important role in developing the KV. These rules, provided for in the Sifre, are based on Deuteronomy 19:15-20. Its analysis of these scriptural passages provide much of the tension reflected in the dialectic.

Within the context of the Pentateuch's characterization of the lender-borrower relationship, these three areas, the

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31. Tanakh, 119. While the term "elohim" in many biblical passages is a reference to God, in the legal sections of Scripture, the Midrash defines the term as "judges." This has theological implications which are more fully treated in Chapter 6.

oath, admission, and witnesses, will be explored through a study of selected biblical and midrashic passages with the purpose of formulating a scriptural foundation.

This scriptural foundation provides the fuel which drives the talmudic dialectic in analyzing the baraita of R. Hiya. These underpinnings illustrate that the talmudic process is neither disjointed nor irrationally associative in nature.[32] Instead, the scriptural foundation will reveal the inherent logic of the Talmud in its search for the Divine will. As a corollary, their continual search for the significances of God's revealed word, which transcends time, is fueled by the Divine imperative of Sinai to explore the meaning of Torah.

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[32]. The reader will recal from Chapter 1 that the Talmud has been criticized on the basis that the Talmud appears disjointed and associative. Critics conclude from this apparent structure that the editors were far more interested in advancing their own agenda, i.e. authority. In response, it is the reader's own lack of familiarity with the literary antecedents relevant to the discourse that gives the Talmud this appearance. This work attempts to demonstrate that once this foundation is provided, the discourse is logical and is in essence an exegesis of Scripture.

CHAPTER 5: THE SCRIPTURAL FOUNDATION FOR THE TALMUDIC DIALECTIC

INTRODUCTION

Numerous biblical passages have been either cited or alluded to in the course of the talmudic dialectic on the baraita above. These scriptural elements provided the authority upon which the arguments were formulated and analyzed. Just as the authors of the baraita were totally familiar with these sources, so too did they presuppose their reader's knowledge of their exegesis. The aim of this chapter is to provide the reader with this scriptural foundation and then to reexamine the baraita and the Gemara in the light of this knowledge. In so doing, the reader will encounter the central issue of this text: the Talmud's reluctance to allow a rabbinic court to require an oath in the absence of a litigant's partial admission.

Three scriptural concepts were evident throughout this selection from Bava Metzia; the oath, admissions, and witnesses. The requirement of the oath hinged on whether the evidence for the plaintiff was furnished by the defendant or instead, by independent testimony. However, the text never explained the characteristics of this oath in its theological and human dimensions as developed by Scripture and its early rabbinic exegesis. By understanding its nature and function in man's relationship to God and to his fellow man, we can understand the underlying theological and psychological aspects of the dialectic.

The second part of this chapter will show the process through which the law of admissions is exegetically derived from Exodus 22:8. When one examines this passage, the inference is not clear. Rather, the context, as indicated by the verses immediately preceding it, is a suspicion by a bailor of misappropriation of a bailment by the bailee[1] The laws pertaining to loans however are described in Exodus 22:24. The difficulty is that this latter verse does not provide for a remedy in the event of a dispute or a default by the borrower. Therefore, in order for the provisions of 22:8 to apply to the baraita, one must demonstrate a sufficient analogy between the relationship of a lender-borrower to the relationship of a bailor-bailee. This can only be accomplished through an analysis of the rabbinic exegesis of these passages. In so doing, the reader will be exposed to a rabbinic philosophy that suggests that the function of litigation is as much the removal of suspicion and the restoration of trust in human relationships as it is to determine the truth of a matter.

The third section of this chapter is to examine the roles of both the single and multiple witnesses in litigation in the absence of an admission as described in Deuteronomy 19: 15-21. The dialectic arises from the tension created due to the

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1. A bailment is where X entrusts property to Y for safe-keeping for a period of time. In the scriptural setting, the bailment has either been stolen or has been allegedly misappropriated. X now brings suit against Y.

legal definition of truth (according to Scripture) in the absence of an admission. Legal certainty in such a case is evidenced by the testimony of two independent witnesses who are neither refuted nor contradicted. While Scripture is clear that the testimony of two witnesses prevents the defendant from taking an oath altogether, the testimony of a single witness fails to meet the scriptural standard of certainty and truth. It is this uncertainty which creates a basis to impose an oath in the case of a single witness. It also provides half of the necessary precedent to permit R. Hiya's rule to be adopted. Thus the Sifre's analysis of this scriptural passage suggests a subtle shift in the perception by the court of the defendant's honesty and integrity in the absence of conclusive proof by the plaintiff.

Together, these elements will form a "scriptural foundation" which may enable the reader to consider more fully the scriptural concepts which the Talmud relied upon in constructing its dialectic. To this end, I hope to provide the reader with an opening through which he or she may peer beneath the surface of the text and into the rich theological and humanistic worlds created by God and humanity.

A. THE OATH AND ITS MIDRASHIC EXPLICATION

The Role of Intent

It is generally accepted within Jewish tradition that violation of a commandment requires intent. The oath is an exception, for Scripture considers both its deliberate and its

inadvertent violation to constitute a transgression which triggers theological and practical consequences. Two passages, Exodus 20:7 and Leviticus 5:4, are juxtaposed by the Mekhilta de Rabbi Ishmael which support this conclusion. These passages provide:

> You shall not swear falsely by the name of the Lord your God; for the Lord will not clear one who swears falsely his name. (Exodus 20:7)[2]
>
> Leviticus 5:4-5,13
>
> (4) When a person utters an oath to bad or good purpose-whatever a man may utter in an oath--and, though he has know it, the fact has escaped him, but later he realizes his guilt in any of these matters-- (5) when he realizes his guilt in any of these matters, he shall confess that wherein he has sinned. And he shall bring as his penalty to the Lord, for the sin of which he is guilty, a female from the flock, sheep or goat, as a sin offering; and the priest shall make expiation on his behalf of his sin.... (13) Thus the priest shall make expiation on his behalf of whichever of these sins he is guilty, and he shall be forgiven.[3]

A tension exists between these two passages. The verse from the Decalogue is apodictic: "You shall not swear falsely in God's name." No remedy is provided for its violation. God will hold one fully accountable. In contrast, the passage from Leviticus is casuistic. "When a person utters a false oath and realizes his guilt".... then he shall confess, bring an offering, and God will forgive." There is a forum for redress and forgiveness in the Leviticus passage which is

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2. Tanakh, 115.

3. Tanakh, 158-160.

notably absent in the Exodus verse. Thus, the passages, when contrasted, seem contradictory.

The Mekhilta addresses this dichotomy by interpreting Exodus 20:7 as addressing the situation where one intentionally swears to a falsehood. In such a case, the phrase "for God will not acquit" renders ineffective any atonement offering. Instead, the punishment for its transgression (to be distinguished from forgiveness) is laches which is instituted only in capital cases. Society reproves the offender.[4] In contrast, the Mekhilta asserts that Leviticus 5:4 applies to the unintentional false oath. The person mistakenly believes x to be the case when y was the situation. At one time, the defendant may have actually known the truth, but at the time of his testimony, it was "concealed" from his consciousness. The individual, with the assistance of the religious institution, purges himself of this guilt through confession and offering.

Both passages assert that the individual is in an ontological state of guilt when false testimony is presented, regardless of intent. In the Exodus verse, "God will not acquit" implies guilt on the defendant, while the Leviticus

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[4]. In capital cases, Jewish law requires two witnesses to forewarn the defendant of the specific crime that he is about to commit and then these same two witnesses are to testify against him before punishment could be inflicted.

passage makes the reference to it explicit.[5] The ability of the individual to rid himself from this state depends upon his intent, for one scriptural passage provides a means for relief while the other provides no such mechanism. As to this latter element, another dimension of the oath is to be explored before approaching the midrashic understanding of atonement for swearing falsely: its relationship to holiness and profanation.

The Oath In the Context of Holiness

The oath functions in both contexts of holiness and profanation. Leviticus 19:1,12, commonly referred to as the "Holiness Code of Scripture" provides[6]:

> (1)The Lord spoke to Moses, saying: Speak to the whole Israelite community and say to them:
>
> (2)You shall be holy, for I, the Lord your God, am holy... (11) <u>You shall not steal; you shall not deal deceitfully or falsely with one another.</u> (12) <u>You shall not swear falsely by My name, profaning the name of your God: I am the Lord.</u>

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[5]. Guilt in scripture is an ontological state, not one simply of emotion. A good analogy is one in modern law. One may be guilty of a crime, but not feel guilty. One is purged of this legal guilt through punishment imposed by the court. Likewise, the individual who incurs scriptural guilt could only be cleared of this status through the remedies that are provided. Thus, for intentional violations of Exodus 20:7, the absence of such a remedy is a serious matter.

[6]. The reader is urged to read all of Leviticus 19 in order to appreciate the relationship between holiness and human action.

[7]. <u>Tanakh</u>, 185.

The Sifra comments first on the importance of this chapter of the Torah:

> The reason that Moses was to speak before the entire community was on account that the majority of underlying principles of the Torah are contained in it.[8]

According to the early rabbinic communities, this chapter is the core of the Torah. It is foundational for it expresses a clear theology that holiness is the ontological state which is the object of religious practice. To remain in this state, there are specific standards of conduct which must be adhered to; one of which is the avoidance of a false oath. The Sifra articulates the relationship between this ontology and behavior.

> You shall be holy because I, your God, am holy. This may be interpreted to mean "if you sanctify yourselves (by fulfilling these commandments), then I will consider you as if you are sanctifying me and if you do not sanctify yourselves (by following these mitzvot) I will consider you as though you are not sanctifying me.
>
> [Rhetorically it asks] Or does it mean rather if you sanctify me, surely I will be sanctified and if not, I will not be sanctified? [No, for] Scripture teaches that the phrase "I am holy" is to be understood as follows. I am in my holiness whether you sanctify me or not. Abba Shaul stated: It is [similar to] a minister [in his relationship] to the king. What is his charge - to follow in the wake of the King.",[9,10]

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8. Sifra: Torat Kohanim, 70.

9. Ibid., 70.

10. Jastrow, Dictionary of the Targumim, 460.

Holiness characterizes the relationship between human behavior and its imitation of the Divine. It is a state achieved through action which results in self-sanctification [holiness achieved through action]. But this aspect is not one of egocentrism, for the Sifra implicitly rejects humanism. Action which leads to self-sanctification moves the religious person into the realm of the Divine. Self-sanctification through righteous behavior corresponds to God's continual state of being, as it were, which is one of holiness [I am in my holiness whether you sanctify me or not].

Similarly, unrighteous behavior does not mean that God is less sanctified. God's holiness is undiminished. Instead, righteous behavior is analogous to one who ministers to a King. His mission is to conduct himself with the appropriate protocol which consists of acts which complement the King. For humanity, these proprieties are detailed in the Holiness Code of Leviticus and includes the prohibition of lying, cheating, and swearing falsely.

The Sifra interprets these commandments as an interrelated series of events.

> You shall not steal, you shall not deal deceitfully, you shall not lie against your fellow man, and you shall not lie in my name. If you steal, you will come to deal deceitfully. And if you deal deceitfully, you will eventually lie. And if you lie, you will come to swear falsely in my name.[11]

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[11]. Sifra, 75.

There are two ways in which to explain this Midrash. The first is to take a specific event and show how in the end, the offender will come to take a false oath. For example, suppose X steals from Y. X will come to deal deceitfully with Y through being evasive. Eventually Y will sense this deception and will confront X. X will then lie. Y will then bring X before a court where the latter will be compelled to swear falsely because of his previous actions. The house of cards eventually collapses.

Another rendering of this Midrash is that it describes the human personality that has embarked on the slippery path away from the state of holiness and towards its opposite, desecrating God's name. It leads from stealing to deceit to lying and finally to even being false to God. The person moves farther from honesty and integrity which culminates in invoking God to further his own wrongful conduct.

The essential feature of this process is intention. Each of the acts involved, stealing, deception, lying, and invoking God's name to attest to a false matter, are deliberate. With regard to this last element, one might think there is a possibility of a loophole, which would be to swear in one of

God's other names, rather than "the tetragammeton."[12] The Sifra rejects this position.

