

Mishnah Horayot: An Exploration of Rabbinic Authority

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To Marni and Noah

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Digest

“How do you read a book that does not identify its author, tell you where it comes from, or explain why it is written—a book without a preface? And how do you identify a book with neither beginning nor end, lacking table of contents and title?”¹ Throughout the history of studying the *Mishnah*, questions like these have led students, both academic scholars and rabbis alike, to a wide variety of conclusions about its authority, its messages, and the lives of those who compiled it and are mentioned within.

For most of its history, the *Mishnah* has been read as a book of *halachic* wisdom and instruction; shortly after its completion, “the *Mishnah* became the central text in the rabbinic curriculum of sacred study, occupying a place of honor alongside the Hebrew Bible.”² Beginning in the nineteenth century, with the rise of *Wissenschaft des Judentums* the paradigm of the scholarship of rabbinic literature dramatically changed as scholars began to question the origin and legitimacy of the *halachic* decisions handed down in the text, and to question the motives for attributing them to specific rabbis and recording their arguments. This new paradigm was at the forefront of scholarship until Jacob Neusner, and his students, began to raise questions of authorship and attribution, of the whole and individual *mishnayot*, during the middle of the twentieth century. This new generation questioned how the *Mishnah* was compiled and whether the attributions could be accepted as historically reliable. More recently, Seth Schwartz and others have changed the paradigm again. By examining the texts of rabbinic literature and comparing them to outside epigraphic and archaeological sources, these scholars have begun to question the historical validity of the texts and to use them as a looking glass on the larger context of the societies in which they were produced.

It is this last point is explored in this thesis. It examines new scholarly sources to see how the *Mishnah* is currently understood, and how these approaches to reading the text have changed during the last century. Through a close reading of the text of *Mishnah* tractate *Horayot* some of the questions that have been posed by recent scholars will be examined as well. *Horayot* is an appropriate tractate for this examination because it “deals mainly with religious and legal decisions.”³ Specifically, the tractate deals with the legal decisions of the rabbis in relation to the priesthood and the larger community, so it is possible to see how the rabbis viewed themselves in relation to these two groups.

Finally, the question of role the *Mishnah* can play for modern, liberal rabbis will be examined. It is important to contemplate the role of this ancient rabbinic text in the context of the modern rabbinate. As the paradigm for understanding the history and authority of the *Mishnah* has changed, it becomes necessary to reexamine the place of this work in the rabbinic corpus in light of new research on the *Mishnah* and rabbinic authority.

¹ Neusner, Jacob. *The Mishnah. An Introduction*. Northvale, NJ: Jason Aronson, 1989. p. 1.

² Alexander, Elizabeth Shanks. *Transmitting Mishnah: The Shaping Influence of Oral Tradition*. Cambridge: Cambridge University Press, 2006. p. 2.

³ Blackman, Phillip. *Mishnayoth: Nezikin*. New York: Judaica Press, 1963. p. 557.

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Chapter One:

An Introduction to the Study of the *Mishnah* Through History

In *An Introduction to the Mishnah* Jacob Neusner¹ opens by questioning the formation of the *Mishnah*. He asks, “How do you read a book that does not identify its author, tell you where it comes from, or explain why it is written—a book without a preface? And how do you identify a book with neither beginning nor end, lacking table of contents and title?”² These questions are very appropriately posed, and have led students of the *Mishnah*, both academics and rabbis, to a variety of conclusions concerning the authority of the book, its messages, and about the lives of those who compiled it and are mentioned within.

In his questions Neusner ironically leaves out the fact that the *Mishnah* has been read and studied for close to two millennia. For most of its history, the *Mishnah* has been read as a book of *halachic* wisdom and instruction, for shortly after its completion, “the *Mishnah* became the central text in the rabbinic curriculum of sacred study, occupying a place of honor alongside the Hebrew Bible.”³ Along with, and likely because of its relationship to, the Babylonian *Talmud*, the *Mishnah* retained this place of honor in the curriculum of *halachic* study, until the advent of the culture of *Wissenschaft des Judentums* in the nineteenth century. During this time the paradigm for the study of rabbinic literature dramatically changed as scholars began to question the origin and authority of the *halachic* decisions transmitted in the text, and to question the motive for

¹ Further background study was compiled from: Cohen, Abraham. “Everyman’s Talmud: The Major Teachings of the Rabbinic Sages.” Los Angeles: BN Publishing, 2008.; Neusner, Jacob. *The Modern Study of the Mishnah*. Leiden, Netherlands: E.J. Brill, 1973.; Lapin, Hayim. *Rabbis as Romans: The Rabbinic Movement in Palestine: 100-400CE*. Oxford: Oxford University Press, 2012.; Schwartz, Seth. “The Political Geography of Rabbinic Texts.” Pages 75-98 in *The Cambridge Companion to the Talmud and Rabbinic Literature*. Edited by Charlotte Elisheva Fonrobert and Martin S. Jaffee. Cambridge: Cambridge University Press, 2007.; Simon-Shoshan, Moshe. *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah*. Oxford: Oxford University Press, 2012.; and Spigel, Chad S. *Ancient Synagogue Seating Capacities*. Tübingen, Germany: Mohr Siebeck, 2012.

² Neusner, Jacob. *The Mishnah. An Introduction*. Northvale, NJ: Jason Aronson, 1989. P. 1.

³ Alexander, Elizabeth Shanks. *Transmitting Mishnah: The Shaping Influence of Oral Tradition*. Cambridge: Cambridge University Press, 2006. p. 2.

attributing them to different rabbis and recording their disputes. In fact, while it is “composed in very terse language and arranged topic by topic over a wide range of subjects, the *Mishnah* looks very much like a code of Jewish law, though it is probably something other than that.”⁴ What the *Mishnah* is and how it was composed and compiled has become the dominant challenge for scholars over the past century and a half. This is not to say that these questions had not been raised previously, in works such as the *Iggeret Rav Sherira Gaon* which was written in the middle ages, but that what qualified as evidence for reconstructing the history of the *Mishnah*’s composition changed. “Many of these [19th century] scholars maintained that the proliferation of varying opinions had no place in a legal corpus, and from this it was but a short leap to the conclusion that the *Mishnah* was not intended as a binding legal code.”⁵ This new paradigm, that was put forth by the *Wissenschaft* movement, was at the forefront of scholarship until Jacob Neusner, and those like him, began to question the attributions of authorship, of the whole and individual *mishnayot*, during the middle of the twentieth century. They questioned how the *Mishnah* could have come together and whether the saying and teachings were attributed in historically accurate manner to different authors and tradents.

More recently, historian Seth Schwartz and others have changed the paradigm again. Through examining the text of rabbinic literature and comparing it to outside epigraphic and archaeological sources, they have begun to question the whether this historical account reconstructed from a straightforward reading of the *Mishnah* is

⁴ Holtz, Barry W. *Back to the Sources: Reading the Classic Jewish Texts*. New York: Simon and Schuster Paperbacks, 1984. p. 131.

⁵ Gafni, Chanan. “*The Emergence of Critical Scholarship on Rabbinic Literature in the Nineteenth Century: Social and Ideological Contexts*.” PhD. diss; Cambridge, MA: Harvard University, 2005. p. 114.

historically accurate, and, in concluding it is not, have tried to use it as a looking glass on the larger context of the society in which it was produced. That is to say, if the *Mishnah*'s claims about the past are fictional, what might we learn from it about the people who would create such a fiction and the society and times they inhabited?

The following pages provide a brief account of the development of the *Mishnah* in light of recent academic discussion and a survey of history of *Mishnah* scholarship, especially in the past century and half. Particular attention will be paid to those commentators and scholars who have, through their work, brought profound new light to the study of the *Mishnah* or changed the paradigm of *Mishnaic* study for those that would come after them. The core of this study is an in-depth discussion of *Masechet Horayot* which delves into the question of how much authority early rabbis actually held in relation to what they claimed to possess. This thesis concludes with a discussion of how the *Mishnah* can be used as a source document for a modern, liberal movement of Judaism. In particular it explores how the understanding of the development of *tannaitic* authority has shaped the paradigm of the contemporary rabbi's role in the community, and, how the role of the rabbi can be adapted based on a new historical understanding of the ancient rabbi's role in the community.

Palestine During the Time of the Mishnah

When examining the history of *Mishnaic* scholarship, it is important to begin by looking at what the Jewish community in Palestine was like as this book was written and organized. Many scholars agree with the dating of Herbert Danby who defined the *Mishnah* as "a deposit for centuries of Jewish religious and culture activity in Palestine, beginning at some uncertain date... and ending with the close of the second century

A.D.(sic).”⁶ Prior to 70 C.E., within Jewish Palestine, the Temple was the central focus or religious life, at least in theory. Even so, for all Jews, the Temple was not the central focus of Jewish life, especially in the Diaspora and areas of the Galilee which created different institutions to worship and congregate. In fact, some sects during the Second Temple period created “alternative forms of worship to supplement and, at times, even replace Temple ritual.”⁷ This period was marked by a myriad of Jewish sects, each with their own practices and interpretation of the Law. In fact, Seth Schwartz suggests,

It is difficult to imagine any serious scholar ever again describing the Judaism of the later Second Temple period as rigorous, monolithic orthodoxy, as was still common only a generation ago. Criticism of old categories, and construction of new ones, may contribute to a slow accretion of understanding.⁸

New scholarship is effectively demonstrating that the Jewish community during the latter years of the Second Temple period consisted of different sects, in different geographic areas, and each had their own traditions and customs. Influenced by Rome, “the [local] rulers of the Jews in the later Second Temple period were empowered by their overlords to use the ‘ancestral laws’ of the Jews—the Torah—as their constitution.”⁹ But other than being required to use the Torah as the basis for their laws, each subset of the larger Jewish community was free to understand and interpret the Torah as it saw fit.

Among those sects that were interpreting the Torah for their own subset of the Jewish community were the Pharisees. This sect, which in subsequent years would acquire a terrible reputation because of hostile representations expressed in the New Testament, aimed at “the extension of holiness from the limits of the Jerusalem Temple to

⁶ Neusner. *Modern Study*. p. 1.

⁷ Levine, Lee I. *The Ancient Synagogue: The First Thousand Years, 2nd Edition*. New Haven, CT: Yale University Press, 2005. p. 175.

⁸ Schwartz, Seth. *Imperialism and Jewish Society: 200 B.C.E. to 640 C.E.* Princeton, NJ: Princeton University Press, 2001. p. 5.

⁹ *Ibid.* p. 2.

a wider range of everyday life."¹⁰ Their tendency to bring the holy into the everyday "turned life into an inexhaustible supply of opportunities to fulfill divine law and thus to sanctify life."¹¹

After the destruction of the Temple by the Romans, the landscape of the Jewish community changed even further, for, "the tragedy of 70 following an era of dramatic Jewish demographic, religious, and social growth, undoubtedly caused serious reverberations throughout the Jewish world."¹² It was at this time that a new generation of scholars arose and began their work. Claiming the hereditary portion of the Pharisaic tradition, the rabbis, at least for their own purposes, claimed authority over the Jewish community. This transition was slowly underway; it was expedited as a result of the destruction. In fact, beginning in 63 B.C.E, if not earlier, but certainly a century and a half later with the destruction of the Temple,

Jews were facing increasing pressure from Rome and Romans were threatening the pride and self-understanding that had been inherited. The sacred books seemed too diverse and too 'archaic,' at least to many Jewish youths, to provide answers to the new questions. Beginning in 63 B.C.E., the kingdom established by the Hasmoneans – and eventually freedom itself – were lost to the Romans. Many Jews would have uttered words similar to those recorded in Fourth Ezra; they would have wondered what happened to God's promises.¹³

The Pharisees, and the rabbis following them, sought to understand the Torah in ways that could be applicable to the community. The rabbinic movement "sought to merge studiousness with a sense that the laws of Scripture should be expanded to cover all of life, not limited to their own originally intended contexts."¹⁴ The Pharisees and rabbis

¹⁰ Holtz. *Sources*. p. 130.

¹¹ *Ibid.*

¹² Levine. *Ancient Synagogue*. p. 175.

¹³ Charlesworth, James H. "Hillel and Jesus: Why Comparisons are Important." Pages 3-31 in: *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders*. Edited by James H. Charlesworth and Loren L. Johns. Minneapolis: Fortress Press, 1997. p. 15.

¹⁴ Holtz. *Sources*. p. 130

also sought to answer questions answering the questions of the people. In order to accomplish this goal, rabbinical schools were established and literature was written. “From this mass of material, one can cull a great deal of information about contemporary Jewish society, and even about certain aspects of the Roman world generally, though this clearly was not the intention of the editors of these compilations.”¹⁵ And foremost among the early material is the series of books known together as the *Mishnah*.

The Mishnah and the Concept of Oral Torah

The *Mishnah* is “the earliest teaching-text, the oldest curriculum of Jewish learning in the world today.”¹⁶ This book, made of six סדרים, or orders, is, ultimately a collection of law and rabbinic teaching which, tradition states, was compiled by Rabbi Judah HaNasi (Rabbi), which, in the form it has come to the present contains many modifications and additions. The term *Mishnah*, itself, comes from the Hebrew root מ.נ.ה, which means ‘to repeat’ and in its technical sense means to learn...or teach...oral tradition by repeated recitation,”¹⁷ which is in contrast to ק.ר.א, which is used as a reference to the study of Torah. The use of the Hebrew, מ.נ.ה, to title the book is important, since the traditional view of the *Mishnah* became, along with other early rabbinic sources, that it is the Oral Torah. In fact, “within a hundred years or so of the *Mishnah*’s appearance, the ever growing corpus of rabbinic teachings...came to be known as the Oral Torah.”¹⁸ While, “the Oral Torah provided a much-needed and valuable interpretation of the cryptic and weighty words of the Written Torah,”¹⁹ namely

¹⁵ Levine. *Ancient Synagogue*. p. 180.

¹⁶ Holtz. *Sources*. p. 131.

¹⁷ Strack, H.L and G. Stemberger. *Introduction to the Talmud and Midrash*. Minneapolis: Fortress Press, 1992. p. 123.

¹⁸ Shanks Alexander. *Transmitting Mishnah*. p. 3.

¹⁹ *Ibid*.

the Hebrew Bible, rabbinic tradition has held that that “whereas the words of the Written Torah were inscribed on the tablets, the words of the Oral Torah were conveyed from God to Moses by word of mouth.”²⁰ It has, indeed, in the viewpoint of traditional rabbinic Judaism, held “the status of divine revelation right alongside the Pentateuch.”²¹ The *Mishnah*, as part of the Oral Torah, in this view is said to have been passed from generation to generation, from Moses, to Joshua and the Elders, who then transmitted it “to the men of the Great Assembly.”²² In fact, the *Mishnah*, and the rest of Oral Torah was not supposed to be written down,²³ it was merely to be passed, using a system of *tannaim*. The *tannaim* “were pupils chosen for their extraordinary memory, although they were not always endowed with intelligence...The stupider the *Tanna*, the more reliable his text; he was not suspected of doctoring it.”²⁴ The *tanna*’s job was to make sure that the Oral Torah could be repeated and taught to the next generation. However, eventually, there seemed to be a need to write down the material of the Oral Torah in order to ensure that it would not be lost. Almost all descriptions of the genesis of the *Mishnah* are based on *Sherira Gaon*’s letter of 987, in which he answered the questions of the congregation of *Kairouran*, who inquired how the *Mishnah* was written down and the method in which the material was chosen.²⁵

Sherira’s answer combines scattered Talmudic information into a historical outline of the Talmudic period. Prior to Rabbi there was no homogenous formulation of the laws, much less an ordered [*Mishnah*]. Concerned that the teaching might be lost, Rabbi took up the redaction of [*Mishnah*]. He did not

²⁰ *Ibid.* p. 4.

²¹ Neusner. *Mishnah*. p. 37.

²² *Mishnah* Avot 1:1

²³ Bavli T'murah 14b: "Those who write the traditional teachings [are punished] like those who burn the Torah, and he who learns from them [the writings] receives no reward."

²⁴ Lieberman, Saul. *Hellenism in Jewish Palestine*. New York: Jewish Theological Seminary of America. 1994. p. 88.

²⁵ Strack and Stemberger. *Introduction to the Talmud*. p. 138-139.

proceed at his own discretion, but examined the tradition all the way back to the men of the Great Synagogue in order to adopt verified sentences verbatim.²⁶

It was important for the understood genesis of the *Mishnah* to have ancient roots in the Great Synagogue, and to have been written by a man as prestigious of *Yehudah haNasi*, since later rabbis had a vested interest in believing the claims of their rabbinic forebears. These later rabbis explicitly rooted their own authority in an unbroken transmission from the earlier rabbis. The following, then, are the points of reference of a traditional common opinion among the followers of rabbinic Judaism: “Rabbi *Yehuda ha-Nasi* edited [the *Mishnah*]; his main source was the [*Mishnah*] of R. *Meir*, who in turn is based on the [*Mishnah*] of his teacher *Aqiba*. Yet *Aqiba*, too, was not the first redactor of the [*Mishnah*], but falls back upon a ‘first [*Mishnah*],’ whose roots go back to biblical times.”²⁷ This view and understanding of *Mishnah* has framed its study for close to two millennia.

While there have been different iterations of Judaism throughout history, the single one that predominated from late antiquity until modern history was one born out of the *Mishnah*. Neusner explains that:

The Judaism that began with the *Mishnah* and led to the Babylonian *Talmud* (*Bavli*), which became the normative statement of Judaism from then to now, may therefore best be traced through the unfolding of its writings, because it was in writing, in study in academies, through the teachings of holy men (and women in contemporary times), qualified for saintliness by learning—specifically mastery of the Torah through discipleship—that that Judaism took shape.²⁸

²⁶ *Ibid.* p. 139.

²⁷ *Ibid.* p. 140.

²⁸ Neusner. *The Mishnah*. p. 220.

The *Mishnah*, in certain religious circles, still continues to be memorized and the two documents which came out of it, namely the Palestinian *Talmud* (*Yerushalmi*) and the Babylonia *Talmud* (*Bavli*), “form the core curriculum of Judaism as a living religion.”²⁹

Wissenschaft des Judentums

Since the first manuscripts of the *Mishnah* were written down and, even until today, the religious study of the *Mishnah* has been unchanged. Yet, during the 19th century, there was a shift in the direction of Jewish scholarship, in general, and scholarship of the *Mishnah*, in particular, due to the emergence of *Wissenschaft des Judentums*. This movement, which sought to bring a scientific study to Judaism, emerged from the students of Leopold Zunz at the University of Berlin during the early years of the 19th century. With the emancipation that allowed Jews to begin studying more freely in universities, so, this “exposure to the world of academia and to the critical methods or research employed in rabbinical seminaries, made a deep impression on Jewish scholars.”³⁰ This impression impelled many scholars to apply original methods of thought and critical tools of analysis to Jewish history and literature. In fact, these scholars were seeking “to investigate and reveal ‘historical truth,’”³¹ even if this meant shattering centuries-old convictions and held beliefs. “They now were willing to approach historical documents that had been sanctified by tradition with unbridled skepticism, seeking to date their origin, collate their various versions and single out errors that had crept into them over the generations.”³²

²⁹ *Ibid.* p. 38.

³⁰ Gafni. *Critical Scholarship*. p. 17.

³¹ *Ibid.* p. 18.

³² *Ibid.* p. 18.

The *Wissenschaft* movement forged a significant shift in the attitude of towards the *Mishnah*. “The unequivocal admiration, which the *Mishnah* had enjoyed in earlier generations, was exchanged for a critical, penetrating approach, which set out to determine the work’s original goal and degree to which it fulfilled that purpose.”³³ Early on in the movement, the founder of Jewish scholarship in Galicia, Nachman Krochmal (1785-1840), “expressed his opinion on the issue of the writing of the oral tradition, distinguishing between legal and *aggadic* literature.”³⁴ Krochmal claimed that the *aggadic* literature had already been written down by the time of R. *Yochanan*, but the *halachic* material in the ‘Oral Torah’ maintained its oral status until a much later time. In addition, during “the Geonic period, as well as in the days of the *Rishonim* and *Aharonim*, it was customary to extol the *Mishnah* and present it as the epitome of perfections, for which reason it was universally accepted by all Jews as absolutely authoritative.”³⁵ Krochmal, as a member of the *Wissenschaft* movement was unable to ignore the historical inaccuracies and theological difficulties contained within, yet he had a desire, as well, to sing the praises of the *Mishnah*, so he chose to highlight the aims of its redactor. He explained that “the imperfections in the *Mishnah*’s compilation stemmed from *Rabbi*’s decision to record the views of his predecessors in their own words, rather than compose his own new formation.”³⁶

In opposition to Krochmal was the erudite Rabbi Abraham Geiger, who lived in Frankfurt-am - Main, intended his work to serve as a mouthpiece for the new Reform movement, and who “described the coincidental nature which surrounded the *Mishnah*,

³³ *Ibid.* p. 177.

³⁴ *Ibid.* p. 71.

³⁵ *Ibid.* p. 153.

³⁶ *Ibid.* p. 157.

emphasizing that R. *Yehudah haNasi* was not the first to collect laws or put them into writing. Instead, in Geiger's opinion, many of the sages collected compilations of legal teachings for themselves, and only due to historical circumstances did *Rabbi's* personal collection of laws turn into the commonly accepted *Mishnah*.³⁷ In addition, Geiger's scholarship helped provide further understanding for how the *Mishnah* was compiled. The names of the tractates are ancient (the *Amoraim* were already familiar with many of them), and were derived, for the most part from the subject matter. The sequence of the orders of *Mishnah* was attested at an early date by *Simeon ben Lakish* in the third Christian century. However, the reasoning behind the sequence is not entirely clear. Maimonides, in the twelfth century, attempted to justify the order in the introduction to his Commentary on the *Mishnah*. He attempted "to explain rationally that sequence which he considers to be the original: related subjects are brought together, then priority is given to the things that are indispensable or the sequence is determined by that in the written Torah."³⁸ However, it was Geiger, using newer and more critical methods of scholarship who theorized that it seemed "as if the Orders were arranged to follow according as the matters they treat of were of more frequent or of rarer occurrence."³⁹ Geiger also "advanced the theory that the tractates are arranged within the *Sedarim* according to size (number of chapters). This theory is borne out in five of the *Sedarim*, and in the first Seder at least as regards the latter part."⁴⁰ Additionally, Geiger wrote about the men described and discussed in the *Mishnah*. Geiger, in his *Das Judentum und seine Geschichte* (Breslau, 1865 [second edition], volume 1. p. 100.), argued that "Hillel

³⁷ *Ibid.* p. 76.

³⁸ Strack, Hermann L. *Introduction to the Talmud and Midrash*. Skokie, IL: Varda Books, 2004. p. 27.

³⁹ *Ibid.* p. 26.

⁴⁰ *Ibid.* p. 27.

is a strictly historical personage.’ He went on to claim that *Hillel*, unlike other figures such as Jesus, was not hidden behind legends.’⁴¹ Geiger’s understanding of how the *Mishnah* was composed, as well as the historical identity of those that it seems to write about, help, change the face of Jewish scholarship. His work led to, Austro-Hungarian rabbi and professor of Jewish history, Bible, and Talmud at the Vienna Jewish Theological Seminary, Adolf Buchler feeling that, in 1922,

He could discuss *Hillel* and his teachings without having to assess to what degree what was attributed to him in the *Mishnah* and *Tosephta*, as well as the *Targumim*, could be traced reliably back to him. These are dated and untenable views which were forged in the crucible of a minority religion trying to survive within a hostile ostensible Christian culture. As [Ismar] Elbogen, [Armand] Kaminka, [Judah] Goldin, and many, including notably J. Neusner, have demonstrated Hillel’s life and teachings were altered during the transmission from his death, around 20 C.E. to the writing down of his teachings around 200 C.E. and even much later. Moreover, his life was celebrated through redaction and through legendary expansions. We cannot assume that because later Pharisees adopted him he must have been a pre-70 Pharisee; here we benefit from the research conducted by Neusner and [Jonah] Sievers.⁴²

In effect, what Geiger, and others within the *Wissenschaft* movement did was to allow for the critical scholarship of Jewish literature, specifically the *Mishnah*, where it had not been evident before. This paradigm-changing research allowed for the reformation of Jewish society, which was no longer, in all cases, beholden to a dogmatic approach based on the *Mishnah* and its two commentaries, the two *Talmudim*, since “gradually, a more balanced picture of *Rabbi*’s work came to be accepted. The *Mishnah*, it was felt, should not be perceived as a purely legal work, but at the same time, it should be seen merely as

⁴¹ Charlesworth, James H. “Hillel and Jesus: Why Comparisons are Important.” in *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders*. Edited by James H. Charlesworth and Loren L. Johns. Minneapolis: Fortress Press, 1997. p. 10.

⁴² *Ibid.* p. 10-11.

a digest of *Tannaitic* statements, not as a private collection intended for widespread use.”⁴³

Additionally, the concept of Oral Law changed during this time-period. Although the *Mishnah* had, for the most part, been seen as part of the revelation given at Sinai the paradigm was shifting. So that, “while in earlier times, the struggle was primarily one of defending the Divine origin of Oral Law, the focus would now shift to the future role of the *Mishnah*, and the degree to which its laws were fixed and remained binding.”⁴⁴ This new understanding of the *Mishnah*, one in which the laws could be understood under a new paradigm of 19th century European society, would allow *Wissenschaft* scholars, as well as those who succeeded them, to look at the *Mishnah* in a whole new light. It was under this light, of critical scholarship, that the study of the *Mishnah* would progress until the middle of the twentieth century.

Israeli Scholarship

During the nineteenth century, scholars attributed significance to technical terms employed in rabbinic literature to denote various aspects of learning, which was all part of their attempt to determine the methods of transmission and understand the meaning of the *Mishnah*. While “modern scholarly introductions [during the twentieth century] have generally not advanced beyond these rudimentary beginnings...[and] almost without exception, a long prehistory of [*Mishnah*] is assumed,”⁴⁵ the mode and method of scholarship has changed. Currently, a majority of scholars of this material in academic settings assume a very specific type of group identity, that of the Jewish community. In fact, “many Jewish historians are writing from deep inside some sort of romantic

⁴³ Gafni. *Critical Scholarship*. p. 169.