> You shall not swear falsely by my name: What is adding [by this verse] for surely it has already been stated "you shall not swear in the name of the Lord your God [in Exodus 20:7]?"[13] [Had this verse from Leviticus been omitted] I might have thought that I would only be liable for violating this commandment if using God's special name [i.e. the tetragammeton]. From where is it derived to include all names [of God]. Scripture teaches [in this verse that the term] "in my name" means any name that I have.[14]

The oath is not a technicality. Using any of God's names for a false oath constitutes a transgression. Thus, intention, not behavior, is the essence of violating these dictates; a point developed in this chapter from Leviticus.

The act of taking God's name as an accomplice in order to promote the individual's wrongful design renders the act a hilul hashem. The Sifra concludes its analysis:

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[12]. The Mekhilta describes that the oath was to be administered though the use of the tetagrammaton. Since both the Mekhilta and the Sifra were edited subsequent to the destruction of the Second Temple in 70 C.E., this may reflect a response that since its name could no longer be pronounced (either because the Temple was destroyed or because no one actually knew how to pronounce it), the commandment against swearing falsely no longer applied. It may also support a thesis that the Sifra was compiled after the Mekhilta since the latter relies on the oath's administration by the tetragrammeton while the Sifra does not. See Lauterbach, Mekhilta de-rabi Ishmael, p.122.

[13]. The midrashic issue is that Leviticus 19:12 appears redundant in light of Exodus 20:7. This would contradict the principle that there is nothing extraneous or arbitrary in the Torah. Ben Bag Bag states in Avot 5:22 "Turn and turn it (the Torah) for everything is in it."

[14]. Ibid., 75.

> And you profane the name of your Lord: [This verse is teaching] that a false oath is a hilul hashem, a desecration of God's name.[15]

The intentional desecration of God's name renders the individual unholy and at the same time places the Almighty and the purpose of creation as a mockery before humanity. By placing the intentional false oath in the category of a hilul hashem, Scripture and the Sifra are emphasizing the seriousness of the transgression.

To summarize, thus far we have shown that the crime of swearing falsely is serious, whether intentional or unintentional. Its violation has an ontological effect in that it renders one unholy. For unintentional violations, the remedy is confession, offering, and restitution. But its intentional transgression renders the act a hilul hashem, a desecration of God's name through which no immediate relief appears available.

The Perjurer is the Moral Equivalent of a Thief

Given the halakhic impact of a hilul hashem, it is important to consider the psychological dimension of the perjurer and its impact on his community. The parallel drawn is to the scriptural treatment of the thief. The perjurer desecrates God's name in a public forum, by attesting to a false matter. In a sense, he is a thief who commits his crime secretly. Like the thief who steals when no one is able to

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15. Ibid., 75.

witness his crime, the perjurer also steals because he thinks no one will contradict or refute his testimony which he knows is false. This argument is supported by the Mekhilta's analysis of Exodus 22:6 in which it describes the mind-set of the thief.[16]

> When a man gives money or goods to another for safekeeping which are then stolen from the man's house - if the thief is caught, he shall pay double.[17]

The Mekhilta implicitly equates the perjurer to the thief. It begins its analysis by contrasting the different psychological states of the thief and the robber with the penalty more severe upon the former than the latter. It notes that if the thief is found, he must pay double the value of what he stole. However, a robber does not pay such a penalty. Rhetorically, it asks:

> Why is the Torah more severe in its treatment of the thief than of the robber?[18]

The Mekhilta cites a mashal (parable) attributed to Rabbi Yochanan Ben Zakai, the founder of the rabbinic community at Yavneh.

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[16]. The reader should note that Exodus 22:6 is within the context of the main exegetical verse which deals with the law of partial admission where the individual is allowed to take an oath.

[17]. Tanakh, 119.

[18]. Horowitz-Rabin, Mekhilta de-rabi Ishmael, 299.

> The robber treats equally the servant and his Master. However the thief favors the servant over his Master.[19]

R. Yochanan ben Zakai explains that the thief acts as if God's eyes and ears neither hear nor see the thief's transgression. The thief wrongfully believes that God simply does not take note of his actions. Three proof-texts are furnished; Isaiah 28:15, Psalm 94:7, and Ezekial 9:9-10. The citation from Isaiah provides:

> Ha! Those who would hide their plans deep from the Lord! Who do their work in dark places and say, "Who sees us, who takes note of us? Isaiah 28:15[20]

The passage from Psalms requires context which is provided in the three sentences which precede the actual citation found in the Mekhilta.

> (1) God of retribution, Lord, God of retribution appear! (2) Rise up, judge of the earth, give the arrogant their deserts! (3) How long shall the wicked, O Lord, how long shall the wicked exult, shall they utter insolent speech, and shall all evildoers vaunt themselves? (5) They crush Your people, O Lord, they afflict Your very own; they kill the widow and the stranger; they murder the fatherless, (7), thinking, "The Lord does not see it, the God of Jacob does not pay heed."[21]

The Psalmist is appealing to God to take action against those who seek to destroy Israel. Those who utter "insolent speech" are also characterized as wicked. They erroneously think that

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19. Ibid., 299.

20. Tanakh, 676-677.

21. Tanakh, 1220.

the God of Jacob does not pay attention to it and thus deny God's omniscience.

Likewise, Ezekiel confronts God in the Temple regarding the latter's order to kill those who have committed abominations in Jerusalem. God responds:

> (8) The iniquity of the Houses of Judah and Israel is very great, the land is full of crime and the city is full of corruption. (9) For they say, 'The Lord has forsaken the land, and the Lord does not see.' (10) I, in turn will show no pity or compassion; I will give them their deserts."[22]

R. Yochanan's analysis and proof-texts support a thesis that there exists a strong analogy between the characterization of the thief under this rabbinic model and the one who swears falsely. First, in each of these citations, thought and speech constitute the essence of the transgression. In Isaiah, it is the evil design in dark places where they say "who sees us, who takes note of us?" According to the Psalmist, it is the insolent speech that incurs God's wrath. From Ezekiel, it is the corruption that has infested the city where the corrupt say, "For the Lord has forsaken the Land, the Lord does not see." Both of these elements, evil design and speech, are present when one intentionally proffers false testimony. His conduct in both speech and behavior make the statement, "God does not see what I am doing."

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[22]. Tanakh, 903.

But there is one element absent in the thief that is present in the one who takes a false oath in open court. The latter is done in a public forum. This element, absent in the thief, renders it a hilul hashem and will create a theological dilemma: whether God will forgive such a transgression during the lifetime of the perjurer even if he repents.

The Oath, Hilul Hashem and Repentance

An open transgression of God's name, as has been shown thus far, is a serious offense. The Mekhilta and parallel passages in the Talmud suggest that such a crime will not be forgiven by God until death. This possibility, that God will not forgive an intentional false oath because it constitutes a hilul hashem, presents a fundamental challenge to the Jewish notion of repentance in which all infractions against the Almighty are forgiven on Yom Kippur. This difficulty is illuminated in two passages. One is from the Mekhilta. The other is from the concluding Mishnah from the Talmud Yoma. Within the context of this dialectic, the essence of the hilul hashem, a public display of arrogance against God, will be examined.

The author(s) of the Mekhilta were troubled by the phrase "for God will not acquit the one who takes God's name in vain." (Exodus 20:7) If the verse is taken literally, then one will remain guilty forever. God simply does not forgive the one who violates this commandment. Such a position is

disturbing from the rabbinic perspective where repentance and atonement are considered available in every instance.

Perhaps for this reason, the Mekhilta analyzed Exodus 20:7 in conjunction with Exodus 34:6-7. The latter reads:

> The Lord! the Lord! a God compassionate and gracious, slow to anger, abounding in kindness and faithfulness, extending kindness to the thousandth generation, forgiving iniquity, transgression, and sin; yet He does not remit all punishment but visits the iniquity of parents upon children and children's children upon the third and fourth generation.[23]

The verse contains the verb "nakeh" (acquit) which is in the infinitive absolute. Thus, it appears that God forgives iniquity, transgression and sin. On the other hand, it contains the finite form of this verb "lo yenakeh" (he will not acquit) to indicate that some transgressions may persist throughout generations. The author of the Mekhilta concludes that repentance is the determinative factor in God's forgiveness. If the one who commits the transgression repents, God will pardon. If there is no repentance, then there is no pardon.[24] This reflects the traditional Jewish position on sin and repentance.

However, the Mekhilta limits the efficacy of repentance when it involves a profanation of God's name.

> If one has profaned the name of God and repents, his repentance cannot leave the case pending, neither can the Day of Atonement bring him forgiveness, nor can sufferings cleanse him of his

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23. Tanakh, 139.

24. Horowitz-Rabin, Mekhilta de-rabi Ishmael, 294.

> guilt. But repentance and the Day of Atonement both can merely make the matter pend. And the day of death with the suffering preceding it complete the atonement.[25]

The scriptural basis for this assertion is derived from I Samuel 3.14 and Ezekiel 37.13. According to the Book of Samuel, Eli, a priest at Shiloh, had two sons, Hophni and Phinehas. The Bible describes these two as scoundrels who treated the offerings brought by Israel with contempt. For this reason, they were despised by the people. In addition, they laid with women of ill-repute at the Tent of Meeting which housed the tablets of Moses. Eli argued with them, "if a man sins against a man, the Lord may pardon him; but if a man offends against God, who can obtain pardon for him?" When they ignored their father's admonition, God told Samuel:

> And I declare to him (Eli) that I sentence his house to endless punishment for the iniquity he knew about - how they committed sacrilege at will - and he did not rebuke them. Assuredly, I swear concerning the house of Eli that the iniquity of the house of Eli will never be expiated by sacrifice or offering.[26]

This proof-text submits that those acts which are directly offensive to God, such as lying with women of ill-repute in the sanctuary or mocking the offerings of the community to God, are not forgiven through sacrifice or offering. These acts constitute a desecration of God's Name. The result seems to be an endless form of punishment.

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[25]. Jacob Z. Lauterbach, Mekhilta de-Rabbi Ishmael: Vol II, 250-251.

[26]. Tanakh, 422.

Ultimately, an unforgiving God is rejected by the Mekhilta because it contends that death achieves complete repentance for profaning God's name. The Mekhilta invokes the messianic vision of Ezekiel's dry bone's prophecy.

> And therefore prophecy and say to them, so says the Lord God, surely I will open your graves and lift you up from your tomb and bring you to the land of Israel. And you will know, that I, in opening your graves and lifting you up from there, am God and that you are my people. And I will breathe my spirit into you and you will live and I will bring you to rest upon your land; and you know, that as I have spoken, so will I do, sayeth the Lord.[27]

Israel's exile from the Holy Land was viewed by the prophets as Divine Retribution for its transgressions against the Word of God. Yet, even in their exile, Ezekiel envisions redemption. God, regardless of the sin, does not forsake the community of Israel. Thus ultimate forgiveness and redemption will occur so long as one repents and observes Yom Kippur.

The concluding Mishnah from Yoma which deals with Yom Kippur challenges the Mekhilta's understanding of Exodus 20:7.

> "... Transgressions between man and God - Yom Kippur atones. Transgressions between one person and another, Yom Kippur does not bring atonement until the man who committed the offense will seek pardon from his neighbor. And so R. Elazar b. Azaryah would drash on the phrase "From all you sins before God, you shall be purified" (Leviticus 15:30); for sins between Man and his Creator -Yom Kippur effects atonement.... Rabbi Akivah stated: Rejoice, O Israel! Before whom may you be

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[27]. Torah, Nivi'im, Ketuvim. Koren Publishers Jerusalem Ltd., Jerusalem (1988). Transl. by author of this thesis.

> purified?[28] Who purifies you? Your father who art in heaven, as it is stated (Ezekiel 36:25): And I shall sprinkle upon you purifying waters and you shall be purified; and as it states in Jeremiah 17:13: God purifies Israel; Just as the ritual bath cleanses one's sins, so to does the Holy One, Blessed Be He, purifies Israel.[29]

This Mishnah posits that one who atones on Yom Kippur is cleansed of sins committed against God. Rabbi Akiva, who lives shortly after the destruction of the Second Temple and witnesses the crushing of the Bar Kochbah rebellion by Rome, proclaims to Israel that God will purify them, even in the absence of the temple cult and as proof-texts, rely on those prophets who witnessed the destruction of the First Temple.