⁴⁴ *Ibid.* p. 110.

⁴⁵ Strack and Stemberger. *Introduction to the Talmud*. p. 140.

nationalist ideology, nowadays usually Zionism.”⁴⁶ This can be seen through the work of Gedalyahu Alon, who was one of the first scholars of the post-*Wissenschaft* era to critically study rabbinic literature.

For Alon and his followers the ‘spiritual’ (i.e. religious) character of the Jews’ nationhood, which is only implicit in the passage quoted here but is a basic assumption of Alon’s work, meant that there was an unusually close connection between the prescriptions of the rabbis, the ancient Jews’ presumed spiritual leadership, and the Jews’ behavior. Indeed, it is difficult to find in Zionist and Israeli scholarship even a hint that the rabbis were anything other than the distillation of the Jewish national will. This has important implications for how such historians read rabbinic literature: in short, they used what we might call a hermeneutics of goodwill, as opposed to the hermeneutics of suspicion now widespread among non-Israeli scholars. According to this model, rabbinic prescriptions could be used to *describe* Jewish life, rabbinic disagreements were thought to reflect deeper social and political conflicts among the Jews, and so on. In fact, Alon was more careful about the deployment of this model than his followers have been. Thus, although his historiography remains resolutely rabbinocentric, Alon was at least aware, because the Palestinian *Talmud* told him as much, that the authority of the rabbis in Palestine in the third and fourth centuries was neither absolute nor unchallenged.⁴⁷

The Israeli scholarly view has, with the exception of a few scholars, notably Lee Levine, been very much centered on a Zionist narrative that has allowed the scholar to adapt the early rabbinic paradigm into a proof-text for the Zionist dream, namely, a strong Israeli state and identity. This viewpoint is an interesting development because it is not typical of Zionist historiography. Instead, the period of the Talmud had a special status for many scholars in that “it functioned for many of the historians and their audience as a kind of utopia, when, as Alon put it, the Jews ‘still lived as a nation on their land’ and still lived there characterized by untrammelled commitment to the Torah as expounded by the rabbis, in opposition to an oppressive foreign empire.”⁴⁸ As the writing of the ancient rabbis, who were living amongst the world of Rome, reflects their living situations, recent

⁴⁶ Schwartz. *IJS*. p. 5.

⁴⁷ *Ibid.* p. 6.

⁴⁸ *Ibid.* p. 7

Israeli scholars, living surrounded by enemies of the State of Israel, have read into the text of the *Mishnah*, and other early rabbinic texts, a heroic tale of the Jewish community's survival and rebirth after the destruction in 70 CE. However, this seems to be a clear case of, as James Charlesworth describes⁴⁹, the historian who uses rabbinic texts inputting a theological or political agenda .

In the Diaspora, both Jewish and non-Jewish scholars have taken a different, non-nationalistic approach to the text. Erwin R. Goodenough, in his monumental collection and study of material artifacts and remains, *Jewish Symbols in the Greco-Roman Period* (1953-1968), argued that “the rabbis did not control Jewish life to the extent imagined by earlier scholars. On the contrary, most Jews of the rabbinic period practiced a profoundly Hellenized, mystical, platonic version of Judaism that received its classical literary formula in the works of Philo of Alexandria.”⁵⁰ While the first part of his thesis is accepted by many, the second half of Goodenough's argument, based as it was on a highly problematic method of ‘reading’ ancient Jewish art, was immediately and almost universally rejected.

Jacob Neusner Changes the Paradigm

Jacob Neusner, who is the Distinguished Service Professor of the History and Theology of Judaism at Bard College, most dramatically changed the paradigm of *Mishnah* scholarship. Neusner was the first who argued consistently that rabbinic documents were not simply repositories of tradition but careful selections of material, shaped by the interests, including the self-interest, of tradents and redactors. “In his view, the documents did not simply reflect reality but constituted attempts to construct it,

⁴⁹ Charlesworth, James H. and Loren L. Johns. *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders*. Fortress Press. Minneapolis. 1997. p. xvii.

⁵⁰ *Ibid.* p. 7.

that is they are statements of ideology.”⁵¹ In fact, his work historicized rabbinic literature, treating it as an artifact of society in which it held marginal status. He holds the view that rabbinic writings need to be read separately, on their own terms, before relationships between individual works can be understood. This view than has been criticized by some, including Seth Schwartz, who states that this view is “obviously less reasonable than it seems at first glance, given the obvious fact that the documents overlap, presuppose, and comment upon one another, and so on, some theory of the documents’ relationships should logically precede the description of the discrete texts.”⁵² Further criticism of this argument is that Neusner went too far with his viewpoint, since he insisted that the documents are, in fact, self contained, “that each one is as it were a summary statement of the ideology of a discrete social organization,”⁵³ when in fact, more recent scholars have argued, that the documents of the “Oral Torah” must be read with an eye towards intertextuality, since they form a single, though wide-reaching, genre of literature.

By looking at a sampling of Neusner’s scholarship, it is possible to understand his overall view of the *Mishnah*, and from there, his view of rabbinic literature in general. First, Neusner claims that scholarship of the *Mishnah* is different from other types of literary scholarship, since “the *Mishnah* nowhere tells us when it speaks. It does not address a particular place and rarely speaks of events in its own day. There is scarcely a ‘you’ in the entire mass of sayings and rules. There is no predicting where it will commence and or explaining why it is done.”⁵⁴ Neusner also notes that the authors of the

⁵¹ *Ibid.* p. 8.

⁵² *Ibid.* p.8.

⁵³ *Ibid.* p.9.

⁵⁴ Neusner, Jacob. *Mishnah*. p. 4.

Mishnah made no effort at imitating the Hebrew of the Hebrew Bible, as did the writers of the Dead Sea Scrolls. Rather, the Hebrew is much more elliptical and not as direct or sparse as that of the Bible. In other words, while the Bible tends to be very economical in its use of words, not using more than absolutely necessary to state something, the Hebrew that is used in the *Mishnah* is much more elaborate and descriptive, often describing items or events in multiple ways. In addition, the *Mishnah* does not attribute its sayings to biblical heroes, prophets or holy men. It takes its authority from a שלשלת הקבלה, a chain of transmission, that it claims from God to Moses on Sinai. Even still, “the *Mishnah* does not claim to emerge from a fresh encounter with God through revelation, as is not uncommon in Israelite writings of the preceding four hundred years.”⁵⁵

Therefore, all manners and devices which other Israelite writers had used to gain credibility for their messages were deliberately ignored by the authors of the *Mishnah*. Neusner ponders whether the authority of *Mishnah* was self-evident to its authors, but, “self-evident or not, they in no way take the trouble to explain to their readers why people should conform to the descriptive statements contained therein.”⁵⁶ Since the authorities cited in the *Mishnah* lived in the century and a half prior to the original circulation of the document, “the claim that things said by men known personally to the very framers of the document in fact derived from Moses at Sinai through a long chain of oral tradition blatantly contradicted the well known facts of the matter.”⁵⁷ This matter seems to trouble Neusner. He provides an allegory to show how ridiculous he finds the notion that the early rabbis were able to define their authority from the chain of tradition. Just as the *Mishnah* attempts to serve as a “social address, not merely a personal

⁵⁵ *Ibid.* p. 5.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* p. 37.

expression”⁵⁸ that establishes the rules of the community using examples from a society that ceased to exist in 70 CE, Neusner says this would be similar to a situation

If Alexander Hamilton and James Madison had retired to the backwoods of western Virginia and made up a constitution based on the life ancient Athens, referring to the condition of life prevailing not when they lived but somewhere else altogether; and if their constitution for nowhere in particular and for no special time then came to be adopted as the basic law of the United States, we would have a remote parallel to the astounding fate of the *Mishnah*.⁵⁹

Yet, Neusner still recognizes that even though the origin of the *Mishnah* is difficult to understand and the reasons for its authority even more so, it is still important to understand and study the *Mishnah*, since it is a principal component of rabbinic Judaism’s canon.

Further, Neusner sees the establishment and structure of the *Mishnah* as having been born out of the aftermath of the two wars of 67-73 and 132-135CE. The people, whose ideas came to be expressed in the *Mishnah*, had formed a cultic sect. After two wars, the entire framework of the sect and its formational document, the *Mishnah* needed and underwent revision. “The range of topics so expanded that laws came to full expression to govern not merely the collective life of a small group but the political and social affairs of a whole nation.”⁶⁰ In an age after the destruction of the Temple, the problem that the early rabbis needed to focus on, according to Neusner was how to reorient themselves and the community for a new age. The *Mishnah*, therefore, is a document “of imagination and fantasy, describing how things ‘are’ out of the sherds and remnants of reality, but, in larger measure, something about how things were, but

⁵⁸ *Ibid.* p. 41.

⁵⁹ Neusner, Jacob. *The Oral Torah*. San Francisco: Harper & Row Publisher, 1986. p. 2.

⁶⁰ Neusner. *Mishnah*. p. 51.

everything about how a small group of men wanted things to be.”⁶¹ Neusner sees the *Mishnah* as a fantastical series of books which sought to establish, through the use of new literary techniques, an authority that emerged “in conjunction with the suppression of the implicit biblical bases of its norms. By asserting the commands in a straightforward sense, without reference to biblical scripture, the *Mishnah* co-opts the authority of scripture”⁶² and replaces it with that of the rabbis.

Lee Levine's Discussion of the Synagogue in Antiquity

A number of scholars have built on Neusner’s conclusions, while others have disagreed with the direction of his scholarship. One of the scholars that disagreed with Neusner, is Lee Levine. Levine, who was a professor Jewish history at the Hebrew University in Jerusalem, has done much of his research on the ancient synagogue and its role in the community. He has noted that the *Mishnah*, for all of its claims, as well as those of its traditional supporters, of being the centerpiece formational document of the Jewish people, does not provide much information about different institutions that have been shown by archaeology to have been present in second century Israel. This lack of information, about the synagogue in particular, shows that *Mishnah* and its authors may not have had the widespread authority that it claims to have had. For if an institution as important as the synagogue is rarely mentioned, then the role of the rabbis in this institution must be questioned. He claims that, “no other Jewish institution was more affected by the events of 70 than the synagogue. In a religious vein, the synagogue had come to play an important, though limited, role on the local level [in Ancient

⁶¹ Neusner, Jacob. *Oral Tradition in Judaism: The Case of the Mishnah*. New York: Garland Publishing, 1987. p. 43.

⁶² Shanks Alexander. *Transmitting Mishnah*. p. 6 n. 10.

Palestine].”⁶³ In the post-70 era, it began “to acquire an increased centrality in Jewish religious life.”⁶⁴ And yet, despite the essential place that the synagogue came to play in Jewish life after the destruction, “the synagogue per se merits minimal attention in the *Mishnah* and in *tannaitic midrashim*.”⁶⁵ This argument serves to point out the fact that the Jewish community in Israel immediately after the destruction, and well into the era of the early rabbis, was factionalized and splintered. That the rabbis did not speak much about synagogue life, other than discussion of liturgical practice, shows that there must have been other leadership groups for those Jews that went to the synagogues rather than following the rabbis of the *Mishnah*.

The Rabbinic Academy

Levine has also examined the rabbinic academy as an institution. He makes the important point that little is known regarding the location of the rabbinic academies, “how they looked inside and out, how they functioned...and what role, if any, the institution played in the larger community.”⁶⁶ Previous ideas of the construction of rabbinic schools seem to be anachronistic. Throughout the *Gaonic* period, rabbis studied in academies known as *yeshivot*, which continued to be the dominant form of rabbinic organization throughout the middle ages and into the modern period. Some scholars retroject this model onto the rabbis of the *Mishnah*, and indeed, even on the proto-rabbis during the time of the Second Temple. Skirball Professor of Talmud and Rabbis at New York University, Jeffrey Rubinstein remarked that “in earlier times, the nature of [rabbinic learning sessions] is an open question that can be answered only by careful

⁶³ Levine. *Ancient Synagogue*. p. 175

⁶⁴ *Ibid.*.

⁶⁵ *Ibid.* p. 180.

⁶⁶ *Ibid.* p. 181.

study of the sources and their portrayal of rabbinic meetings.”⁶⁷ In addition, the rabbis, as Rubinstein notes, did not provide accurate descriptions of the settings of their learning. “The sources themselves rarely provide descriptions of the schools or forums of learning. Where they do, the images tend to be exaggerated or utopian projections of rabbinic ideals, rather than realistic representations of contemporary situations.”⁶⁸ In many instances a distorted historical picture is given, since conditions that were present for the authors of the *Mishnah* were projected back upon earlier ages. This can be seen, for example, in tractate *Pesachim*⁶⁹, where the Passover offering is described. The example is proof that the rabbis were actively involved in retroactively legislating for the Temple cult. Furthermore, the size of the rabbinic schools were small, even just small circles of students in the home of their master. Predominantly among the schools that are named in the *Mishnah* and the other major *Tannaitic* work, the *Tosefta*, are the “House of *Hillel*” (*bet hillel*) and “House of *Shammai*” (*bet Shammai*), which existed during temple times. “Though sometimes portrayed as academies or full-fledged schools, these too were probably small-scale disciple circles that gathered around two important early masters, and the term ‘house’ should be taken at face value.”⁷⁰ Rubinstein is very clear to point out that the written accounts of the rabbis do not necessarily describe the reality on the ground. The numbers of followers claimed by the rabbis, he argues, is quite probably much smaller, and the rabbis influence and authority was much less than what the *Mishnah* claims it was. Even in tractates, such as *Horayot*, which speak of rabbinical

⁶⁷ Rubinstein, Jeffrey L. “Social and Institutional Settings of Rabbinic Literature.” In *The Cambridge Companion to the Talmud and Rabbinic Literature*. Edited by Charlotte Elisheva Fonrobert and Martin S. Jaffee. Cambridge: Cambridge University Press, 2007. p. 58.