But the Gemara to this Mishnah asserts that one who commits a <u>hilul hashem</u> is not forgiven on Yom Kippur. It relies on the above passage from the <u>Mekhilta</u> but cites a passage from Isaiah instead of Samuel as its proof-text:

> For the one who desecrates God's name, repentance is insufficient to leave the matter pending, Yom Kippur does not atone for it, nor does chastising purify. Rather all combined leave the matter pending and death cleanses the person of the guilt. This is supported by Scripture. "Then the Lord of Hosts revealed Himself to my ears; This iniquity

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[28]. The word מטהרין, though Mishnaic Hebrew, is in the piel which is an active, rather than passive, form. It reflects a strong, positive act. Thus, a suggested translation may be "before whom you do you cleanse [yourself from sin]? Who is it that purifies you? Your father, who is in heaven..."

[29]. <u>The Mishnah, Seder Moed, with Commentary by Hanoch Albeck.</u> (Jerusalem: D'vir Publishing Co., 1988), 247.

> shall never be forgiven until you die", said my Lord of hosts." (Isaiah 22:14)[30]

The full context of this citation from Isaiah contains a popular verse. God has summoned Israel to observe a day of atonement by lamenting and donning sackcloth. Israel ignores this Divine exhortation and instead celebrates by eating meat and drinking wine, all the while proclaiming:

> "Eat and drink, for tomorrow we die!"[31]

The public display in which a society openly transgresses the word of God constitutes its desecration. The Gemara to this Mishnah from Yoma develops this theme by exploring the meaning of "and you shall love the Lord, Your God" within the context of hilul hashem.[32]

> That the name of Heaven shall be loved through your acts [the Gemara first describes one whose actions reflect his knowledge of Torah] ... but the one who reads, studies, and serves scholars of the Torah but does not conduct his business affairs with honesty and his words are not comforting to his fellow-man, what do people say about him? Woe to the one who studied Torah and woe to his father and rabbi who taught him Torah for they see how crooked his actions and how repulsive his ways. And about such a person, Scripture states "[But when they came to those nations, they caused My holy name to be profaned, in that it was said of

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30. Yoma, 86a. This aspect of the argument appears nearly verbatim in the Mekhilta. For a comparison, see Horowitz- Rabin, Mekhilta de-Rabi Ishmael, H. A. Horowitz and I.A. Rabin, , 227.

31. Tanakh, p.660.

32. Deuteronomy 6:5 provides in full: "And you shall love the Lord, your God, with all your heart, with all your soul, and with all your might.

them] "these are the people of the Lord, yet they had to leave His land." (Ezekiel 36:20).[33]

The hilul hashem is not the act of corruption by one who is learned in Torah. Rather, it is the perception by other people that one, who represents Torah, has nullified its intent and therefore deserved of punishment. It also challenges God to inflict punishment which, if it does not come, will cause others to be led astray.

The violation of a commandment which falls into the category of hilul hashem thus has two elements. One is that it violates an express decree of the Torah. Second, it occurs in a public forum through which the observer concludes that God is powerless. The comment by Rashi illuminates this point:

> In that it was said of them, this is the nation: This verse is describing the essence of the desecrating act. Just as an important person commits a transgression and punishment befalls him and everyone exclaims [look] what has happened to him, so too one sees the evil that has befallen the righteous and the wise as it states "and they desecrated my holy name."[34] And what is this desecration? Upon seeing these people of God dispersed among them, the gentiles say that God is not able to save them. Hence, the name of heaven is desecrated and his glory diminished because they attribute the befallen state of Israel to God's helplessness rather than an act of Divine retribution].[35][36]

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[33]. Yoma, 86a.

[34]. The wise and the righteous of subsequent generations suffer punishment from God because of the hilul hashem of their ancestors which lead to the destruction of the Temple and the diaspora.

[35]. Ibid., 86(a).

To summarize: There is a difference between one who swears falsely through negligence and one who does so intentionally. As to the former, Yom kippur, when combined with confession and offering, will entirely atone for the sin.[37] But the intentional violation constitutes a hilul hashem which cannot be fully atoned for in one's lifetime. Ultimately, death will complete it and bring redemption. Perhaps for this reason, the Mekhilta urges one not to swear at all for only God knows what is in the heart; a God who becomes a judge who will not forgive the one who takes the His name in vain during the lifetime of the penitent. Instead, he shall remain unholy.[38]

B. THE SCRIPTURAL DERIVATION FOR THE PARTIAL ADMISSION: EXODUS 22: 6-8

Introduction

The derivation of the law of admission is from Exodus 22:6-8 which deals with the relationship created by a

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[36]. An implication of the hilul hashem concept is that it has the potential to confirm the argument of the gnostics: God, after creating heaven and earth, is no longer concerned with it. Thus, God is not going to intervene in the affairs of his "chosen people" or anyone else for that matter. It is theorized by historians that much of the literature of the tannaitic and amoraic period was a polemic against gnosticism.

[37]. Since the destruction of the Second Temple, as Rabbi Akiva indicates, complete atonement is effected on Yom Kippur through prayer and repentence.

[38]. Horowitz-Rabin, Mekhilta de-Rabi Ishmael,, 227.

bailment. At first glance, these passages seem irrelevant to the baraita of R. Hiya. However, three important principles will be established. First, a bailment is a relationship of trust. When a suspicion arises that undermines this element, these verses suggest a mechanism for the resolution and restoration of the underlying association. The difficulty is that the lender-borrower relationship is not explicitly covered by this passage. Thus, the first task is to demonstrate that an adequate level of similarity exists between bailments and loans such that the latter should also be subject to Exodus 22:8.

The exegesis of Exodus 22:8[39] will show the following: First, the analogy between loans and bailment will support the rabbinic understanding that the failure to repay a loan would constitute a trespass on another's property. Second, a significant shift from ancient forums for eliciting truth occurs. The Mekhilta will reject a suspected practice of consulting oracles for determining the truthfulness of an individual. In its place, the Mekhilta will interpret the word "elohim" to refer to judges and through a gezera shava, it will empower the court to administer an oath . Thus, instead of utilizing divination, the responsibility for

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[39]. For purposes of clarity [though the full citation is within the body of this work], Exodus 22:8 provides "in all charges of misappropriation -pertaining to an ox, an ass, a sheep, a garment, or any other loss, whereof one party alleges, "This is it" - the case of both parties shall come before God; he whom God declares guilty shall pay double to the other. Tannakh, 119.

determining the truth of a matter comes to rest with humanity. Third, the rendering of the phrase "this is it" is the source for the doctrine of partial admission which gives rise to the imposition of the oath. A Mishnah and supporting commentary by Rashi, taken from the Talmud Shavuot, will crystallize this the analogy between the loan and bailment.

Finally, an important element, not present in either the baraita or the Gemara of Bava Metzia, is discerned from this passage. There exists an obligation to accept the oath of the litigant by the other party.[40]. This suggests that the primary goal of the scriptural litigation process is the restoration of the relationship from one grounded on suspicion and doubt to one of trust. Though important, a secondary purpose is to resolve the underlying dispute in the absence of independent evidence.

We turn now to the first goal of our discussion of these verses; to demonstrate the correlation between a bailment and loan. This is a necessary endeavor because the validity of the methodology contextual depends upon demonstrating that scriptural support for midrash halakah is not arbitrary or the result of a strained or forced-reading of the text. Instead,

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40. It should be noted that such terms as "adversary" or "opposing sides" do not adequately reflect the scriptural or talmudic characterization of their relationship of the litigants in court. The term which is used by the Talmud and later commentators is חבר which connotes friend. This is in keeping with the scriptural requirement that where the defendant takes an oath, in the absence of other contradictory proof, the plaintiff is to accept it.

the verse in its full context clarifies the interdependency between the two sets of laws.

The Legal Analogy Between Bailment and Loan

Exodus 22: 6-8 provides:

> (6) When a man gives money or goods to another for safekeeping, and they are stolen from the man's house - if the thief is caught, he shall pay double; (7) if the thief is not caught, the owner of the house shall depose before God that he has not laid hands on the other's property. (8) In all charges of misappropriation - pertaining to an ox, an ass, a sheep, a garment, or any other loss, whereof one party alleges, "This is it" - the case of both parties shall come before "elohim": he whom "elohim" declares guilty shall pay double to the other.[41]

A specific procedure must be followed in order to constitute a bailment. One, the bailor must deposit the article with the bailee. Second, he must state to the bailee, "here it is, guard this article for me." If the bailor's language is informal (for example, if he states "keep an eye on it"), then the bailee is exempt from liability.[42]

In order for a claim based on a violation of this passage to be heard by a rabbinic court, certain requirements must be met. It must be subject to measurement, such as weighing or counting. Rabbi Natan defines "monies" to include those amounts which have been set-aside for tithing. By focusing on the Hebrew lishmor, Rabbi Natan expands the definition of

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41. Tanakh, 119.

42. Lauterbach, Mekhilta de-rabi Ishmael: Volume 3, 113-114.

"monies and vessels" to include any object which could be the subject of a bailment.[43]

In summary, a bailor (the one who deposits the item) and bailee (the one who accepts the item for safe-keeping) have a relationship based on trust and a firm understanding. The bailor seeks protection of an article which has real value to him. The language which creates the legal relationship of a bailment is unequivocal and the item is identifiable. All of these factors, trust, understanding, specificity, and a transfer of the item into the physical possession of the bailee, must be present before a disputed claim which arises from this relationship may be brought before a court. These same elements must exist in the lender-borrower relationship in order for the halakhah, which results in the imposition of an oath by a court, to apply.

The Duty To Loan

In this same chapter from Exodus, the requirement of lending to those in need is provided.

> (24) If you lend money to My people, to the poor among you, do not act toward them as a creditor: exact no interest from them. (25) If you take your neighbor's garment in pledge, you must return it to him before the sun sets; (26) it is his only clothing, the sole covering for his skin. In what else shall he sleep? Therefore, if he cries out to Me, I will pay heed, for I am compassionate.[44]

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[43]. Horowitz-Rabin, Mekhilta de-Rabbi Ishmael, 298.

[44]. Tanakh, 120.

The Mekhilta makes emphatic the obligation to lend money to those in need.

> R. Ishmael states: Every "if" that is in the Torah renders [such a command] permissive [A person may either choose to fulfill its dictates or because of his own choice or action, may be subject to its dictate. For example, the one who unintentionally swears to a falsehood is then obligated to perform certain acts] except in three circumstances, one of which is this commandment.
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> [The Mekhilta challenges this statement of R. Ishmael] You say [that the scriptural term] "if you loan money" renders it an obligation. Perhaps it does not? Rather [the phrase] is permissive. Scripture provides at [Deuteronomy 15:8] "thou shalt surely lend him" in order to render this mitzvah obligatory and not permissive.[45]

The full text of the Deuteronomy citation supports R. Ishmael's interpretation that if someone seeks a loan, you must lend him funds. Deuteronomy 15: 7-8 states:

> (7) If, however, there is a needy person among you, one of your kinsmen in any of your settlements in the land that the Lord your God is giving you, do not harden your heart and shut your hand against your needy kinsman. (8) Rather, you must open your hand and lend him sufficient for whatever he needs.[46]

Therefore, the lender is required to loan money to one in need. He cannot refuse without committing a transgression. The Sifre's remarks:

> Do not harden your heart: There are people that will be in difficulty whether you give or not. Do not shut your hand (your heart): There are people that stretch forth their hand then close it. Against your needy kinsman: And from where is it derived that if you open once, you are to open

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45. Horowitz-Rabin, Mekhilta de-rabi Ishmael, 315.

46. Tanakh, p. 299.

> [your hand] even one hundred times? Scripture teaches <u>for you must open your hand</u>.[47] <u>You shall lend him</u>: We give to him repeatedly and we collect it, these are the words of R. Judah. But the Sages [provide]: We say to him, "in the future we will collect it only to pacify his mind."[48]

The ethical values illuminated in this passage are a statement against the complacency of human nature to the poor. You are commanded to give, even though poverty will continue. There is an immediacy to lending for the opportunity is lost if the moment not seized for their hand quickly closes out of the embarrassment suffered by having to ask. And just as you give to a person who is in need once, surely you should extend yourself one hundred times. The obligation is endless.

The legal right to consider it a loan indicates a dispute between R. Judah and the Sages. R. Judah's remarks reflect relationship grounded in legality, for the one loans the money has the right and expectation to collect it. But the Sages suggest that the characterization of the transaction as a loan is done only to pacify the borrower in order to preserve his sense of dignity and mutuality. Thus, the lender should consider carefully the pursuit of a legal remedy in the event of non-payment. The duty to lend should not create the

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47. The infinitive absolute form in the Hebrew פתוח תפתח is interpreted by the <u>Sifre</u> to indicate a repetitive obligation.

48. <u>Sifre debi Rav</u>, 98-99.

automatic expectation of repayment.[49] [50] The halakhah follows R. Judah.

Though establishing the obligation to loan monies without interest, Exodus 22: 24, et. seq. is silent on remedies where the debtor has failed to repay. However, from the above, the same elements present in the case of bailment are found in the case of the loan. The lender trusts the borrower that at some point he will be repaid because even from the Sages perspective, it is the borrower who wishes to treat this as a loan so that from the outset the relationship will have an element of mutual respect at least in the mind of the borrower. There is an overt expression that concretizes the understanding in the borrower's mind that there is the expectation of and right of repayment to the lender. A specific sum of money is transferred into the possession of the borrower from the lender. Finally, a dispute arises through the denial as to the amount owed such that the lender suspects a misappropriation as evidenced by the borrower's refusal to pay the balance claimed. Thus, the lender-borrower relationship is scripturally analogous to that of the bailor-

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49. This position might be evidenced by such statements to the borrower as "I know you'll pay this back whenever you're able to", "don't worry about it, when the time is right I know you'll pay it back," "or you don't have to sign anything, I know you'll take care of it whenever you're back on your feet.

50. For an extended discussion on the issue of loans to those in need, see Bava Metzia, 31b.

bailee such that the provisions of Exodus 22:8 should apply. We now turn to the rabbinic exegesis of this pivotal verse.

Concerning All Matters of Trespass

This analogy between loans and bailments is further supported by the Mekhilta's exegesis of the opening phrase "concerning all matters of trespass." The overall structure of the verse invokes the hermeneutic principle of k'lal u'phrat u'klal.[51] The Mekhilta states:

> Concerning Any Matter of Trespass: It is a general statement (in its description of items); concerning any ox, donkey, sheep, or clothing are specific... or any other loss is a general statement. Since the pattern is general, specific, and then general, only items which share the common element listed in the specified items can be included (within the rubric of Chapter 22:8). The elements common to each are that they are personal property and not subject to security.[52] [53]

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[51]. The term k'lal u'phrat u'klal literally means generalization, detail, and generalization. Where a Scriptural verse begins with a general statement, followed by a detail list of items, and concludes with a generalization, only items which have the same element as those contained in the detailed statement of the verse, are subject to the scriptural mandate which follows. For a more extended disucssion, see Chapter 3. Steinsaltz, A Reference Guide, 153.

[52]. Horowitz-Rabin, Mekhilta de-rabi Ishmael, p.301. As an aside, this analysis is the basis for the halakhah in which a toraittic oath (one which uses the tetragammeton) is not invoked in a claim based on real estate.

[53]. It should be noted that personal property in modern law can be the subject of security agreements, so long as specific statutory requirements are met (See Article 9 of the Uniform Commercial Code, adopted in all 50 States). However in common law, security agreements with respect to such chattel was not originally recognized. Only land could be subject to such an agreement.

A specific interpretation is made of the term "concerning any matter of trespass" which renders it applicable to R. Hiya's baraita. Trespass includes not only objects which are movable and not subject to mortgage, but also monies which theoretically could include the failure to repay a loan so as to constitute a trespass (lit. silver). This initial exegesis gives further foundation to the analogy between these two legal relationships used to support the applicability of Exodus 22:8 to the case of the lender.

The Meaning of "This Is It"

In simple fashion, the Mekhilta defines the ambiguous phrase זה הוא כי (lit. "this is it") as constituting an admission to a part of the claim of the plaintiff's. It states:

> 'that one says "this is it:" that this one (the defendant) states "this is it" and this one (the plaintiff) says it is not. From here, the (Rabbis) reason that there is now an admission to a part of the claim.

The case of partial admission has now been raised. The plaintiff claims against the defendant that the latter has misappropriated in some fashion an article that belongs to the plaintiff. The bailee or borrower either refunds a portion in open court (or both parties agree that a portion has already been returned) and in open court, he states "this is it" referring to that which is refunded as being the extent of his liability. The plaintiff responds, "this is not the [entire]

claim."[54] The Sages conclude that the status of the case is now one of partial admission to which there exists a disputed remainder.

"The Matter Between Them Shall Be Brought Before Elohim: From Oracles to God To Judges

The relationship of trust which preceded the litigation has now turned to one of suspicion as represented by the term "all charges of misappropriation." The defendant is unable to return the item such that a relationship, once grounded on trust, has now turned to suspicion. The resolution of this suspicion begins with the Mekhilta discerning the meaning of the phrase "the case of both parties shall come before "Elohim." This term "Elohim" is dealt with by the Mekhilta in its analysis of the same term found in preceding verse. There, the Mekhilta states:

> I might have thought (that the term "elohim") refers to the uriim and v'tumim (i.e. oracles). But since (in v. 8) it states "he whom Elohim shall condemn," it must refer to judges, for only judges may condemn.[55]

The Mekhilta may be reflecting a previous practice where such disputes were resolved through oracles. Perhaps at one time, this may have been the manner in which conflicts were settled where there was no independent evidence to support the claim

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[54]. One could infer that the text means the plaintiff to state 'this is not the claim in its entirety.' Though the actual wording of the text is "this is not it." Horowitz-Rabin, supra, p.301.

[55]. Lauterbach, Mekhilta de-rabi Ishmael: Vol III, 116.

of a party. Instead, the resolution of mistrust, which at its worst undermines a basic element necessary for a community or society to function, has now become a human duty.

There is a theological parallel as well. In the preceding section, it was established that after one took an oath, God became a judge in determining whether a false oath had been taken intentionally. Like their counterpart in heaven, judges determine the guilt or innocence of parties involved in a dispute and thus the term is appropriate.

A logical consequence of defining the term "Elohim" as judges would be to empower them with the right to administer an oath. However, neither verses 7 nor 8 explicitly provide for this remedy. Because of its serious theological nature on the one hand and the human requirement to resolve issues of suspicion and mistrust on the other, the authors of the Mekhilta anchored their determination to impose the oath based on the hermeneutic principle of the gezera shava (verbal analogy) to Exodus 22:10. [56]

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[56]. See Chapter 3 of this thesis for a detailed analysis of the gezera shavah. Briefly, a gezerah shavah is a verbal analogy used in Biblical exegesis. If the same word or phrase appears in two places in the Torah, and a certain law is explicitly stated in one citation, then one may infer that the same law must apply in the other citation as well. It is often used not only to determine the meaning of words and phases, but to "transfer entire halakhot from one context to another." Adin Steinsaltz, The Talmud: The Steinsaltz Edition, A Reference Guide. (Random House: New York, 1989), 150.

The Mekhilta notes that the phrase "whether the defendant has sent forth his hand" is found in both Exodus 22:7 and 10. The latter verse provides in full.

> The oath of God shall decide between the two of them that the one has not laid hands on the property of the other; the owner must acquiesce, and no restitution shall be made.[57]

Since both verses contain the phrase " that he has not laid hands on the other's property", the halakhic requirements of Exodus 22:10 may be applied to Exodus 22:7. Since an oath of God is the remedy provided for in Exodus 22:10, one may be imposed in the case where a party suspects another of misuse. Since the same phrase "Elohim" is contained in verse 8, both its definition as "judges" and the remedy of the oath are proper constructions.

This contextual reading, based on the interdependent relationship between Exodus 22: 7, 8, and 10 is concretized in the Mishnah from the Talmud Shavuot and developed in the supporting commentary of Rashi. The Mishnah provides in relevant part:

> Concerning the oath of litigants: .... if [the plaintiff claims against the defendant] that the latter owes $100 and the [defendant] admits to $50, the defendant is obligated to take an oath denying liability on the remainder [and is thus relieved of any further obligation].[58]

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57. Tanakh, 119.

58. Shavuot, 38(b).

This Mishnah from Shavuot begins specifically "the oath of litigants" and is therefore not limited to one group, such as a bailee.[59] Rashi writes:

> Concerning the oath of witnesses: That the litigants swear on account of the admission to a part of the claim as derived from [scripture] where one states "this is it" (Exodus 22:8) as well as on the preceding [scriptural passage] wherein it is written that "the master of the house" is brought before "Elohim" to determine through the oath whether he sent forth his hand.

This interpretation by Rashi is based on the reading of Exodus 22:8 in its full context to support or to derive the halakhah as articulated in the Mishnah. Any litigant, including a borrower, who is charged with misappropriation, wherein he states "this is it" in order to indicate that he admits to a part of the plaintiff's claim, is to be brought before a court of law for the purpose of taking an oath in the absence of independent witnesses.[60] This Mishnah thus concretizes the analogy between the lender-borrower and the bailor-bailee. When the borrower is then charged with "misappropriation" and

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[59]. The previous section of the fifth chapter of Shavuot concerns the oath of the one who accepts a deposit, i.e. a bailee. Thus, the Mishnah from the main passage concerns the application of the oath in the context of general litigation and includes therefore the lender-borrower relationship.

[60]. The reader will note that the full context of Exodus 22:10 indicates that there are no witnesses to testify as to the actual circumstances under which the loss of the bailment was incurred. There, the issue is negligence. Likewise, it appears as if the Mekhilta and the Mishnah assume the same lack of witnesses in the charge of misappropriation. Such an assumption would be appropriate given the parameters of the gezara shava.

admits to a part of the claim, he is brought before the court and the oath administered.[61]

The Requirement to Pay Double

However, the text still contains an ambiguity. Exodus 22:8 concludes:

> (to whom the Judges shall attribute guilt) such person shall surely pay double to his neighbor.[62]

This verse, according to the opinion of R. Shimon in Mekhilta, appears to be in conflict with Leviticus 5:24. It provides:

> Or anything that one has sworn to falsely, he shall repay the principal amount and add a fifth part to it. He shall pay it to its owner when he realizes his guilt.[63]

The Mekhilta reconciles these two passages as follows. The term "double" in the Exodus verse refers to two types of payment, rather than amount. One is the requirement of restitution. The other is the one-fifth penalty. One who is obligated to pay the principle [because of false, even inadvertent testimony] regarding a dispute must also pay the additional one-fifth penalalty. Both verses cover the same situation. The court has determined that the individual has

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61. This presumes that there is not evidence which is uncontrovertable, such as the testimony of two or more witnesses who can establish the entire validity of the plaintiff's claim. In such a case, the defendant is prohibited from testifying.

62. Tanakh, 119.

63. Tanakh, 160.

sworn falsely. Thus, he pays both the principle amount and the one-fifth penalty.

The Requirement to Accept the Oath

The gezera shava which was used above allows the remainder of the verse from Exodus 22:10 to be read as part of Exodus 22:8. This has the effect of imparting the purpose of the oath: to effectuate, if possible, the removal of suspicion and to restore a relationship which was initially based on trust. This segment provides that once an oath is taken:

> (10) ...the owner must acquiesce,[64] and no restitution shall be made...

As a prelude to the analysis of this part of the verse, the Mekhilta suggests that the oath functions to restore the original bond between these two litigants. The Mekhilta, citing Rabbi Natan, provides:

> That the oath softens the matter which affects both of them.[65]

The verb hilah means to soften, sweeten; to soothe, assuage.[66] An added dimension to the oath is thus intimated by the Mekhilta in this rendering: that the jurisprudence of the Torah is fundamentally concerned with the restoration of the qualitative nature of the relationship which preceded the litigation. In other words, the oath becomes a tool through

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64. Tanakh, 119.