⁶⁸ *Ibid.* p. 58.

⁶⁹ *Pesachim* 5:5-7.

⁷⁰ *Ibid.* p. 60.

courts, these may be overemphasized, as “the official courts were the Roman provincial system under the ultimate authority of the Roman governor. Yet individuals who respected the sages and their knowledge could approach a rabbinic master to adjudicate disputes.”⁷¹ The question that Rubinstein posits is how many individuals belonged to groups who would have approached a rabbi for his judicial decision.

Seth Schwartz: A Consideration of the World in which the Rabbis Lived

Seth Schwartz of Columbia University has most profoundly changed the paradigm of *mishnaic* study after Nuesner. Schwarz’s assumptions in looking at the text of the *Mishnah* are based on the premise that one must consider “the wider political and social worlds in which the ancient Jews lived”⁷² in order to help explain why the evidence is the way it is. Regarding the development of the *Mishnah* and the rabbis who are supposed to have written it, Schwartz notes that,

the rabbis cannot readily be ‘normalized.’ It must finally be admitted that the culture of the Greco-Roman city and the Judaism of the rabbis contradicted each other both essentially and in superficial detail. As far as we can tell from the surviving literature, the rabbis, no less their Christian counterparts, largely rejected high imperial urban culture and offered their followers a radical and coherent alternative to it.⁷³

By living outside the realm of urban society in smaller towns, villages, and the rural areas, the rabbis attempted to wrest more control over their constituents, Schwartz argues, since there was not as much central control from either other Jewish groups or, more significantly, from Rome. This is to say that since all legal authority and power were in the hands of the Roman state and its local representatives, and “the cultural norms, even in the countryside, were overwhelmingly set by the elites of the Palestinian cities,

⁷¹ *Ibid.* p. 61.

⁷² Schwartz, Seth. *Imperialism*. p. 292.

⁷³ *Ibid.* p. 163.

including such 'Jewish' cities as Tiberias, Sepphoris, and Lydda,"⁷⁴ the rabbis could not have exuded much, if any true authority. This lack of authority can be explained by the rupture that was caused when the Temple was destroyed, and even more so after the *Bar Kochba* revolt, for the core ideology of the people ceased after two revolts to function as an integrating force in Palestinian society. While it was not the rabbis who were vested with authority prior to the destruction, there was a central focus on the Torah and the Temple cult, which the rabbis would later use to claim their own authority. With the destructions in 70 CE and 135 CE,

the intermediaries of the Torah lost not only their legal authority but also their status as cultural ideals. Indeed, if there was anything at all holding Palestinian Jewish society together, it may have been no more than an attenuated sense of a common past, a mild feeling of separation from their neighbors that the latter, who had shared memories of their own, may have conspired to maintain. Finally, some Jews, probably a very small number (among them were the rabbis) still insisted on the importance of the Torah, of Judaism, in their symbolic world, and these Jews, convinced of their elite status, tried to insinuate their way into general Palestinian society. Although marginal and to some extent turned in on themselves, the rabbis and their congeners nevertheless played a role, peripheral and weak though it was, in sustaining among some Jews some sense of separation.⁷⁵

According to Schwartz, many Jews seemed to move in separate directions to many different groups and factions, including the rabbis for some, and even into the waiting and open arms of the pagans for others.

Yet he notes that there is serious disagreement among Jewish historians concerning the effects of the destruction and of the Temple and the *Bar Kochba* revolt on Jewish leadership. Some argue that there was no significant discontinuity: the Pharisees had exercised predominant influence on Jewish religious life before 70, and their spiritual

⁷⁴ *Ibid.* p. 104.

⁷⁵ *Ibid.* p. 103.

descendants, the rabbis, continued to do so afterward.”⁷⁶ Others have suggested the Pharisees were an insignificant sectarian organization that disappeared in the late first century “and the rabbis and patriarchs who gradually became the leaders of the Jews had an undeniable but complex relationship with their predecessors.”⁷⁷ Schwartz points out that due to the historical evidence regarding the Roman empire and its attitudes towards its vassal states in the early first and second century C.E. it is counterintuitive to argue that the patriarchs and the rabbis were granted any official status by Rome, let alone the ability to petition the emperor himself, as certain *tannaitic* writings attest. “By failing to recognize [the rabbis’] jurisdiction, [Rome] made them effectively powerless to compete with the Roman courts and the arbitration of Jewish city councilors and landowners for most purposes.”⁷⁸ Even without official recognition from Rome, the rabbis did have limited authority over those who chose to seek council and judgment based on the rabbis interpretation of Jewish law. In fact, Schwartz points out that “in the middle and later second century, the rabbis were probably nearly invisible to the authorities, and presumably as long as they refrained from the suicidal advocacy of further revolt, they probably had a certain paradoxical freedom.”⁷⁹ As long as they were not inciting revolt, Schwartz suggests, the early rabbis were able to work in their communities as they saw fit. Yet, as mentioned above, their authority was limited, for no one was compelled to accept the judgment of a rabbinic court. All the rabbis could do was threaten and plead, but they could not impose a binding sentence. Ultimately, the worst punishment that could be given was excommunication, but given their lack of control of the Jewish

⁷⁶ *Ibid.* p. 110.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* p. 111.

⁷⁹ Schwartz, Seth. *Were Jews a Mediterranean Society? Reciprocity and Solidarity in Ancient Judaism*. Princeton, NJ: Princeton University Press, 2010. p. 44.

population, either in Palestine or in the Diaspora, even this punishment was largely an empty threat. Ultimately, what Schwartz shows is that the rabbis were present in the major Greco-Roman cities and their outlying areas, but their prestige and authority was limited to a very small circle, both due to the lack of Roman and Jewish communal recognition.

Shanks Alexander: The Oral Transmission of the Mishnah

Another recent scholar who has written on the development of the *Mishnah*, yet in a wholly different frame of reference than Schwartz, is Elizabeth Shanks Alexander. Shanks Alexander, who serves as an associate professor in the department of Religious Studies at the University of Virginia, brings an "oral view" to her understanding of the *Mishnah*. In her opinion, the oral view of textuality "is characterized by an appreciation of the multiplicity and fluidity of textual forms. Rather than seeing texts as fixed and stable and labeling variants as deviants from an original, the oral view recognizes the inherent fluidity of texts in oral settings."⁸⁰ She sees the *Mishnah* as "an ancient set of case law that provides a set of norms that have defined Jewish communal life in the ritual, civil, and criminal domains for centuries."⁸¹

The primary question that Shanks Alexander asks in her book, *Transmitting Mishnah: The Shaping Influence of Oral Tradition*, is how the *Mishnah* was transmitted through the generations. She notes that previously, "scholars have assumed that transmission of *Mishnah* involved verbatim reproduction of a fixed text. When reconstructing ancient practices of oral *mishnaic* transmission, scholars commonly

⁸⁰ Shanks Alexander. *Transmitting Mishnah*. p. 6.

⁸¹ *Ibid.* . p. 1.

emphasize how the short, pithy style of the *Mishnah* facilitates rote memorization.”⁸² She challenges the accuracy of this description building on the work of Albert B. Lord and his mentor, Milman Perry, in the work of epic literature and its transmission. “The work of Albert Lord has shown that the view of oral transmission as verbatim reproduction of a fixed text is only possible in the world of print, where literary copies make such a result possible.”⁸³ Lord asserts that:

Writing, with all its mystery, came to the singer’s people, and eventually someone approached the singer and asked him to tell the song so that he could write down the words. In a way this was just one more performance for the singer, one more in a long series. Yet it was the strangest performance he had ever given. There was no music and no song, nothing to keep him to the regular beat except the echo of previous singings and the habit they had formed in his mind. Without these accompaniments it was not easy to put the words together as he usually did. The tempo of composing the song was different too. Ordinarily the singer could move forward rapidly from idea to idea, from theme to theme. But now he had to stop very often for the scribe to write down what he was saying, after every line or even after part of a line. This was difficult, because his mind was far ahead. But he accustomed himself to this new process at last, and finally the song was finished.⁸⁴

Lord uses this narrative to describe the process with which the first written texts were composed, specifically those that had come from ancient stories passed from generation to generation. He “argues that in orally based societies, there exist different ways of viewing textuality and transmission that do not depend on the notion of ‘text as fixed exemplar.’”⁸⁵ Building on this understanding, Shanks Alexander challenges the idea of the early acceptance of the fixed text: “Traditional accounts suggest that the authority of the *mishnaic* text is a function of its literary form. The elegance of the its precise

⁸² *Ibid.* p. 5.

⁸³ *Ibid.* p. 5.

⁸⁴ Lord, Albert B. *The Singer of Tales*. New York: Atheneum, 1978. p. 124.

⁸⁵ Shanks Alexander. *Transmitting Mishnah*. p. 5.

formulation led to the *Mishnah*'s immediate acceptance and widespread authority.”⁸⁶ Yet even among academic scholars who tend to agree on this point, it must be noted that the early use and purpose of the *Mishnah* is still debated. “The issue of whether the *Mishnah* was intended to function as a law code or academic handbook for young rabbinic scholars has long been contested among academic scholars of rabbinics.”⁸⁷ Even so, “the prevailing tendency among scholars has been to assume that *mishnaic* orality looked very much like the texts that were later produced. While written notes might have existed during this early period, only the oral version would have been authoritative.”⁸⁸ Shanks Alexander challenges the old paradigms and suggests, just as Lord does for Homer, that the *Mishnah* could not have existed in pure oral forms. She notes that for scholar, Saul Lieberman, the oral *Mishnah* is literally and figuratively just like a book; it differs only in the medium of its preservation... Implicit within Lieberman's paradigm of oral performer as ‘living book’⁸⁹ is the assumption that oral performance consists of rote memorization.”⁹⁰ Rather, Shanks Alexander argues that there must have been some extra-*mishnaic* sources that had already been written down prior to the compilation by the *Mishnah* of Rabbi *Yehudah HaNasi*. Therefore, the teaching evident within had to, in her opinion, have been written down prior to the *Mishnah*, rather than existing solely in the minds and mouths of the proto-rabbis, early rabbis, and *meturgamanim*, those charged with the rote memorization of the *mishnaic* text. Ultimately, by drawing on the work of Lord, who found that oral texts were not fixed, but were rather fluid and changing each time they were recited, she concludes that the oral Torah could not have existed in the

⁸⁶ *Ibid.* p. 6.

⁸⁷ *Ibid.* p. 1 n. 1.

⁸⁸ *Ibid.* p. 19.

⁸⁹ Lieberman, Saul. *Hellenism* . p. 90.

⁹⁰ *Ibid.* p. 20.

manner which scholars have claimed it did, in order for it to have been finally written down, accepted, and passed through the generations as it was.

Cohen: The Rabbis and the Memory of the Temple

One of the most recent transitions in the paradigm of academic scholarship of the *Mishnah* has been spearheaded by Naftali Cohen, associate professor and director of graduate studies in the Department of Religion at Concordia University. Cohen's research examines the development of rabbinic identity and authority, specifically how the rabbis used the memory of the Temple in order to solidify their role in society. "Despite the passage of time and the disconnection from the physical Temple and its rituals, the early rabbis gave special prominence to Temple ritual when creating the *Mishnah*."⁹¹ To begin his explanation, Cohen surveys differing scholarly opinions as to the reason that the *Mishnah* devotes so much attention to the Temple. Some scholars have held that in presenting narrative descriptions of how rituals used to be performed in the Temple, the early rabbis simply desired to preserve earlier traditions that dated back to Temple times in an effort to reinstate them if needed. "This explanation is insufficient, however, especially since—as other scholars have shown—the rabbis have demonstrably invented details of their accounts, large and small."⁹² He notes that: another possible explanation is that the laws and narratives about Temple ritual are "part of the larger rabbinic project of creating and recording the details of an all-encompassing biblically derived legal system. Temple ritual is part of this system, so the rabbis may have been developing their own and perhaps even earlier tradition based on legal reasoning and

⁹¹ Cohen, Naftali. *The Memory of the Temple and the Making of the Rabbis*. Philadelphia: University of Pennsylvania Press, 2013. p. 1.