65. Horowitz-Rabin, Mekhilta de-rabi Ishmael, 303.

66. Jastrow, Dictionary, 467.

which human relationships may be preserved or restored through its removal of mistrust.

This theme of reestablishing human trust as a function of toraittic jurisprudence is further developed in the Mekhilta's interpretation of the phrase "and the owner shall accept":

> And its owner shall accept and [the defendant] shall not pay. From here, the rabbis hold that if anyone, upon whom an oath is imposed, swears, then he does not pay. But others hold [that the phrase he shall accept it] means that the its owner takes the actual remains of the carcass.[67]

The actual Biblical phrase does not have a direct object for the verb לקח which generally means to take or receive. The verb can also refer to a gift or lesson.[68] The Mekhilta renders the direct object in its first interpretation to refer to the oath and therefore continues this theme of acceptance of the honesty of the defendant through the oath.

In this spirit, the plaintiff is "required" to accept the oath in the same atmosphere as one might receive a gift. The oath functions to restore human relationships. Thus, Mekhilta, by its exegesis of Exodus 22:8, creates a different world of values when it places the oath in the context of a gift and urges the plaintiff to accept it.[69]

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67. Lauterbach, Mekhilta de-Rabi Ishmael, 124. In the second interpretation, it refers to the owner's duty to literally take the carcass of the deceased animal.

68. Jastrow, Dictionary, 717.

69. It also recognizes the reality of the disgruntled plaintiff by suggesting the other rendering; which is all that he is required to accept are the remains tendered to him.

Summary

There is a theme which runs throughout this section which continually places value in facilitating mutuality, trust and care in human relationships. The potential lender is not to harden his heart in response to those in need. The one who is disadvantaged and requires financial assistance does not seek charity. Instead, the Mekhilta characterize this borrower as one who seeks mutuality and respect. Thus, it is trust, indeed one might even suggest faith, that should motivate the lender to extend his hand in support of his borrower.

But the reality is that sometimes a borrower cannot pay. Often, a suspicion of misappropriation arises and there are no witnesses to the transaction. Exodus 22:8 provides a remedy; a legal proceeding in which, though God's name is invoked, is a uniquely human enterprise. Human judges become the representative of a commitment to the Divine scheme of justice as represented in the Torah. As the implementers of its jurisprudence, they become "Elohim", as it were, but not in the sense of one engaged in divination or who furnishes oracles. The search for truth is now an endeavor grounded in the realities of the interdependent connections between people.

C. THE LAW OF WITNESSES
EXEGESIS OF DEUTEORNOMY 19: 15-20

In the majority of cases, there are witnesses to a transaction that gives rise to the dispute. As we have shown, an admission in the absence of independent evidence compels an oath to resolve disputed matters and to promote a restoration of the underlying relationship. The authenticity of this goal is grounded in the reality that there is no other way in which to determine the truth. But where there are witnesses, suspicion as to the Defendant's integrity is only heightened, for his denial is contradicted by witnesses. On the basis of reason alone, the inappropriateness of the oath in the case of witnesses is self-evident.

Deuteronomy 19:15 provides the laws that determine the impact of the testimony of witness(es) upon a matter in dispute.

> (15) A single witness may not validate against a person any guilt or blame for any offense that may be committed; a case can be valid only on the testimony of two witnesses or more.[70]

The Sifra derives the rule of the oath in the single-witness setting from the phrase a single witness may not validate against a person any guilt or blame for any offense that may be committed:

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[70]. Tanakh, 305. The reader will note the omission of verse 21 which provides "nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot. The rabbinic exegesis that of monetary compensation for the loss of these items. See Talmud Bava Kamma 86(a).

> R. Yose states: A witness cannot establish liability, but he can impose an obligation to take an oath. What is significant about the oath in the case of an admission? Surely he pays compensation and on the basis of his acknowledgment, he is therefore permitted to take an oath as to the remainder. [Rhetorically one could ask] should one take an oath on account of a single witness when surely the latter cannot impose liability? Scripture teaches that [by use of the term] <u>any manner of guilt</u> that while the [single-witness] cannot establish liability, he can impose an oath [upon the defendant to deny the charge].[71]

The <u>Sifre</u> notes the all-inclusive phrase <u>any manner of guilt</u>. One could reason erroneously on the basis of a KV that his testimony could not compel an oath, for his testimony, unlike that of an admission, does not establish liability. Scripture, by using the term <u>any manner of guilt</u>, is referring only to liability. In the absence of specific language directed towards an oath, it does not prevent the court from imposing this requirement upon the Defendant.[72]

The <u>Sifre</u> acknowledges the difference between the case of admission and that of the single-witness. In the former, the defendant evidences honesty by his own conduct in which he admits liability. In the latter, the single-witness has increased the level of suspicion. However the Torah places a

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[71]. <u>Sifra</u>, 108.

[72]. As a practical matter, if the Defendant refuses to take an oath, the plaintiff is awarded damages. The basis for the ruling is a combination of both the defendant's refusal to take an oath and the single-witness's testimony. The presumption is that the Defendant's refusal to take the oath is evidence that his testimony would confirm the single-witness's account. The <u>Mekhilta</u> provides that the Court has no authority to compel the Defendant to swear. See Horowitz-Rabin, <u>Mekhilta de-Rabi Ishmael</u>, 303.

limit as to the efficacy of this testimony. It does not establish liability for payment. It only permits the court to impose an oath. The Talmud Shavuot concretizes this rule in the following discussion:

> R. Nachman in the name of R. Yitzchak, quoting Shmuel: .... but in the claim of a lender where the testimony of a single witness establishes only a perutah of the value of his claim [i.e. a minuscule portion of the plaintiff's overall claim usually insufficient to establish any liability], the Defendant is still obligated to take an oath. What is the reasoning? For it states, a single witness may not validate against a person any guilt or blame for any offense that may be committed [Deut. 19:15]. For any transgression and for any sin, he cannot establish liability, but he can impose the obligation to swear as is taught in a baraita: In any situation where two witnesses can impose an obligation for money, one witness can impose an oath.[73]

Rashi develops this KV in his commentary to this passage from Shavuot.

> The oath which is imposed in the case of a single witness arises from the fact that the borrower denies everything while one witness has testified that he is obligated for at least portion of the claim. Thus the defendant must take the oath even if his claim is only for a perutah and he denies liability since if there were two witnesses they would obligate him monetarily for this amount.

Rashi's insight provides the reader with the necessity for the construction of Deuteronomy 19:15 to impose an oath in the case of the single-witness. If it were dealing only with

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[73]. Shavuot, 40(a). An example of the "chain of tradition", developed in chapter 2, is found in this selection. R. Yitzchak is an amora (the generation of scholars who followed the tannaim) who cites tannaitic authority for his statement of the law with regards to the single witness.

liability for money, there would be no necessity for its inclusion because the last section of this scriptural verse is explicit that liability could only be imposed in the case of two witnesses. The implicit question is thus what does the first part of the verse come to teach us? It teaches that while liability cannot be imposed, the obligation to take an oath does result from the testimony of a single witness.

By the Mouth of Two Or Three Witnesses

Liability can only be imposed by the testimony of two witnesses. The Sifre interprets this edict narrowly:

> Not by a letter [to the Court] and not through an interpreter.[74] [75]

The witnesses must be present in open court. They cannot send a letter or affidavit stating what their testimony is. Furthermore, they must testify in a language which is understandable to the parties and to the court. Only in such an instance, is their testimony regarded as valid.

Summary

The laws of the single-witness and witnesses are grounded in Scripture. They confirm the other reality of the dialectic; that suspicion and doubt as to the integrity of the

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[74]. Sifre, 108.

[75]. The Hebrew word מתורגמן is generally interpreted as a translator. Jastrow also renders the term "an interpreter." Jastrow, Dictionary of the Targumim, 860-861.

Defendant is experienced where the extrinsic evidence contradicts his assertions. To allow for an oath where the evidence is defined as conclusive, as in the case of two witnesses, would not further the ends of scriptural jurisprudence and therefore no oath is allowed. But where there is proof, albeit not conclusive, an oath functions to remove the doubt. Of course, the Torah assumes that the one who assumes this obligation is duly impressed with the consequences in the event of its violation.

CONCLUSION

The blueprint of Torah often seems removed from the realities of the daily struggles between human beings for their economic survival. Nevertheless, the relationships between people is the focus of Torah. Its aim is to remove cynicism and mistrust where a dispute arises. Most important, its goal is to preserve the state of holiness which God intended for humankind to live in. These rules of partial admissions, in which the duty to loan money without interest and to characterize it as a loan so as to maintain the dignity of the borrower, assert that people are worthy to invoke the name of the Almighty so that distrust may be removed from society. The fact that a person may invoke God's name dishonestly is a risk, but it alone would never justify a rule which would prohibit its practice. In that sense, the Torah expresses confidence in the basic honesty of people to use the name of God to increase holiness on earth.

Nevertheless, the purpose of courts are to determine wherein the truth lies. The Torah acknowledges that to permit an oath in the face of strong evidence could actually serve unwittingly to desecrate it. In light of this concern, the oath of a defendant is barred when the evidence is regarded as conclusive on an issue, which is defined as the irrefutable and noncontradicted testimony of two witnesses. At the same time, the testimony of a single witness does arouse doubt because this evidence is independent and contradicts the defendant's denial. Yet, it is not conclusive. Here, the court is allowed to impose the oath on this "grey area" of proof. It reflects a confidence that the defendant, sufficiently aware of God's presence, will swear and testify truthfully or respectfully decline the obligation and fulfill the claim of the plaintiff.

And so, the role of the oath has a transcendent feature which extends beyond providing a methodology for determining the truth. This is to impress the solemnity of the moment by invoking God's presence which serves to permeate the proceeding with holiness, so that the court may achieve its ultimate aim: the restoration and renewal of human relationships. If at all possible, the oath becomes a gift to the plaintiff which he is urged to accept. By doing so, he will fulfill the concluding command of the Holiness Code which was referred to at the beginning of this chapter:

ואהבת לרעך כמוך, אני יהוה׃

Love Your Neighbor As Yourself, I am the Lord.

CHAPTER VI
THE SYNTHESIS OF THE SCRIPTURAL FOUNDATION WITH THE TALMUD

INTRODUCTION

Having described a scriptural foundation to Talmud in Chapter V, we now turn our attention Scripture as the essential fuel which drives the dialectic. This foundation provides three cornerstones. The first is the importance of the oath. The privilege to invoke God's name is a serious one for both the community and the individual. Both are at risk when an oath is taken, for one may conceal that which he knows to be the truth and thereby commit a hilul hashem; an act that endangers both the individual and those who witness it. For the latter, this threat consists of the loss of a religious community's most essential cohesive element, faith in the Divine and a desire to strive towards that which is holy. For the one who proffers perjury, his loss is to suffer iniquity until death.

The second cornerstone is the lender-borrower relationship in which the duty to lend repeatedly to those in need is explicit. A person who refuses to lend is regarded as a pharaoh; one who keeps people in bondage. Its characterization as a legal obligation is done only to promote the borrower's dignity and sense of equality. Yet, when the borrower refuses to pay and an action is instituted, the court has a duty to preserve the honor of the borrower on the one hand, yet encourage a person to lend once again on the other.

The third cornerstone is the nature of suspicion and the role it plays in determining the right of an individual to

swear in the name of the Almighty. If there is an admission, the court's role is clear. If witnesses testify, then as to any portion that their testimony establishes, the law is again apparent. But the baraita is the grey area. Thus, the court must determine at what point is suspicion an adequate basis to prevent a litigant from testifying.

Each of these themes, as developed in the scriptural foundation, is relevant to the development of the talmudic dialectic on the baraita of R. Hiya. The purpose of this chapter is thus to integrate this scriptural foundation with the Gemara. Methodologically, it will take the following form. Each of the major thought units of the talmudic passage will first be summarized to in order to reacquaint the reader with its main features and then analyzed in light of the forgoing cornerstones that comprise the foundation for the discourse.[1] In so doing, I hope to demonstrate that these literary antecedents of the Talmud are a prerequisite to a deeper understanding of the theological and human dimensions which the dialectic confronts in its effort to determine the role of God in a dispute between two who once trusted each other.

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[1]. The term "thought units" has a precise definition. Chapter IV set forth each of the major units of the discourse by dilenating each by roman numerals. For example, the first major thought unit was "I. The Rule and Rationale of the Baraita". The second major unit was "II. The Necessity For the KV", etc.

I. THE RULE AND RATIONALE OF R. HIYA'S BARAITA

The baraita's unique structure suggests that ADM and WS are equivalent in their impact. As we have seen, a KV rests on the assumption that case A stands in a relationship of minor to major importance to case B. Thus, the baraita should have been formulated:

> That an admission has a lesser effect than the testimony of witnesses and that this statement is derived from a KV.

Instead, the baraita employs the phrase שלא תהא הודאת פי' גדולה מעדת עדים (that an ADM should not have any greater effect than the testimony of WS). This phrase implies an equivalency between the two laws rather than one of minor to major.

This comparability lies in the nature of the presumption which confronts the Court. When one makes an admission, as we learn later in the Gemara, there is external evidence of the defendant's honesty. Thus, the dangers of a hilul hashem to the community and the transgression of taking a false oath are diminished. For these reasons, the Torah allows a defendant who admits his guilt to take an oath on the disputed remainder.

But, where witnesses are present, no such evidence appears before the court. The dangers of a hilul hashem resulting from a false oath are increased because witnesses have controverted the defendant's denial. The rule should be

just the opposite of the baraita.[2] This conclusion, however, is implicitly rejected by it.

Therefore, the baraita is making a significant theological, ethical, and legal statement. A rabbinic court can only declare one unfit to testify on the basis of unequivocal extrinsic evidence and even then the defendant may still testify on any issue not covered by it. The lender is still presumed fit to testify despite the presence of witnesses who contradict him as to a part of the plaintiff's claim. There is no increased danger of a hilul hashem to the community, nor an enlarged risk that the litigant would take a false oath. It is in this sense that the testimony of witnesses and admissions are equivalent because neither pose a threat to a violation of any component of the scriptural foundation. In both the case of ADM and WS, the defendant is considered honest and thus competent to take the oath on the disputed remainder because there is no direct evidence on this aspect of the claim that would support an inference of dishonesty.

As a corollary, the baraita implies that a court can only declare one unfit to testify, and thus avoid committing a hilul hashem, on the basis of unequivocal extrinsic evidence, such as the testimony of two witnesses. Furthermore, no

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[2]. Perhaps this accounts for its exclusion from the Mishnah.

inference may be drawn as to the defendant's honesty or lack thereof on any issue beyond that evidence.[3]

The baraita seeks further support by stating that its rule is consistent with the Mishnah of "two holding onto the garment." The extrinsic evidence in this Mishnah is that both are holding onto the garment equally. Therefore, no inference may be drawn as to either party's dishonesty. Both may testify on the basis of what the issue is before the Court, i.e. the doubt as to the portion which the other is holding. This element is represented by each claiming "all of it is mine."[4] The testimony consists of "that I do not have less than a one-half interest in the whole" despite the other's implicit claim of misappropriation (because each claims that "all of it is mine"). The honesty of both is presumed because there is no extrinsic evidence on the doubt that would render the oath in this instance a hilul hashem. Thus, the phrase אומר אומן is read by the baraita to stand for the following principle. Where there is no independent evidence as to a disputed portion of a claim, despite the presence of a doubt as to the honesty of litigant(s) caused by extrinsic evidence

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3. There are some exceptions to this rule. One who has been found guilty of being thief, a perjurer, or a bailee who has misappropriated a bailment for his own personal benefit cannot testify in a subsequent case. However, these offenses point to fundamental issues of character so as to impeach his credibility. The inability to pay a loan, as a matter of law, does not impugn the character of a borrower.

4. Rashi supports this interpretation of the phrase אומן אומר in his commentary at Bava Metzia 3(a).

(such as the testimony of witnesses, a partial admission, or having physical possession of a portion), this apprehension does not rise to the level of a suspected hilul hashem sufficient to prevent the defendant from taking an oath. The belief in the integrity of the litigant(s) is mandated by the Torah.

In short, the language of the baraita in suggesting an equivalency between ADM and WS forces the reader to closely examine each of these rules and to familiarize himself with the relevant scriptural passages and to determine their nature as developed in the midrashic literature. Furthermore, the phrase "v'tanah tunah" indicates R. Hiya's acknowledgment as to the necessity for harmonization with the Mishnah. By examining the scriptural foundation, the depth of the baraita's claim that it be incorporated within the body of halakhah is understood before one confronts the intensive analysis by the dialectic. The baraita is asserting that neither Scripture nor the Mishnah preclude the court from administering an oath in its case. In short R. Hiya claims that the baraita harmonizes with both scriptural and mishnaic precedents.

II. The NECESSITY FOR THE KV

An important distinction was made between ADM and WS. An ADM was extrinsic evidence of the borrower's truthfulness though there was an inner-tension in which he wanted to deny the claim entirely. The oath was allowed because the Torah

asserts that no one would be so arrogant as to deny the claim of his lender.

At first, this statement seemed implausible. A person could deny the entire claim of a lender, whether in order to buy time or for any other reason. The audacity of the borrower could extend this far (and perhaps often does) in the everyday world of business relations. It seems more plausible than not that if the borrower did not have sufficient funds that he would deny the entire claim, rather than admit to a portion.

The Torah rejects this position. When one examines the scriptural scheme of lending described in Exodus 22:24 and its rabbinic exegesis, the rendering by Rabbah is readily understood. The loan is interest-free and the refusal to lend is equated to a hardening of the heart. Thus, the lender is encouraged to extend credit to his neighbor many times over lest he become an oppressor similar to a pharaoh. Third, the early midrashic exegesis characterized this transaction as a loan at the behest of the borrower in order to "quiet" his anxiety that it might be perceived as charity. In light of this description and his subsequent admission, the presumption that the defendant would not be so arrogant as to deny the claim of his lender is convincing.

But in the case of WS, this presumption as to the borrower's lack of insolence is challenged by the Gemara.[5] Though the transaction which preceded the litigation may be identical, the defendant has demonstrated his arrogance by denying the entire claim such that the lender must produce independent evidence which substantiates only a part of it.

In this regard, the Gemara utilizes the scriptural foundation to asserts its authority to define the parameters and hence the usage of the laws of Torah. If the rationale for the rule of imposing an oath on a disputed remainder is challenged, (such as in this case where there exists extrinsic evidence of complete arrogance in the form of the defendant's own initial denial in the presence of two witnesses and whose denial is then conclusively contradicted at least in part by their testimony) then its applicability must be reconsidered. The contradiction of an underlying presumption justifies the suspension of the law which rests on it. This is a significant achievement in any system of advanced jurisprudence.

In such an instance, the law's application would either have to be rejected or a different underlying principle operative. It is interesting to note that the Gemara chooses the latter option as its path by developing and then challenging the subsequent KV formulations. In so doing, it

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[5]. The Gemara is analyzing the parameters of the rabbinic exegesis of Exodus 22:24 which presumes the borrower's honesty.

accomplishes two objectives. One, it preserves the chain of tradition, for if the former option was followed, the baraita would be discarded and probably forgotten. Second, while preserving as many links as is possible, it forges a new coupling to the reality of its present. No single aspect of the scriptural foundation satisfies the baraita; that much is clear.[6] Nevertheless, the process of shaping this past tradition to the demands of the present, provides the community with an authentic relationship between the Divine Law and human needs. The chain is strengthened on account of the Gemara's dialectic form which continuously questions the assumptions which underly the Divine Law of Torah in the context of real life circumstances.

In summary, the necessity of the KV rests on a finding of the inapplicability of the scriptural and midrashic characterization of the lender-borrower relationship. A rigid formula to determine the appropriateness of a rule is rejected because the Gemara reasons that if the underlying rationale is contradicted, then the law may not be automatically applied. It may be proved on another basis and so the passage will continue in hopes of finding such a justification. To paraphrase the dialectic, 'just because a transaction falls within the parameters of Exodus 22:24, it does not necessarily mean that the law of Exodus 22:8, 10, despite the gezera shava

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[6]. One could easily reformulate the scriptural foundation as a dialectic.

which would result in the oath's imposition, should automatically apply. Instead, the appropriateness of scriptural law to a case must be carefully considered.'

III. KV No. 1
ADMISSIONS AND TESTIMONY ARE LEGALLY ANALOGOUS AND STAND IN A RELATION OF MINOR TO MAJOR IMPORTANCE

Structurally, this section of the sugya consisted of three steps. First, the KV asserted that an ADM is a less stringent criterion than that of WS in that the former did not obligate the defendant for "money", while the testimony of WS rendered him liable for payment. Since the oath was permitted in the case of ADM in which liability could not be established, how much the more so in the case of WS, in which a defendant is obliged to pay, should an oath be rendered upon him. This KV was challenged on the basis that an admission was the equivalent of one hundred witnesses and thus dispensed with the requirement of any additional proof on the matter admitted.

This lead to the KV being reformulated to define monetary obligation as limited to a fine. Once an admission was made, no fine was imposed. However in the case of WS, a fine was imposed and therefore the law of WS was more stringent than that of ADM. If in the case of the latter, an oath was permitted, then how much the more so should it now be enforced in the case of WS.

The Gemara does not challenge this new formulation. One possible theory is that the author(s) presume that its readership is acquainted with the scriptural derivation of the exemption from a fine which would defeat the KV. The right to impose a fine is matter of statutory construction which defines the court's jurisdiction. It has nothing to do with the nature of an ADM or WS or in determining whether they stand in a KV relationship. This relief from the payment of double restitution; one in terms of underlying liability and a fine is derived exegetically from 22:8 from the phrase "and the judges shall determine his guilt". The one whom the judges determine to be guilty shall pay "double." In the case of the ADM, the litigant has already determined his own guilt, not the court. Thus, the judiciary has no authority to impose a fine based on this statutory construction of Exodus 22:8. The reader is presumed to know the weakness of this formulation because it is apparent from both Scripture and its midrashic exegesis.

Instead, the Gemara redirects its focus toward understanding the scriptural treatment of an ADM and WS in order to determine whether the two concepts stand in such a relation as to sustain a KV formulation.

IV. THE RELATIONSHIP BETWEEN ADMISSIONS AND WITNESSES

A. Challenge: An Admission Charges A Litigant With Greater Religious Obligations Than the Testimony of Witnesses

This argument was premised on Leviticus 5:4 which detailed the sin of negligently uttering a false oath. According to Scripture, such an individual is in an ontological state of guilt. Through confession and offering, a person possesses the means to remove himself from this condition. However, when such an act is done wilfully, no such remedy is provided. This is in keeping with the counterpart to Leviticus 5:4, i.e. Exodus 20:7 in which it is stated "thou shalt not take the Lord, thy God's name in vain." All that can be accomplished through confession and atonement for this latter violation is to leave the matter "pending." Complete forgiveness is granted only through death.

Scripture is silent on the effect of independent testimony which contradicts the denial of the defendant beyond establishing liability in a civil case. There are no references to offerings or sacrifices. It is in this arena where the dispute between the Sages and R. Meier takes place.

Therefore, the challenge to the baraita's rationale rests on the assumption that WS, who are present in court when the defendant denies the claim, will contradict him and that he knows they will in fact do so. Furthermore, despite this knowledge he still maintains his innocence. According to the Sages, such a person does not demonstrate the sufficient

mental state to constitute "confession" so as to render him obliged to bring an offering.

R. Meier's argument rests on characterizing the testimony of witnesses as indicating simply that the defendant is mistaken in his position. The only inference which may be drawn from their testimony (in the absence of an overt statement which indicates arrogance, i.e. "I did it deliberately"), is that the defendant is negligent in his position. Just as Scripture defines legal truth to consist of the testimony of two uncontradicted and irrefutable witnesses, R. Meier would consider the requirements of Leviticus 5:4 satisfied in the case where there is the independent testimony of two witnesses and the absence of a clear expression of defiance by the defendant; the defendant simply being "legally" negligent in his denial. He is in a state of guilt which requires atonement. For R. Meier, there is no delineation between legal and theological guilt. Therefore, since WS, even in the face of a denial by the defendant could impose the death penalty, how much the more so should their testimony be powerful enough to impose the less stringent penalty of an offering where the defendant has only denied the validity of the plaintiff's claim. R. Meier maintains the presumption of integrity and his position is theologically benevolent.