⁹² *Ibid.* p. 2.

exegesis.”⁹³ And further, he notes that, while commenting on the same issue, Neusner suggests that the “extensive focus on the Temple in the *Mishnah* was a rabbinic ‘reaction’ to the destruction.”⁹⁴ Yet Cohen rejects all of these theories. In fact, he argues the opposite when he states:

Having been born into a Temple-less world, these rabbis were not reacting to the loss of the Temple and changes in society that resulted from this loss. Nor were they merely preserving traditions or developing law...In writing or talking about the Temple and its rituals, the rabbis who created the *Mishnah* were arguing for their own authority over post-destruction Judaeen law and ritual practice. They were asserting that their own tradition was correct and that all Judaeans should follow their dictates.⁹⁵

Cohen claims that the rabbis used the Temple as a focus of their writings in order to place themselves in a position of authority because of their marginality because “cultural, political, and legal institutions were controlled by the Romans, and the rabbis had neither place nor power within the Roman system. Even among Judaeans, the rabbis were not especially important or powerful.”⁹⁶ Thus, in order to bolster their own position in society, “the rabbis not only asserted the validity of their body of teaching but insisted that they—and not others—had the authority to determine how *all* Judaeans would practice the traditional biblically based rituals.”⁹⁷ The rabbis attempted to accomplish this feat, by putting themselves on par with Roman authority, and definitely above all other Jewish authority figures, through their “oral Torah,” specifically the *Mishnah*. Cohen states that in the *Mishnah*, which is largely about law, the rabbis present themselves “as legal authorities engaged in a variety of activities pertaining to traditional

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* p. 3.

⁹⁶ *Ibid.* p. 3.

⁹⁷ *Ibid.* p. 17.

Judaeen law. Most commonly, rabbis in the *Mishnah* hold legal opinion, though they are also frequently described as teaching, debating, and issuing rulings, among other legal endeavors.”⁹⁸ Within the *Mishnah*, the rabbis used case studies and other narrative techniques to prove their points and make their arguments, and “the best explanation for mishnaic case stories...is that they depict the rabbis functioning with respect to Torah as Roman jurists function with respect to Roman law.”⁹⁹ Rather than turn to the paradigm of Torah, the rabbis turned to the paradigm of greatest authority that they knew, that of Rome, in order to create their own important place within society. Roman authority would have been more easily recognized by the Jewish communities in Palestine than previous Jewish authority based on Torah.

Ultimately, Cohen understands that for the writings of the *Mishnah*,

even if no Judaeans besides the rabbis had access to the text of the *Mishnah*, either directly or through informal communications with rabbis, the portrayals of rabbis therein still make the argument that all Judaeans should be following the dictates of the rabbis and should practice the traditional way of life as the rabbis envision it.¹⁰⁰

The *Mishnah*, and other early *tannaitic* works, serve to delineate the rabbis and place them in a sphere of society that was in a place of authority over all Judeans, and yet, it is important to remember, while reading the *Mishnah*, especially in the case of the following chapter, that “the rabbis who created the *Mishnah* were...one small distinct group within the larger complex landscape of Judaeen society in Roman Syria Palestina, yet they claimed the right to determine how all Judaeans would practice.”¹⁰¹

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* p. 20.

¹⁰⁰ *Ibid.* p. 26.

¹⁰¹ *Ibid.* p. 31.

Cohen comments that through the *Mishnah*, memories of the society during the days of the Temple are used as evidence to the rabbis authority. “On more than one occasion, brief narratives recall courts of priests in Temple times that seem to stand in contrast to and in competition with the main court or with sages—groups that...the rabbis saw as their predecessors in Temple times.”¹⁰² Ultimately, the rabbis seem to have understood that there were competing groups, yet, they used the narrative of the Great *Sanhedrin* during the time of the Temple to show their authority, by placing themselves in the position of direct successor that great court. “Because they see the Court [in Temple times] as their predecessors, their memory of an authoritative Court provides a historical foundation out of which the rabbis and their role emerge.”¹⁰³ However, it is important to note, Cohen argues, that even as the rabbis were claiming to have been the authority figures that even the Temple priests had to rely upon, they were acutely aware that their role may have been limited, they just were not willing to outwardly acknowledge it. Within the synagogue itself, as Levine has previously argued, the rabbis had little to no authority. In fact,

On a number of occasions in the *Mishnah* and *Tosefta*, there is mention of leaders or functionaries in the synagogue (*rosh hakkeset* or *hazzan hakkeneset*) who play a central role in the performance of ritual. If, as some argue, the rabbis had no authority in the synagogue, these leaders or functionaries of the synagogue may have been the ones to determine how ritual was practiced, and so may have been competition for the rabbis.¹⁰⁴

But even with the doubt that the rabbis may have had about their own authority, it is clear, as Cohen points out, that the memory of the Temple served as a function to place

¹⁰² *Ibid.* p. 34.

¹⁰³ *Ibid.* p. 56.

¹⁰⁴ *Ibid.* p. 34.

the rabbis in control of the community. Since the Temple ritual narratives support rabbinic authority by the ways the past is remembered,

they also support rabbinic authority by emphasizing the act of recounting. The rabbinic interventions that dot Temple ritual narratives make clear that the rabbis are the narrators who control the memory of the past and who reach from the post-destruction act of telling into the imagined world of the Temple, placing themselves into the action and asserting their own control over what happened even in the innermost sanctum, the *kodesh kodashim*.¹⁰⁵

Cohen understands that the rabbis have created a text to support a reality that they have imagined. Manipulation of a shared communal memory of the Temple allowed the rabbis to create a situation in which they could gain the authority they desired and which later generations attributed to them.

The understanding that the *Mishnah* was used to make rabbinic claims of authority rather than reflecting a particular historical accuracy is examined in the next chapter. Using tractate *Horayot* of the *Mishnah*, which includes teachings on “differences between the court, the high priest, and others in case of erroneous judgments, [as well as other] distinctions between the high priest and ordinary priests”¹⁰⁶ the attempt will be made to discover how the *Mishnah* was used to develop rabbinic authority in antiquity. Care will also be taken to discover whether the text created an understanding for the rabbis of their role in the community or whether the rabbis used the text of the *Mishnah* to create a new role for themselves.

¹⁰⁵ *Ibid.* p. 72.

¹⁰⁶ Strack and Stemberger. *Introduction to the Talmud*. p. 130.

Chapter Two:

Mishnah Horayot: A Examination of the Development of Rabbinic Authority

Tractate *Horayot* is the tenth and final tractate of *Seder Nezikin*. The tractate is named for the instructions or rulings (יִרְה) discussed in its various *mishnayot*. *Horayot* includes teachings on “differences between the court, the high priest, and others in case of erroneous judgments. Other distinctions between the high priest and ordinary priests”¹ are included as well. Its three chapters deal with the evolution of rabbinic authority as related to the implications for the members of a court and the community when incorrect or uninformed legal decisions are rendered. *Horayot* is an appropriate tractate for the examination of this evolution for it provides the process for legal and religious decisions made by the rabbinic court. Specifically, the tractate treats the relationship between legal decisions of the rabbis and the priesthood and the larger community. As a result exploring how the Rabbis viewed themselves in relation to these two groups is possible. And yet, *Horayot* treats only those decisions in matters of religious law which have been made by error. These recorded errors also help show that the rabbis did not see themselves as infallible, and were able to acknowledge errors made by their colleagues, and to set up a system for handling these mistakes.

The following examination of the tractate focuses on a number of key issues. First, it provides a linguistic examination of the text, looking specifically at the vocabulary used. Second, it provides the opportunity to collect a great deal of information about Jewish society in antiquity, for ultimately, Rabbinic literature is a set of laws, sermons and stories that the Rabbis deemed important enough to discuss, teach to their students, and to pass on to future generations, who saw fit to save this material in perpetuity.² Third, it

¹ Strack, H.L and G. Stemberger. *Introduction to the Talmud*. p. 130.

² For further discussion see: Levine, Lee I. *The Ancient Synagogue: The First Thousand Years*, 2nd Edition. New Haven, CT: Yale University Press, 2005. p. 180.

explores rabbinic self-understanding of their position in society. This can be derived, even though,

the sources themselves rarely provide descriptions of the schools or forums of learning. Where they do, the images tend to be exaggerated or utopian projections of Rabbinic ideals, rather than realistic representations of contemporary situations. In many cases Rabbinic sources project back upon earlier ages the conditions at the time the sources were formulated, which gives a distorted historical picture.³

As Lapin explains, "no one of the case narratives [in the *Mishnah*] can be mined for historical detail about the actual events...However, in aggregate, these stories are important for how the tradents and editors of the rabbinic corpora represented rabbinic judging."⁴ Fourth, this work explores the possibility of deducing the theological agenda of the rabbinic authors.⁵ And, finally, through the examination of the text, there will be an attempt to reject the idea of multiple "Judaisms" in antiquity, while demonstrating "that Judaism was complex, capacious, and rather frayed at the edges."⁶ In other words, that Judaism had essential features that held different groups together, rather than multiple groups each claiming to be a viable and legitimate alternative to the illegitimate others.

The textual analysis will include comparisons of the commentaries on *Horayot* by medieval commentators Rabbi Moshe ben Maimon (Rambam or Maimonides) and Rabbeinu Ovadia ben Avraham m'Bartenura (who is usually known by his place of origin, Bartenura) as well as those of modern scholars Hanoch Albeck, Phillip Blackman,

³ Rubinstein, Jeffrey L. *Social and Institutional Settings*. p. 58-59.

⁴ Lapin. *Rabbis as Romans*. p. 99.

⁵ For a further discussion of how early rabbinic writings provided the theological agenda of it author and editors see: Charlesworth, James H. and Loren L. Johns. *Hillel and Jesus: Comparative Studies of Two Major Religious Leaders*. Minneapolis: Fortress Press, 1997. p. xvii.

⁶ Schwartz, Seth. *Imperialism*.. p. 9.

and Pinhas Kehati, in addition to my own commentary. The text of the *Tosefta*⁷, the other major *tannaitic* legal work, will be compared to the *Mishnah* in order to examine other *tannaitic* literature on the same themes. While the *Talmud Yerushalmi* and *Talmud Bavli* are two of the original and foremost sets of commentary on the *Mishnah*, they will be left out of this analysis since, as Maimonides writes in his introduction to *Seder Zera'im*, "the Talmud makes of the *Mishnah* a matter that will never be able to be logically grasped."⁸ In other words, the Gemara, unlike the commentaries that have been chosen for the purpose of this analysis, does not limit itself to commenting on the *Mishnah*; rather, it uses the *Mishnah* as a springboard for further discussion on a plethora of issues not always related to the *Mishnah* that the *gemara* claims to be analyzing. Rather, the *Mishnah* is used as a starting place for the *gemara's* explanation which goes in too many different directions to be pertinent to this examination. When individual commentators reference the *gemara* in a way that is relevant to the discussion at hand, that reference will be included in the following analysis.

Rabbi Moses ben Maimon (Rambam, Maimonides), was born in Cordoba, Spain in 1135. He later settled in Cairo, and, was a well respected *halachic* authority, philosopher, and medical doctor. His three most famous works are the *Mishneh Torah*,

⁷ The *Tosefta* is a collection of *halachic* and *aggadic beraitot*, or statements similar to those contained in the *Mishnah*, organized in the same structure as the *Mishnah*. In most respects, the *Tosefta* is identical to the *Mishnah*. Its Hebrew language is similar in all essential points to the language of the *Mishnah*, and seems unaffected by later dialects of *amoraic* Hebrew. The content, terminology, and formal structures of the *halakhah* in the *Tosefta* are the same as those in the *Mishnah*. In addition to containing two additional generations of *tannaitic* traditions, there are two primary differences between the *Mishnah* and the *Tosefta*. First, the *Tosefta* is some three to four times larger than the *Mishnah*. Second, the overall order of the units of tradition found in the *Tosefta* is largely dictated, not by internal criteria, but rather by the external standard of the order of the *Mishnah*. For more information see: Berenbaum, Michael and Frank Skolnik. *Encyclopedia Judaica: 2nd Edition*. Detroit: Macmillan Reference USA, 2007. p. 70.

⁸ Neusner. *Modern Study*. p. 5.

the *Guide for the Perplexed*, and his Commentary on the *Mishnah* which was completed in 1168.

It is through his commentary to the *Mishnah* that one can begin to review Maimonides as a *halakhist*. In his commentary, Maimonides sets out to explain to the general reader the meaning of the *Mishnah*, without having recourse to the involved and lengthy discussions in the *Gemara*, the language of which was more difficult than the *Mishnah* itself (*Mishneh Torah*, introd.). Out of the *mishnaic* and other *tannaitic* texts and corresponding passages in the *Gemara*, often widely scattered throughout the *Talmud*, Maimonides evolves the underlying principles of the subjects discussed, which a particular *Mishnah*, chapter, or entire tractate presupposed.⁹

Maimonides commentary on the *Mishnah* was seen as a way to understand the text without the time consuming and difficult process of the studying the *gemara*.

Rabbi Ovadia ben Avraham m'Bartenura, was an Italian born Rabbi and banker. He travelled extensively in Italy, the land of Israel and Egypt. His is famous because of his commentary on the *Mishnah* which was compiled in Jerusalem and published in Venice in 1549. His commentary, which is typically found in printed editions of the *Mishnah*, is written in an easy and lucid style drawing largely on Maimonides and Rashi's Torah commentary (1475).