This theological aspect, which serves as a basis for sustaining the <u>baraita</u>, is evinced through R. Meier's

position, for it would further the ends of restoring the relationship between the litigants (a primary function of the oath). Once again assuming the absence of defiance, the plaintiff has received restitution. He further observes the defendant making the requisite offerings according to the scriptural mandate for the removal of sin. Though not an overt expression of contrition, nevertheless, just as God accepts atonement offerings for acts which are done inadvertently, but nevertheless constitute an affront to God's honor, so too must the injured party infer that these acts, though ordered by the rabbinic court, are done so willingly in order to effectuate atonement. In conclusion, R. Meier has equated the efficacy of WS and ADM within the context of negligent conduct regarding the act upon which the litigation is founded and the defendant's subsequent denial. Therefore, a KV could be sustained on this basis because it confirms R. Hiya's position that 'ADM is not any more efficacious than the testimony of WS.' The two are legally equivalent for purposes of atonement in the absence of verbal defiance.

B. An Admission Is Not Affected By Evidence Which Contradicts Or Refutes It

This is the argument which most seriously challenges the rationale of the baraita. An ADM is irrefutable and non-controvertible, even in the presence of witnesses who seek to demonstrate the innocence of the litigant. It promotes healing between the parties. The defendant is permitted to

take an oath with regards to any other claim. The plaintiff is required to accept it. It accelerates the Scriptural process of litigation towards a final resolution of the dispute. It is a significant column upon which to rebuild the relationship of trust.

Witnesses engender the opposite result. Their testimony fosters embarrassment upon the defendant. It generates anger upon the plaintiff for having been forced to produce independent evidence to sustain his claim. Furthermore, it encourages the adversarial nature of the proceeding in that these witnesses are subject to refutation and contradiction by other witnesses. In this latter case, the oath is administered to everyone. Thus, from a theological point of view, the name of God is being used not to promote holiness, but to determine wherein the truth lies. When applied to the lender-borrower scenario, the continual invocation of the oath creates the distinct possibility of forever discouraging such a lender from extending his hand to give another loan to a borrower. Thus, the fulfillment of a small portion of God's design for the world and the intended ontological state of scripture for humanity - holiness towards one another are frustrated through this process.

This is an important challenge to the baraita for this analysis suggests that ADM promotes harmony and trust, while WS advance discord and alienation. The baraita's premise that an admission has no greater effect than the testimony of WS is

thus compromised. A new KV is required to sustain the baraita's validity.

V. The Law Of The Single Witness (SW) As A Basis for The KV

A. A Singe Witness May Compel a Defendant To Deny Under Oath The Substance of the Former's Testimony

The concept of the rolled-over oath in the SW setting is derived from two scriptural passages. From Deuteronomy 19:15, the rule is inferred from the construction of the verse. Since the passage is explicit in that the testimony of a SW could not impose liability, it is to be understood as permitting an oath to be enjoined on the defendant (otherwise what would be the purpose for its inclusion since the "b" part of the verse was definite that only the testimony of two or more witnesses could establish liability).[7]

The other passage was from Numbers and dealt with the suspicion of a jealous husband as to his wife's faithfulness. When she appeared before the priest, she would have to issue two denials. One was on the specific charge of adultery as pertained to an individual. The other was to deny having ever committed adultery.

The passage from Numbers is helpful in that it furnishes a basis for an analogy to be drawn from the husband-wife

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7. A rabbinic axiom of scriptural exegesis is that there is nothing superfluous contained within Scripture. Every word has relevance. Theologically, this makes sense since it is regarded as Divine in origin, and hence perfect.

relationship in the context of adultery and applied to the lender-borrower relationship in the context of a denial of the loan. Both are grounded in trust. For the marriage, one aspect of this trust is the prohibition against adultery and the corresponding duty of faithfulness. Likewise in regards to a loan, the trust is affirmed when the lender generously provides the funds and the borrower promises to repay the money. In each instance, there is a suspected violation of a central component of that trust. In the case of the marriage, the oath is imposed to refute all doubt. Likewise, in the lender-borrower case, the SW has generated a significant level of doubt such that the oath could be used by a court. Thus, the oath is imposed not only on the specific aspect of his testimony, but on all other counts as well so that doubt is removed and the relationship repaired.

The introduction of the SW rule is appropriate from a scriptural perspective because it focuses on this underlying issue of doubt. The oath in this setting is used to quiet suspicions and promote harmony between the respective parties. Therefore, since the baraita's difficulty arises within the context of witnesses, the law of the SW provides a foundation upon which to articulate a KV capable of withstanding the challenge that the scriptural perception of WS is that it promotes discord in its search for determining legal truth, while that of ADM promotes resolution and reestablishing trust.

Despite these parallels, there is a difficulty which the Gemara articulates. The imposition of an oath in the SW case is based on an inference from Scripture. The decision to impose another oath on a disputed remainder is the product of a rabbinic ordinance built on this inference. To extend it now to serve as a basis for the facts of the baraita is problematic for the testimony of WS, unlike that in the SW setting, is conclusive. The doubt as to the defendant's integrity in the baraita is far stronger because of such testimony than in the SW. Since there is no Scriptural authority to impose an oath in the first instance, even though there may be a valid analogy to be drawn, no oath can be imposed on the remainder. Nevertheless, because of the similar scriptural issues of trust and doubt, it may serve as a partial basis for a KV.

V. A KV FROM TWO Rules ADM AND SW

A. A KV Based On The Common Element Of Claim and Denial

Neither ADM nor SW are sufficient to formulate a KV. But the deficiency of one may be compensated for by the other such that together it may serve as the KV to support the baraita. The element that each share is that their respective status is that of a disputed remainder. This is the issue that is now being brought before the court such that the provisions of Exodus 22:8 should be operative. In the case of a partial ADM, as we have seen, the defendant is subject to Exodus 22:8

on the basis of his admission. In the case of the SW, the oath in the first instance comes to nullify that portion of the plaintiff's claim under Deuteronomy 19:15. Now, there exists a disputed remainder which also renders Exodus 22:8 applicable. Together, a KV could be inferred which would establish the scriptural validity of the baraita, for the issue in all three cases is that of a disputed remainder.

B. Challenge: A Presumption of Truthfulness Distinguishes Both the Single-Witness and Partial Admission from the Baraita

The Gemara raises the fundamental objection to extending the oath as to the disputed remainder in the case of witnesses. Not only have witnesses established the conclusiveness as to a portion, unlike the case of the SW, the Defendant can now be viewed suspiciously so as to prevent him from taking an oath and committing a hilul hashem.

C. But the Defendant In the Baraita Is Presumed Truthful So As To Testify In Other Cases

This objection is confronted directly. A borrower who denies his lender is not to be viewed suspiciously. Instead, his circumstances, as detailed in the lender-borrower schema of Exodus 22:24, creates a presumption that the need for economic preservation compels him to initially deny the claim of the lender before the court. Thus, the law permits a borrower to be a fit witness in other cases.

The Gemara makes an important statement which supports the scriptural foundation developed in Chapter 5 with regards

to the analogy between the lender-borrower and the bailor-bailee. In this part of the argument, R. Idi b. Avin seeks to distinguish the bailee from the borrower for only the former is unfit to testify in subsequent cases. But this creates a serious problem of statutory construction because, as we have shown, in order for the provisions of Exodus 22:8 to apply to the lender, an analogy supported by Scripture must exist between a loan and a bailment. Rashi addresses this concern:

> [In the case of a charge of misappropriation of a bailment] witnesses are prepared to testify that during the time the defendant was entrusted with the bailment, he made personal use of it.[8]

His denial in the presence of witnesses stems from greed which renders him the equivalent of a thief. For this reason, he is unfit to testify in subsequent cases. This motivation of greed, present in the bailee, is absent in the borrower.

There is a concept in modern law called a legal presumption. Essentially, it operates to allow a court to assume a certain fact to exist based on either the dictates of a statute or a common societal practice. The rationale that Rabbah affixes to the lender-borrower, i.e. that only the necessity to avoid becoming destitute forces him to make the initial denial, falls into the category of a presumption. The presence of witnesses that contradict the borrower's denial, only further evidences his desperate circumstance. The presumption still exists.

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[8]. Rashi, Bava Metzia, 4a.

But such is not the case of the bailee cited by R. Idi b. Avin. Hardship was not present when the transaction was created at the outset. The bailee was given the object for safekeeping. Witnesses are now prepared to testify that he has misappropriated it. The case of the bailee presented by R. Idi renders operative the "b" portion of Deuteronomy 19:15 which prohibits him from testifying for he is considered a thief. And as previously shown, the thief and perjurer share the common characteristic of intentional deception for selfish gain. By knowingly permitting such a person to testify, the rabbinic court would become involved in the process of furthering an individual to commit a hilul hashem which brings harm to both the community and the bailee. Therefore, he is considered unfit to testify in subsequent cases.

However, as Rashi indicates, in the absence of this specific circumstance, the underlying analogy between the two legal relationships is still sustained. Thus the KV based on the binyan av remains valid.

D. ADM and SW Are Not Subject To the Law Of Retaliation

Another challenge was made against the binyan av of the SW and ADM by the Gemara. Utilizing the contextual approach[9],

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[9]. The term "contextual approach" is understood as follows. When a proof-text is utilized to formulate a halakhic position, such a verse must be considered in its full context. The remaining elements of the text may be utilized to either sustain or reject the position. In this instance, the rendering of Deuteronomy 19:15 as pertains to the SW to form a part of the binyan av is being challenged on the basis of the remaining verses, i.e. 16-21, to refute it.

it considered the baraita in light of the entire section dealing with witnesses, i.e. Deuteronomy 19: 15-21 in which the law of retaliation was contained. This penalty, quite severe, applied to witnesses who had maliciously given false testimony. If a conviction or liability was established on the basis of their testimony and then later the defendant's innocence was demonstrated, the witnesses would suffer the same punishment that the defendant would have incurred had their testimony been found credible.

This element is present in the baraita for two witnesses have testified. If later their testimony is determined to be false and malicious, they will incur a penalty. But this factor is not present in the SW because no liability can be established. Clearly it is not available when the defendant makes an admission. Since this element is not shared by each case which forms the binyan av, the KV is refuted.

The degree of analysis in which the authors utilize this contextual approach demonstrates their care in their use of Scripture. Often, the rabbinic communities of this period are characterized as "proving what they want to prove." Thus, their treatment of Scripture is considered arbitrary in the sense that they use it to advance their own agenda. Without debating this point, at least in this instance, the opposite is true. The proof-text is being challenged by the Gemara based on the context in which it appears. It is attempting to disprove its "own" usage of Deuteronomy 19:15 by referring to

subsequent passages in advancing its challenge to the binyan av.

E. The Law Of Retaliation Is Not A Sufficient Distinction So As To Render This KV Invalid

R. Hiya regards this distinction as invalid. Deuteronomy 19: 16, et. seq., is penal in its intent. It is not evidentiary except to the limited extent of refutation. However, the laws of ADM and SW in the scriptural setting have a pronounced evidentiary effect to the principle issues in the litigation. Each compel an oath to resolve all issues that are in doubt. This factor is present in the baraita as well. There is a disputed remainder with no independent evidentiary proof. Just as an oath was imposed in the scriptural settings of an ADM in Exodus 22:8 and in the SW of Deuteronomy 19:15, so too should Exodus 22:8 apply to the factual setting of the baraita.

CONCLUSION

The Talmud has a definitive reliance on scriptural and midrashic antecedents of which its authors presume its reader to have knowledge. In the commentary sections of Chapter 4 which relies heavily on Rashi and mishnaic sources, scriptural precedents were uncovered.

These scriptural provisions are identifiable and consist of the following:

1. Exodus 20:7 is concerned with the seriousness of taking God's name in vain. For the intentional false oath, complete atonement is not possible in one's lifetime for this

offense. This was the background which added an important dimension to the dialectic in understanding its relunctance to readily adopt the rule of R. Hiya.

2. Leviticus 5:4 implicitly provides for the administration of an oath by allowing for a remedy where false testimony is presented, but which was due only to negligence.