The three modern commentators referenced include Hanoah Albeck, Pinhas Kehati and Phillip Blackman. Albeck (1890 to 1972) was a professor of Talmud at the Hebrew University in Jerusalem and one of the foremost scholars of the *Mishnah* in his time. Kehati, who lived from 1910 until 1976, wrote a commentary of the *Mishnah* in modern Hebrew and is widely credited with enabling the study of Torah for the masses.¹⁰ Blackman was an English Rabbi writing at the beginning of the twentieth century. He wrote an English commentary to the *Mishnah* which often emphasizes historical context

⁹ Berenbaum and Skolnik. *EJ Vol.13*, 2nd Edition. p. 385.

¹⁰ Shorek, M. *Rabbi Pinhas Kehati*. Jerusalem: Tog: News and Jewish Content, 12/13/2009. <http://www.tog.co.il/he/Article.aspx?id=387>. Accessed: December 4, 2013.

as well as obscure words and phrases, while Albeck's commentary focuses on providing a clear understanding of the text based on a surface level (*p'shat*) reading of the text, and Kehati's commentary provides an explanation while often using the explanations of each *Mishnah* which are provided in the *gemara* as a basis for his understanding.

Maimonides' Introduction to Horayot

Before beginning a close look at the language¹¹ and meaning of the text of *Mishnah Horayot*, an analysis of the introduction to the tractate provided by one of the *Mishnah*'s earliest commentators, Maimonides will be conducted. Similar to the other tractates of the *Mishnah*, Maimonides begins his commentary with a lengthy introduction that provides background information and the direction in which his commentary will take the reader. While the other commentators examined all provide short introductions to the tractate, unlike the others, Maimonides' introduction gives the reader a very clear insight into his understanding of the text. Therefore, an understanding of Maimonides commentary of the text necessitates an examination of his introduction first. Maimonides begins his commentary on the tractate by introducing the text and providing a link between the situations that are provided in this tractate and the laws in the Torah that require excommunication as a punishment if committed on purpose or with malice. These violations of commandments, which if committed by accident require a sin-offering and do not carry the punishment of excommunication, "are all counted at the beginning of tractate *Keritot* (excommunication), there they are clarified. And generally, they refer to *Avodah Zarah* (idolatry)."¹² Maimonides then differentiates the severity of

¹¹ All translations of *Mishnah* text, Rambam, and Bartenura are my own unless otherwise noted. For a full, working, un-vetted translation of Rambam's commentary to *Horayot*, see Appendix A. For a full, working, un-vetted translation of Bartenura's commentary, see Appendix B.

¹² *Mishnah with Commentary by the Rambam*. Jerusalem: Mossad HaRav Kook, 2005. p. 305.

the sin of idolatry if it occurs in public or in private, and whether the perpetrator was a scholar or an ignoramus.¹³

Maimonides concludes his introduction with a discussion of the situation in which the court issued an erroneous ruling. This ruling if followed would cause an individual to transgress and therefore become liable for a sacrifice. He then provides conditions that must be met by the court in order for their erroneous judgment to require a sacrifice for those who have transgressed. He explains that, if all the conditions are met, “every person is exempt, and the obligation is charged to the court because they instructed incorrectly to sin.”¹⁴ However, if the conditions were not met, then the court would be exempt from liability, but the individual who had transgressed would then be obligated to provide a sacrifice. Therefore, he understands the tractate as teaching that the *beit din*, the court, must not have inadvertently caused the people to sin very often, due to the stringent conditions placed upon the court that would allow the court to be considered liable. Now to quote Maimonides, “ועתה אתחיל בפירוש, now I begin my commentary.”¹⁵

Mishnah Tractate Horyaot, Chapter 1

משנה מסכת הוריות פרק א

משנה א
הורו¹⁶ בית דין¹⁷ לעבור¹⁸ על אחת מכל¹⁹ מצות²⁰ האמורות²¹ בתורה והלך היחיד ועשה²²
שוגג²³ על פיהם²⁴ בין²⁵ שעשו ועשה עמהן²⁶ בין שעשו ועשה אחריהן בין שלא עשו ועשה

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.* p. 306.

¹⁶ Root is ירה. *Hiphil*. To give an instruction, make a decision, or give a ruling. In this tractate of the *Mishnah* it is generally understood that the הוריות given by the court are erroneous in some way. This leads to the discussion in the different *mishnayot* of this chapter that deal with whether consequences exist for the court or those who follow their erroneous instruction. Usually this word will be translated as “instruction”, but it may also be rendered to mean “ruled.”

¹⁷ A construct meaning: court. Literally “house (בית) of law/justice (דין).”

¹⁸ Root is עבר. To commit a sin, transgression, to cross a line.

¹⁹ One of. Literally “one from all.”

²⁰ Root is צוה. Commandments. Collectively the 613 commandments that are given in the Torah.

²¹ Root is אמר. Participle. ה function like ש (that was). Meaning is “that was spoken.”

²² הלך ועשה. Literally: went and did.

פטור²⁷ מפני²⁸ שתלה בבית דין הורו בית דין וידע אחד מהן שטעו²⁹ או תלמיד והוא ראוי להוראה והלך ועשה על פיהן בין שעשו ועשה עמהן בין שעשו ועשה אחריהן בין שלא עשו ועשה הרי³⁰ זה חייב³¹ מפני³² שלא תלה בבית דין זה הכלל³³ התולה³⁴ בעצמו חייב והתולה בבית דין פטור:

Translation:

If the court gave an instruction causing a transgression of any one of the commandments that is articulated in the Torah, and an individual went and acted in ignorance relying on their word, whether they (the court)³⁵ acted and he acted with them, or they acted and he acted after them, or they did not act and he acted so, he is exempt since he ascribed [his actions to the instructions of] the court. If the court gave instruction and one of [its members] knew they had erred or a student that was competent to instruct [knew they had been mistaken], and an individual went and acted based on their word, whether they acted and he acted with them, or whether they acted and he acted after them, or whether they did not act and he acted, indeed he is liable [to bring a sin offering] since he did not ascribe [his actions to the instructions of] the court. This is the general rule: one that relies on himself is liable, and one that relies on the court is exempt.

²³ Root is שגג. An inadvertent bad act.

²⁴ Literally שלהם.

²⁵ בין... Whether this or that.

²⁶ Suffix of הן means “them.” The final ך in this *Mishnah* denotes a masculine plural suffix.

²⁷ Root is פטר. Passive participle. Meaning is: to be exempt. Literally exempt from having to provide a sin offering.

²⁸ On account of.

²⁹ Root is טעה. *Kal*. Meaning is “to error or go astray.”

³⁰ “Behold, here is”

³¹ Liable. Stative participle. Literally liable for providing a sin offering based on his actions.

³² “Because of, since”

³³ A general principle. A *halachic* statement usually follows.

³⁴ Root is תלה. Participle. Meaning is “one who relies.” Followed by ב: one who relies on.

³⁵ Within the translation of the *Mishnah* text, parentheses will be used to provide further clarification to a word that is directly translated from the Hebrew while brackets will be used to add additional words or phrases that are not located in the Hebrew in order to better contextualize the text.

Analysis:

The tractate of the *Mishnah* begins by proposing a situation where the court provides an instruction or a ruling that causes those who follow it to transgress one of the commandments delineated in the Torah. The first question that must be asked is which court this *Mishnah* refers to. Albeck's commentary suggests that this *beit din* is actually the Great *Sanhedrin*³⁶ that existed during the time of the Temple.³⁷ This reference to the Great *Sanhedrin*, along with further references in the following *mishnayot* that will refer to the relationship between the priests and the court will allow the Rabbis to establish their authority, because the Rabbis, in the words of Naftali Cohen, "see the Court [in Temple times] as their predecessors; their memory of an authoritative Court provides a historical foundation out of which the Rabbis and their role emerge."³⁸ In other words, by establishing the pre-Rabbinic court as the basis of this tractate, the editors of the *Mishnah* have reaffirmed a paradigm where they see their authority derived from previous generations.

Maimonides gives an example of such an erroneous ruling from the court by stating:

The lesson here is that if the *beit din* ruled that forbidden fat is permitted, if a person intended to eat forbidden fat and did so based on the *beit din*'s ruling, he is not obligated to bring a sacrifice. But if he intended to eat permitted fat and ate forbidden fat, he must bring a sacrifice, since the error was not based on the *beit din*'s ruling because he did not eat the forbidden fat because of the *beit din*'s ruling. But if he did eat it according to the *beit din*'s ruling he has no obligation at all [for a sacrifice], even if he did it together when they announced their ruling, or

³⁶ The Rabbis of the *Mishnah* discuss the *beit din* in reference to the Great *Sanhedrin* in Jerusalem. However, scholars are unclear of what the makeup of this body was, or if it even existed in the manner that the ancient Rabbis describe it in *tannaitic* literature. For further discussion on the Great *Sanhedrin*, see: Berenbaum and Skolnik, *EJ Vol. 18 2nd. Ed.* p. 21-23.

³⁷ Albeck, Chanoch. *Shishah Sidre Mishnah: Seder Nezikin*. Jerusalem: The Bialik Institute, 2008. p. 393.

³⁸ Cohen, Naftali. *Memory of the Temple*. p. 56.

if he did it before they made the ruling³⁹ and even if he did it and they did not do anything, he is exempt [because he relied on the court] as discussed in the introduction: “An act is dependent on the community and the ruling of the *beit din*.”⁴⁰

Through this story, Maimonides argues that the *Mishnah* states that a perpetrator of a sin is exempt whenever the sin is committed with the consent of the *beit din*. This is the opening argument made by the *Mishnah*, that puts the culpability on the court for making a mistake in its ruling. Yet, both Maimonides and Bartenura, along with contemporary commentators, disagree with this point and side with the *Tosefta*’s ruling which states, “If the court gave a decision and the entire community, or the majority of the community carried out their decision, when their decision is the decision of a court, they are exempt.”⁴¹ Bartenura explains his dissent by stating:

Rabbi *Yehuda* says that one who acted based on the *beit din*’s ruling is exempt. This is not the law. The Rabbis said that an individual who acted based on the *beit din*’s ruling is obligated. He is not exempt until the majority of residents in the Land of Israel, or the majority of the tribes, act according to the *beit din*’s ruling, and then the *beit din* brings the bull for a communal error-in-judgment sacrifice, and those who acted according to the *beit din*’s ruling are exempt.⁴²

The condition put upon the *Mishnah*’s ruling by the commentators further solidifies the Rabbis’ position of authority. So, while this *Mishnah* limits the Rabbis’ position by making the court liable when they rule incorrectly or issue improper instructions, the ruling in the *Tosefta*, along with later commentaries, place the burden of knowledge on the individual and not the court. Since the *Bavli*⁴³ accepts the ruling in the *Tosefta*, later

³⁹ In this case, the transgression happened before the *beit din* made their judgment. However, Maimonides rules that the perpetrator is still exempt, since a later mistake by the *beit din* will nullify the past mistake of the individual.

⁴⁰ *Rambam*. p. 306.

⁴¹ Neusner, Jacob. *The Tosefta: Translated from the Hebrew; Fourth Division: Neziqin (The Order of Damages)*. New York: KTAV Publishing House Inc, 1981. p. 345.

⁴² *Mishnayot M’irot Einaim im Peirush HaRav Ovadia ben Avraham m’Bartenura: Seder Nezikin*. Hebron: Hadafeset Sifre Eichot. p. 267.

⁴³ *Horayot* 2b

commentators prioritize the *Tosefta* in this case, even though, rulings in the *Mishnah* hold weight over its contemporary text.

משנה ב

הורו בית דין וידעו שטעו וחזרו⁴⁴ בהן בין שהביאו⁴⁵ כפרתן⁴⁶ ובין⁴⁷ שלא הביאו כפרתן והלך ועשה על פיהן רבי שמעון פוטר⁴⁸ ורבי אליעזר אומר ספק איזהו⁴⁹ ספק ישב לו בתוך ביתו חייב הלך לו למדינת הים⁵⁰ פטור אמר רבי עקיבא אני בזה⁵¹ שהוא קרוב לפטור מן⁵² החובה אמר לו בן עזאי מה שנה⁵³ זה מן היושב בביתו שהיושב⁵⁴ בביתו אפשר היה לו שישמע וזה לא היה אפשר לו שישמע:

Translation:

If the court gave instructions and one [of its members] knew that they had erred [after they acted], and they retracted [the decision], whether they brought their [offering for] atonement or whether they did not bring their [offering for] atonement, but [an individual] went and acted according to their words, R' *Shimon* says he is exempt, and R' *Eliezer* says there is doubt [as to whether or not he is exempt]. What is [the nature] of this doubt? If an individual was within his house [when the retraction was given] , he is liable, but if he went abroad, he is exempt. R' *Akiva* says, "I admit that he is closer to exemption than liability." *Ben Azzai* said to him, "How does this one [that went abroad] differ from one that resided in his house? [R' *Akiva* replied to him:] "For him that

⁴⁴ Root is חזר. *Kal*. Meaning is "to return." ... חזרו is an idiomatic phrase that means, "they retracted."

⁴⁵ Root is בוא. *Hiph*. Meaning is "to bring or carry."

⁴⁶ כפר - Atonement. Literally the sacrifice intended for atonement of sin.

⁴⁷ ובין...בין... Literally: Whether this...or that.

⁴⁸ In this case, R' *Shimon* explains that they are exempt. The root אמר is omitted but implied.

⁴⁹ Which one? Idiomatically can be rendered as "where is?" or "when is this?"

⁵⁰ This construct phrase, literally meaning "the land of the sea" is understood as "abroad."

⁵¹ אני בזה. In this case, "I am in this" should be rendered as "I understand that this" or "I admit that this."

⁵² קרוב...מן. Closer to (one) that (the other).

⁵³ שנה - To change or to differ. מה שנה - What is the difference?

⁵⁴ While R' *Akiva* is not mentioned again, it is clear that the text implies a conversation between R' *Akiva*, who spoke first, followed by *Ben Azzai*, who spoke second. Therefore, it is logical to assume that the unnamed respondent to *Ben Azzai* is once again R' *Akiva*.

resided in his house, it would be possible for him to hear [the recantation of the court], but the other could not possibly have heard of this.

Analysis:

This second *Mishnah* continues the discussion of what happens if the court make an erroneous ruling. A situation is presented where the court has made an erroneous ruling, one of its members realizes the error and the court retracts the ruling. In this situation, then, the *Mishnah* asks who is liable. Rabbi *Shimon* says that the individual is not liable, even though the court has rescinded its ruling, while R' *Eliezer* expresses some doubts. Maimonides explains R' *Shimon*'s position by teaching that, "Rabbi *Shimon* exempts the one who acted from having to bring a sacrifice, because it was a ruling that became publicly accepted and if one acted, then likely the majority acted thus."⁵⁵ However, Bartenura uses the Rabbis' ruling from the previous *Mishnah* to explain R' *Shimon*'s position, since if the "ruling had reached the majority of the community,"⁵⁶ it would exempt the court but make the individual liable.

R' *Eliezer*'s statement, that there exists some doubt about who is liable in this current situation, is explained by the various commentators because "it is not clear whether it is a case of reliance on the *Bet Din*⁵⁷ or an act of an individual's own volition. Kehati holds that it was his duty to keep up-to-date with regard to *Bet Din*

⁵⁵ *Rambam*. p. 307.

⁵⁶ *Bartenura*. p. 267.

⁵⁷ *Bet Din*- The בית דין, or Rabbinical court. As this is a transliteration of the Hebrew, rather than a translation, the exact spelling is debated. In my own writings and commentary, I will use the spelling, "beit din," yet, others have chosen to use the spelling, "bet din." For the sake of remaining true to the words of other scholars, when they have chosen the alternate spelling, I will leave they words as they have been written. Within the tractate, the *beit din* typically refers to the Great *Sanhedrin*. When other courts, such as the rabbinical courts that were claimed by the rabbis to have existed in each of the tribes, are mentioned, they will be specifically demarked.

pronouncements.”⁵⁸ In other words, it is incumbent upon the individual to make sure that actions are consistent with current rulings of the court.

The *Mishnah* finishes with a discussion of the doubt that R’ *Eliezer* mentions. This doubt stems from whether or not the one who transgressed was at home or abroad. Blackman comments that this literally means that he was “somewhere outside Palestine. This [exemption] applies also if he was on the road to leave the country.”⁵⁹ The *Mishnah* explains that R’ *Akiva* and *Ben Azzai* had a dispute about this case, with R’ *Akiva* holding that “a person who is preparing for a journey will not be able to inquire whether the *beit din* reversed its ruling and he is exempt from bringing”⁶⁰ a guilt offering. Whereas *Ben Azzai* disagreed and taught that “since he had not yet set out on the journey, he should have inquired.”⁶¹ The *halacha* follows R’ *Akiva*’s ruling, but this dispute brings into the light the issue of the Rabbis’ authority. If one assumes that an individual within the land of Israel should be aware of the Rabbis’ rulings on all matters, it can be assumed that the Rabbis were in a position, or wished to be in a position where they had control over the Jewish community throughout the land.

What is important to recognize here is *when* the Rabbis were writing compared to the *time* they seem to be writing about. As they discuss the issues of needing to bring a sacrifice, it becomes clear that they are setting the judgments of the court to have taken place during the time of the Temple. Yet, during the time of the *Mishnah*, the Rabbis’ authority over the Jewish community, even within Palestine, was shaky at best, and, in

⁵⁸ Kehati, Pinhas. *The Mishnah: Seder Nezikin Volume 4: Tractate Horayot*. Jerusalem: Department for Torah Education and Culture in the Diaspora of the World Zionist Organization, 1988. p. 7.

⁵⁹ Blackman. p. 561. Blackman’s comment is based on a ruling in Bavli Horayot 4a which states, “Raba replied: The difference between them is the case of one who started on a journey. According to *Ben Azzai* he is liable because he is still at home; according to R’ *Akiva* he is exempt since he has already started on his journey.”

⁶⁰ *Bartenura*. p. 267.

⁶¹ *Ibid*.

fact, “no one was compelled to accept Rabbinic judgment. The Rabbis could threaten, plead, and cajole but could not subpoena or impose a sentence.”⁶² In other words, as Lapin explains, the rabbis were “a small group of religious experts within a religious association putting that expertise at the service of pious members.”⁶³ Therefore, it becomes necessary to understand that the reason why the question of location and time remains an important one for the Rabbis as they seek to establish their authority. Under the Romans, the authority of the Rabbis was severely limited, yet this *Mishnah* seems to argue that the Rabbis had the authority to control and influence the lives of all Jews within the land of Israel.

משנה ג

הורו בית דין לעקור⁶⁴ את כל הגוף⁶⁵ אמרו אין נדה⁶⁶ בתורה אין שבת בתורה אין עבודה זרה⁶⁷ בתורה הרי אלו פטורין הורו לבטל⁶⁸ מקצת⁶⁹ ולקיים⁷⁰ מקצת הרי אלו חייבין כיצד אמרו יש נדה בתורה אבל הבא⁷¹ על שומרת יום כנגד יום⁷² פטור יש שבת בתורה אבל המוציא מרשות היחיד לרשות הרבים פטור יש עבודה זרה בתורה אבל המשתחוה פטור הרי אלו חייבין שנאמר⁷³ (ויקרא ד') ונעלם דבר דבר ולא כל הגוף:

⁶² Schwartz. *Imperialism*. p. 120.

⁶³ Lapin. *Rabbis as Romans*. p. 99.

⁶⁴ Root is עקר. Infinitive. “To uproot, destroy, displace.”

⁶⁵ Literally “the body,” it is understood here as “the structure.” It can also be understood as “the body of the Torah,” i.e. “the basic rulings of law.”

⁶⁶ The halachic category of laws regarding the menstrual cycle.

⁶⁷ Understood as “idolatry.” Other sources have עבודה גילולים (See: Blackman. p. 561.) meaning “worship/service of filth.” This is a later change which was caused by the *Mishnah* being censored.

⁶⁸ Root is בטל. Infinitive. “To annul.”

⁶⁹ מקצת. This is a construct of “מ” and “קצת”, meaning “part of.”

⁷⁰ Root is קים. Infinitive. “To raise up, to sustain, to uphold.”

⁷¹ הבא - Root is בוא. Followed by על, means “to have sexual relations with.”

⁷² אשה הרואה דם לאחר שבעת ימי נידתה, בתוך אחד-עשר יום: ג: Footnote See: Albeck, p. 394. שומרת יום כנגד יום שבין סוף הנידה שעברה לתחילת הנידה הבאה, צריכה לשמור יום אחד בטהרה כנגד יום הטומאה, היינו שהיא טובלת למחרת היום הטמא ואם אינה רואה בו דם הרי היא טהורה לערב, אבל באותו יום דינה כנידה והבא עליה חייב כרת (ויקרא כ', יח')

⁷³ Root is אמר. Indicated that the following words will be a proof text from the Torah.

Translation:

If the court gave instructions that uprooted the body [of the commandments], if they said, “There is nothing about the laws of menstrual purity in the Torah, or nothing about Shabbat in the Torah, or nothing about idol worship in the Torah,” then, indeed, they are exempt. If they gave an instruction to annul [a commandment] in part and to uphold it (confirm it) in part, then they are liable. How is this so? If they said there are [laws concerning] menstrual purity in the Torah, but a man who has sexual relations with a woman who is “guarding day against day”, is exempt. Or, if they said that there [are laws concerning] Shabbat in the Torah, but one who carries from his private domain into the public domain, is exempt. Or if they said that there [are laws concerning] idolatry in the Torah, but one who bows down and worships [an idol], is exempt, then they are liable. As it is said: “the thing is hidden.”⁷⁴ The thing (i.e. the detail) but not the whole structure.

Analysis:

This *Mishnah* begins by explaining that if the court were to rule a law that was expressly stated in the Torah to be null and void, then the court would not be liable for an individual committing the transgression, rather, the individual is liable. The *Mishnah* then provides a few examples, such as laws of menstrual purity, Shabbat, and idolatry. Kehati references the *Gemara* in his explanation of this situation stating that the reason that the court is exempt and the individual is liable for a transgression based on such a ruling is that “every school boy knows it is forbidden.”⁷⁵ Kehati further explains that this

⁷⁴ Leviticus 4:13

⁷⁵ Kehati. p. 9.

ruling is of no consequence since “every Jew knows that these are specifically prohibited in the Torah.”⁷⁶

Where the *Mishnah* does put liability on the court is in the case where the ruling nullifies part of a Torah-based law, but upholds another part. The first example given refers to a man who has sexual relations with a woman who is *יום כנגד יום*, or “guarding day against day.” Maimonides explains this situation in the following way:

We already clarified it at the beginning of the book, and clarified the laws of *niddah* and *zavim*. An example of an error: “She only keeps a day for each day if she saw blood during the day, but if she saw the blood at night, she does not, as a *zava* is not a *zava* until she sees traces of blood for three days, they will sin by mistake, saying: Days of *zava* means during the daylight hours, and if they err in this way and if the majority of the community’s wives see blood at night, they will be obligated to bring a cow as a sin-offering.”⁷⁷

What Maimonides is clarifying is how a woman must maintain a status of menstrual purity, even if the court were to attempt to nullify this status of guarding the days between cycles, which would, in effect, nullify the laws of *nidah*. Following different examples, where the laws of Shabbat and idolatry are nullified in part, the *Mishnah* states that in these cases the court would be liable if any individual transgressed.

Regarding the development of the Rabbis’ authority, this is a very important *Mishnah*, for it sets the boundaries of how the Rabbis can rule. According to the *Mishnah*, the Rabbis need to know better than to attempt to nullify a Toraitic law. If the law is nullified in part, then the Rabbis will only succeed in putting themselves in a position of liability, while confusing the entire community. However if the Rabbis were to nullify an entire Toraitic law, then the community will lose confidence in the Rabbis, since these basic laws of the Torah cannot be nullified. In their rulings for the

⁷⁶ *Ibid.*

⁷⁷ *Rambam*. p. 308.

community, the Rabbis must limit themselves to explaining their ruling clearly and focusing on matters which are not clearly delineated in the Torah, such that these matters will be clear for the people.

משנה ד

הורו בית דין וידע אחד מהן שטעו ואמר להן טועין אתם או שלא היה מופלא⁷⁸ של בית דין שם או שהיה אחד מהן גר⁷⁹ או ממזר⁸⁰ או נתין⁸¹ או זקן שלא ראה לו⁸² בנים הרי אלו פטורין שנאמר כאן עדה ונאמר להלן עדה מה עדה האמור להלן עד שיהיו כולם ראויין להוראה אף עדה האמורה כאן עד שיהיו כולם ראויים להוראה הורו בית דין שוגגים ועשו כל הקהל שוגגין מביאין פר⁸³ מזידין⁸⁴ ועשו שוגגין כשבה ושעירה שוגגין ועשו מזידין הרי אלו פטורין:

Translation:

If the court gave instructions, and one of them knew that they had erred and he said to them, “You have erred,” or in “the absence of the *mufla*”⁸⁵ or if one of them was a convert or a *mamzer* or a descendent of the Gibeonites, or an elderly man who did not have children, then these are exempt, as it is said here, “congregation,”⁸⁶ and further on it says, “congregation.”⁸⁷ Just as “congregation” that is said further on (in Numbers) means that they all must be qualified to give instruction, so also “congregation” that is said here (in Leviticus) means that they should all be qualified to give an instruction. If the court gives an instruction unwittingly, and all the community acts accordingly unwittingly, [the court] must bring a bull. If the court willfully makes a wrong decision and [the

⁷⁸ Root is פלא. “Instructing or chief judge.” See: Jastrow, Marcus. “A Dictionary of the Targumim, The Talmud Babli and Yerushalmi, and the Midrashic Literature.” Jerusalem: Chorev. p. 746.

⁷⁹ While גר is translated in the Bible as “stranger,” in Rabbinic literature it has taken on the concept of a convert to Judaism.

⁸⁰ ממזר - Often translated as a bastard, but actually is the descendent of a prohibited union, such as one that is illicit or adulterous.

⁸¹ A descendent of Gibeon.

⁸² Literally “to see for himself.” In this context, it means that he was childless.

⁸³ The bringing of the bull for the sin offering is in accordance with Leviticus 4:13.

⁸⁴ “Willfully” or “wantonly”

⁸⁵ Jastrow, p. 746. The expert who knows how to rule in this specific kind of case is absent.