3. Exodus 22:8 details charges of misappropriation and the status of a litigated matter where there is a partial admission. The provision of the oath is considered to be applicable in this setting based on a gezera shava from Exodus 22:10.

4. Exodus 22:24 focuses on the lender-borrower relationship. It suggests that its characterization as a legal relationship is done at the behest of the borrower. This might account for the absence of a provision in this section for a legal remedy. Therefore, if a dispute would arise, relief would only be through the wording of Exodus 22:8.

5. Finally, Deuteronomy 19:15 describes the evidentiary impact of both the single witness and two witnesses. The latter is regarded as conclusive proof on the matter attested to. It serves as one of the principle arguments against the rule of the baraita. In contrast, the former assists in establishing a binyan av from which the baraita could be rendered harmonious with Scripture.

The Gemara does not cite any of these passages. Nevertheless, they (as well as others which may be unaccounted for) are the foundation, indeed the essential fuel, which drives the Gemara to reach its conclusion that the baraita is grounded on these literary antecedents.

Part II: An Overview of the Underpinnings

The Gemara utilizes the cornerstones of the scriptural foundation. These cornerstones may be analogized to the underpinnings of any system of jurisprudence. In the United States of America, the Constitution, the Bill of Rights, and perhaps the legal theory of anglo-saxon common law, serve as

foundational to the courts. For the rabbinic communities of the tannaitic, amoraic, and saboraic periods, the Torah in its broadest dimension are the foundation upon which halakhah rests.

Having developed the scriptural foundation and seen its application in the talmudic discourse on the baraita of R. Hiya, it is now incumbent to examine it and to determine what theological and ethical conclusions, if any, may be drawn from it.

First, Torah attempts to serve humanity. God is there to be availed so long as humankind recognizes its limitation to invoke God as an aide to serve humanity's quest. A tribunal, which calls the integrity of human beings into question when presented with evidence and issues of doubt, is worthy of being referred to as "Elohim" for it is that role in which they are placed. It is a position to be shunned rather than sought after for God is holy and therefore judges are to follow the protocol of the King upon whom they serve and create an environment of holiness. Permitting even an inadvertent hilul hashem to occur would be a violation of its sacred task. It must protect the sanctity of God's name on the one hand while on the other promoting the integrity of each litigant. If at all possible, its role is to use the oath in its primary capacity, to restore trust in the world by removing doubt and suspicion in the minds of those who are before it.

The litigation which has come before the court arose out of the sensitive desire to perform the mitzvah of aiding and maintaining the dignity of one who was less fortunate and in need. But now, the relationship has turned because of a dispute. As crucial an issue as it is for the court to determine the truth, it must also question whether, through its proceedings, the plaintiff will ever perform this command or be hardened in his heart through this legal process. It must preserve the desire of the heart to do good, even when there is a sense of being taken advantage of. In essence, it must also create an environment within the lender to continue to lend without interest to those in need, lest society be divided between pharaohs and slaves.

As to the borrower, the baraita promoted his dignity by permitting him to testify despite the presence of two witnesses who impeach his credibility before he takes the oath. The court must maintain a perspective of innocence and has no right to withhold the oath except in narrow, clearly defined circumstances. Its duty is not to look into the heart of a human being and determine if it is one that is seeking to do evil. Nor can it protect one from committing a hilul hashem. Rather, the judges must maintain a presumption of innocence in their minds. They are only the ministers to the King. And it is only the King who determines what is in the heart. Thus, a sensitivity must be present that recognizes the presumption of the borrower as being in a difficult

circumstance such that he denies on the one hand, but that he will either take the oath and honestly testify or decline the oath on the other. The scriptural foundation expresses a unique faith in the fundamental goodness and integrity of humankind.

Finally, the Talmud is teaching that the right to the oath is ultimately in the hands of the borrower. There is the prohibition against taking God's name in vain. The penalties for intentionally violating God's name will extend into the grave. Even if he is negligent in his testimony, he will suffer through confession, atonement, offering, and restitution if he subsequently remembers facts that would indicate that his initial testimony was false. Ultimately, the duty to be honest is not between the individual and the court. Instead, it is between the individual and God. If this honesty is violated in open court, God is desecrated because the intention of the oath is to aid the development of holiness in society, not to promote distrust and discord. This will be the burden which the defendant will carry and will perhaps be heavier than the debt of which he will be relieved. But by permitting the oath in this instance, despite the sometimes harsh realites, the Talmud confirms the essential goodness and trust in people, and expresses the hope that relationships can be restored and an environment rooted in holiness can be advanced with the help of the Almighty.

This last element, that God is to aide humanity, is expressed in the midrashic statement that the litigant is to accept the oath as a gift from the defendant. By doing so, the relationship is repaired and the ontological holiness, described in Scripture as a state of being for an individual, becomes the essential feature of human connection and of society at large.

CHAPTER VII
TALMUD AND SCRIPTURE:
IMPLICATIONS OF A SCRIPTURAL METHODOLOGY
IN THE UNDERSTANDING OF TALMUD

The Philological Method: Benefits and Limitations

This book began with a description of recent works which aim to provide access for the reader who wishes to engage the Talmud. The methodology that is used in these works is philological; an approach which emphasizes the meaning of the passage in its syntactical and logical flow.

This methodology, while useful in furnishing a reader with a literal understanding of a talmudic passage, poses certain difficulties for the audience to whom these works are directed. First, the sheer quantity of material which is being furnished to the reader in each work presents a formidable challenge. For example, the Steinsaltz Edition to Bava Metzia alone consists of five separate volumes. The reader is overwhelmed by both the detail and quantity of material in even a single volume. Second, it does not provide the reader with the material which the editors of the Talmud presumed its audience to possess: a thorough knowledge of Scripture, its midrashic exegesis, relevant mishnaic passages, and even contemporaneous portions of the Talmud. Without this background, the reader has difficulty in grasping the theological and human issues that are at stake in the Gemara. Third, it does not illumine the metaphysical or spiritual dimensions that a passage may be addressing through its discussion of a concrete situation. As a corollary, unless stated explicitly in the talmudic passage, underlying theological, ethical, and psychological issues are absent.

A philological approach cannot address the concept that the Talmud is symbolic literature.

In short, Feldman's principle criticism of current translations is justified in that these works fail to give the reader the experience of "learning" Gemara. Such shortcomings, however, do not arise out of the scholarship of these works, which is eminent. The contribution of such scholars as Rabbi Adin Steinsaltz in providing an English translation and commentary to these texts is indeed profound. Instead, they arise from the methodology that has been selected in its aim to provide the modern reader access to all of the literature. The philological method, by emphasizing the "plain-meaning" of the text, does not penetrate to the deeper issues that this literature encompasses.

Scriptural Methodology: An Approach To Understanding Talmud

This methodology calls attention to the historical and scriptural roots embedded in these texts. An axiom of this approach is that the Talmud is a symbol for the rational understanding of the relationship between the Divine and humanity in its myriad circumstances. The problem of the baraita analyzed above is not whether a person who denies his lender in the presence of witnesses should be permitted to take an oath on the disputed remainder. This real problem poses more fundamental issues of human and Divine concern. To what extent may God play a role in restoring human relationships? Under what conditions does the Torah issue a

psychological imperative for the individual and community to turn aside its suspicion and doubt as to the integrity and honesty of a person? How can a court of law create an environment of reconciliation so that the fulfillment of a moral law which provides aide for those disadvantaged may flourish? These are the real issues which are representeed in the baraita and the Talmudic dialectic which follows. The Talmud thus symbolic literature.

The methodology is comprised of three steps. First, the sugya must be comprehended. A philological and contextual understanding is a prerequisite to any increased level of awareness of the underlying issues.

In the next phase, an analysis of a passage is then undertaken which will reveal central themes which occur repeatedly within the passage. In the selection from Bava Metzia, the oath, partial admission, single-witness and two witnesses, are played out on the stage of the lender-borrower relationship. By focusing on these motifs, the reader begins the process of "taking a step back" from the dialectic in order to develop a sense of its Human and Divine dimensions. In this phase, the reader might ask the following:

1. What do Scripture and Midrash contribute to the understanding of the lender-borrower relationship?

2. What is the significance of the oath in Scripture and in the subsequent rabbinic literature which precedes or is contemporaneous to the Talmud?

3. What are the scriptural and midrashic

supports for the laws of admission, single-witness, and witnesses and their rationales?

Once such issues are identified, the most difficult part of this methodology is then engaged: examining the treatment of these topics by the literary antecedents of the Talmud. These consists of scriptural passages and their midrashic exegesis, relevant Mishnayot and baraitot, and contemporaneous literature, such as related talmudic passages. At this level, the assumption of the editors, that its reader is knowledgeable of these topics in their scriptural and historical contexts, is satisfied.

The interrelationships of these various themes are more fully realized in the scriptural foundation, than in the talmudic dialectic. The divine and human dimensions are treated directly in theory. Thus, the reader is able to appreciate the necessity for the dialectic approach that the Talmud adopts, as well as the historic antecedents upon which each talmudic position rests.

Finally, the passage is reread in light of the scriptural foundation in order to discern the Divine intention within the particular human issue that the Gemara confronts. For example, there is a nexus between the oath, which represents the invocation of the Divine, and the right of a person to make use of it, even if suspected of being less than forthright. The <u>baraita</u> tells the community that not only has it no right to withhold the oath from a defendant [but for a few narrow exceptions], but that it must let go of its

suspicions and accept the oath of the defendant as one accepts a gift, and thus conclude the matter. The baraita and the Gemara teach that the Divine, within the parameters of certain definitive exceptions, presumes the essential integrity and honesty of people. Because of this fundamental view by God of humanity, a person is entitled to use the name of God to affirm his character. It is difficult to discern such a lesson from the philological approach precisely because of the lack of a scriptural foundation.

II. IMPLICATIONS OF THE METHODOLOGY

The Meaning of Talmud

This methodology expresses philosophically the concept that the Talmud is an extension of the Written Torah and the Oral Torah. These are the Talmud's foundation upon which it builds. By amplifying these texts, the Talmud falls within the Divine imperative of Sinai. Just as there are conflicting passages within the Tanakh which, when contrasted as the midrashic literature so often does, gives the appearance of a miniature dialectic, so too does the Talmud engage in its own dialectic. The result in each instance is a synthesis and a deeper appreciation for the nuances of each work as it struggles to resolve the human and theological issues that are presented.

Torah is not simply the scroll that is in the ark, or the Mishnah, or the collection of midrashim written centuries before. Instead, Torah is that which preceded creation.

Talmud is another step toward reaching that ultimate perfection because of its demand for a rational comprehension of the paradoxical nature of the human condition. The meaning of Talmud is that it extends the path towards an understanding of the Divine wish for humanity.

The Function of Talmud

Once the meaning of Talmud is grasped as a structure which rests on Torah, its function becomes clear. If Scripture is a partial expression of Torah, then it must serve some overall purpose to life. Rabbi Akiva defined the central tenet of the Torah as "love thy neighbor as thyself." But this verse must once again be placed in context. It appears in the Holiness Code in the Book of Leviticus. It is holiness in everyday life which the Torah and by extension Talmud is attempting to discern.

To be able to "love thy neighbor as thyself" after a person has refused to acknowledge his debt is generally beyond most of our capability in the absence of a mechanism for resolution. It might even be considered naive to ever expect an individual to ever loan money again once he has been taken advantage of. But Torah and its subparts, Scripture, Midrash, and Talmud search for a way in which to restore trust and kindness in the ontology of the human condition. Holiness is the state which Torah always beckons humankind to enter. The Talmud functions to carve a path within the concrete realities of life in order to allow humankind to be holy and thereby

adhere to the protocol of God.

The Challenge That Awaits Us

The scriptural foundation in this work consist of three cornerstones. A building however is comprised of four. It is for the reader to construct the fourth cornerstone, to build the walls, and furnish the interior. The work awaits us. Each of us is challenged to create our own cornerstones, indeed our own homes, by using the gifts that were presented to us centuries ago at the foot of Sinai. The foundations and cornerstones may never be complete. However, when they are, surely there will exist a dwelling place on earth wherein the name of God shall reside.

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