⁸⁶ Leviticus 4:13

⁸⁷ Numbers 35:24

community] unwittingly [follow it], then they bring a sheep or a goat. If [the court] acted unwittingly and [the community] acted wantonly then they are exempt.

Analysis:

As the previous *Mishnah* explained that the incorrect ruling of the court could not apply to certain commandments from the Torah since these laws were unable to be changed, this *Mishnah* sets forth additional conditions that need to be met in order for the members of the court to be liable for a transgression and not the individual who actually performed the sinful act. These conditions include: (1) that the decision of the court is unanimous and that there is no dissent among them; (2) that the entire court, which would be all seventy-one members of the Great *Sanhedrin*, participates in the decision; (3) that the *mufleh* is present for the ruling; (4) that every member is qualified; and (5) that the court had erred in its ruling and the people acted according to the ruling without knowing it was made incorrectly.

By examining these conditions, it is possible to understand the process the rabbis used for creating the conditions, and also their justification for each of them. The reason the decision must be unanimous can be understood as the Rabbis needing unanimity in order for liability as a way of limiting the possibility of court error. Since the rabbis wanted to create a scenario in which their liability was limited, the *Mishnah* seems to hint at the likelihood that all seventy-one members of the court agreeing on a single issue, let alone one that is incorrect in its outcome, was a remote possibility. This seems to say that unanimity was such a remote possibility, the requirement would be a good safeguard against the rabbis liability. Additionally, this is further understood when realizing that all seventy-one members must be present in order for the incorrect verdict to have standing.

For when any number might be missing, the likelihood of an incorrect verdict being agreed to by all members present increases. This can be understood using the *g'zerah shavah* that is present in the *Mishnah*. The *g'zerah shavah*, which is a rabbinic interpretative method that takes a word that is used in the present statement and applies that context of the word from a different location in rabbinic or biblical literature, shows that every member of the "congregation" must be present and must be an expert in the material in order for the verdict to stand. The *g'zerah shavah* merely provides one proof to the makeup of the court. The rest of the *Mishnah* provides further evidence.

The *Mishnah* then speaks to specific members that must be present. First it discusses that the *muflah* must be present and ruling on the case for the verdict to be valid. Bartenura explains that the *mufla* is "the most important and knowledgeable."⁸⁸ It is important that the most knowledgeable, or as Albeck points out, "the president or head of the court,"⁸⁹ must be present in order to lend validity to the judgment that is being made. Next, the *Mishnah* discusses who is not allowed to sit on the court. The list that is given includes a convert, or a *mamzer*, or a descendant of the Gibeonites, or an old-man who never had children. First of all, Maimonides reminds the reader of his commentary that this list was already "clarified in Tractate *Sanhedrin* that those who are referred to are not fit to teach in the *Sanhedrin*, as was said to Moshe: 'That they may stand there with you,' and similar to you, which means of distinguished lineage."⁹⁰ In other words, the convert, the *mamzer*, and the descendent of Gibeon are not considered as having come from a distinguished line. The convert's lineage is not Israelite and the *mamzer* comes from a prohibited union. The case of the descendant of Gibeon can be found in

⁸⁸ Bartenura. p. 268.

⁸⁹ Albeck. p. 394.

⁹⁰ Rambam. p.308.

the Book of Judges. The Gibeonites were residents of four important and strategically located cities in ancient Israel, who tricked Joshua into signing a treaty with them in order to spare them a similar fate to the residents of Jericho and Ai. However, upon learning that he had been deceived, Joshua exclaimed to the chieftains of Gibeon, “Therefore, be accursed! Never shall your descendants cease to be slaves, hewers of wood and drawers of water for the House of my God.”⁹¹ This community was cursed to always be members of the community, yet on a lower status than Israelites. However, during the time of the rabbis, it is unclear whether or not these people actually existed anymore. It is possible that “the Talmudic sages did not have the actual biblical group in mind at all, but merely reapplied an ancient term to contemporary group of declassed persons who were the subject of their own legislation, thus stigmatizing them with traditional associations.”⁹² Due to all of these factors, these three categories of people were considered to have a suspect lineage and not allowed to sit on the court. Regarding those who are elderly with no children, they are not allowed to sit on the court since, according to Maimonides, “an old man who does not have children is not fit to rule on people’s lives, because he is hard-hearted and is not sympathetic to people because he doesn’t have a love for children.”⁹³ One must be sympathetic towards others in order to sit in judgment over them. By setting forth these provisions, the Rabbis intended to set up a system where only the most distinguished could sit among their number, and where they were understood to be sympathetic to those over whom they wielded authority.

The final condition an incorrect decision needed to meet in order for the court to be held liable when its ruling was followed by a third party requires that the incorrect

⁹¹ Jewish Publication Society’s 1985 translation of Joshua 9:23.

⁹² Berenbaum and Skolnik. *EJ*: Vol. 7, 2nd Ed. p. 585.

⁹³ *Rambam*. p. 308.

action becomes the practice of the majority of the people while not knowing that the court had ruled in error. This safeguard is necessary, in the eyes of the Rabbis, since it provides one more check to the ruling based on the knowledge of those affected by the ruling. If the court had met all the previous conditions, yet the people knowingly acted in accordance with an erroneous ruling, the people are liable for their own transgression. This provides one last safeguard for the Rabbis in order to remove them from being liable for making a mistake in judgment. It also made it important for the court to quickly correct their error publicly. The public correction would offer transparency, would move liability from the court to the general population, and would prevent the act from becoming the common action. By placing these stringent conditions on their rulings, the rabbis seem to be assuming that their authority was absolute over the people. For only with numerous mistakes and safeguard bypassed, would the rabbis every be in a position where they would be liable for a transgression caused by their own inadvertent ruling.

משנה ה

הורו בית דין ועשו כל הקהל או רובן⁹⁴ על פיהם מביאין פר ובעבודה זרה מביאין פר ושעיר דברי⁹⁵ רבי מאיר רבי יהודה אומר שנים עשר שבטים מביאין שנים עשר פרים ובעבודה זרה מביאין שנים עשר פרים ושנים עשר שעירים רבי שמעון אומר שלשה עשר פרים ובעבודה זרה שלשה עשר פרים ושלשה עשר שעירים פר ושעיר לכל שבט ושבט⁹⁶ פר ושעיר לבית דין הורו בית דין ועשו שבעה שבטים או רובן על פיהם מביאים פר ובעבודה זרה מביאין פר ושעיר דברי רבי מאיר רבי יהודה אומר שבעה שבטים שחטאו מביאים שבעה פרים ושאר שבטים שלא חטאו מביאין על ידיהן⁹⁷ פר שאף⁹⁸ אלו שלא חטאו מביאין על ידי⁹⁹ החוטאים רבי שמעון אומר שמנה פרים ובעבודה זרה שמנה פרים ושמנה שעירים פר ושעיר לכל שבט ושבט ופר ושעיר לבית דין הורו בית דין של אחד מן השבטים ועשה אותו השבט על פיהם אותו השבט הוא חייב ושאר כל השבטים פטורים דברי רבי יהודה וחכמים אומרים אין חייבים

⁹⁴ Literally רוב מהם. A majority among them.

⁹⁵ Root is דבר. "Word" or "thing". Here is it understood as "the opinion of"

⁹⁶ Literally "tribe and tribe." Understood as "each tribe" or "for every tribe."

⁹⁷ Literally על ידיהם שלהם, "on their hands" or "on account of their actions."

⁹⁸ "For even."

⁹⁹ "on account."

אלא על הורייט בית דין הגדול¹⁰⁰ בלבד שנאמר (ויקרא ד') ואם כל עדת ישראל ישגו ולא עדת
אותו השבט:

Translation:

If the court gives instructions and all of the community, or a majority among them, acts according to the word [of the court], [the court] must bring a bull [for the sin offering], but for [permission of] idolatry they must bring a bull and a goat. This is the opinion R' *Meir*. R' *Yehudah* says the twelve tribes offer twelve bulls and for idolatry they bring twelve bulls and twelve goats. R' *Shimon* says thirteen bulls and for idolatry thirteen bulls and thirteen goats. A bull and a goat for each tribe and a bull and a goat for the court. If the court gives instructions and seven tribes or a majority of them act according to the word [of the court, the court] brings a bull and for idolatry, they bring a bull and a goat. This is the opinion of R' *Meir*. R' *Yehudah* says the seven tribes that sinned bring seven bulls and the remaining tribes that did not sin bring on account of [the sinning tribes] a bull, for even though they did not sin, they bring [a sin-offering] on account of the sinners. R' *Shimon* says eight bulls and for idolatry eight bulls and eight goats: a bull and a goat for each of the sinning tribes and a bull and a goat for the court. If a court of one of the tribes gives instructions and that tribe acts according to their words, then that tribe is liable, and the rest of the tribes are exempt. This is the opinion of R' *Yehudah*. But the Sages say there is no liability other than through an instruction of the Great Court alone, as it is said: "If the whole congregation of Israel shall transgress,"¹⁰¹ and not the congregation of that tribe.

¹⁰⁰ "The Great Court" is understood to be "the Great *Sanhedrin* of seventy-one members." (See: Blackman, p. 565).

¹⁰¹ Leviticus 4:13

Analysis:

This final *Mishnah* in the first chapter of tractate *Horayot* discusses the penalties for transgressions of Toraitic commandments based upon inadvertent rulings by the court. In the previous *Mishnah*, the rule was that if the community inadvertently acted on account of the court's incorrect ruling, then they are liable for a bullock as an offering. Kehati claim that the main question to be asked and answered at this point, “Who is the congregation which have to bring the offering?”¹⁰² This *Mishnah* provides answers, in three parts, of R' *Meir*, R' *Yehuda*, and R' *Shimon* to this question.

The first part discusses what should happen when the court rules incorrectly and all of the community, or a majority of it, acts in accordance with the ruling. R' *Meir* says that for most transgressions the court is liable for a bull-offering, but in the case of idolatry, the court is liable for a bull and a he-goat. R' *Yehuda* says that twelve bulls must be given for a sin, one for each tribe, and he too adds one he-goat for each tribe in the case of idolatry. R' *Shimon* puts the liability on both the court and the community, stating that thirteen offerings must be made, one for each tribe and one for the court. The second part of the *Mishnah* is similar to the first, but answers the question of what happens when only seven of the twelve tribes commits the offense. The Rabbis rule similarly to the first question; however, R' *Yehuda* says that each of the seven tribes is liable, and the remaining five tribes must also bring an offering on account of the other sinners in Israel. R' *Shimon* places the liability again on the sinning tribes and the court and requires eight offerings. The different rabbis rulings reflect different ideas of who should be liable for a transgression based on an inadvertent ruling from the court.

Whereas R' *Meier* places the liability solely on the court for making the mistake, R'

¹⁰² Kehati. p. 15.

Yehuda places the liability on the people, since, it seems that in his opinion, the people should have known better than to transgress. R' *Shimon*, however, is the most stringent, placing the blame on all parties involved. Idolatry is placed as the most important of the commandments to keep in this *Mishnah*, since a transgression of a commandment regarding idolatry requires both a goat and bull offering for an offering, while all of the other commandments only require the bull.

The final part of the *Mishnah* discusses which court might be liable for a mistake. R' *Yehudah* says that the rulings in the *Mishnah* apply to a court of any of the individual tribes, but the Sages disagree stating that only the Great *Sanhedrin* is liable under these rules. Albeck clarifies that the Sages mean the seventy one members of the Great *Sanhedrin*, of all the “congregation of Israel,”¹⁰³ while Bartenura clarifies that “the law goes according to the opinion of the Sages.”¹⁰⁴ Bartenura's clarification is a testimony to how the *halachah* was understood during his time. His clarification provides a basis for further *halachic* understanding, which is how Albeck can arrive at his statement that the Great *Sanhedrin*, specifically its seventy-one member, is the one liable according to the rulings in the *Mishnah*. This ruling does two things. First, it attributes greater authority to the Great *Sanhedrin*, allowing those Rabbis to rule for the entire congregation of Israel. Second, it provides protection for the Rabbis in the smaller communities and within each of the tribes. For without the ruling of the *Sanhedrin*, with all of the conditions met that were described in the previous *Mishnah*, the individual Rabbi could continue to rule for his community, and the tribal courts could continue to rule for their individual tribes without the risk of being held liable for making a mistake. This heightens the authority

¹⁰³ Albeck. p. 396.

¹⁰⁴ Bartenura. p. 269

of the Rabbis since it provides those not on the Great *Sanhedrin* with a certain level of immunity from the penalties of incorrect instruction. This also points out that a small court's decisions would never affect the majority of all Israel, and only those in its relative vicinity would be influenced.

Mishnah Tractate Horayot, Chapter 2

משנה מסכת הוריות פרק ב

משנה א

הורה כהן¹⁰⁵ משיח¹⁰⁶ לעצמו¹⁰⁷ שוגג ועשה שוגג מביא פר¹⁰⁸ שוגג ועשה מזיד¹⁰⁹ מזיד ועשה שוגג פטור שהוראת כהן משיח לעצמו כהוראת בית דין לצבור¹¹⁰ :

Translation:

An anointed priest who ruled (instructed) for himself inadvertently and acted inadvertently brings a bull [for a sacrifice]. [Ruled] inadvertently and acted intentionally, or [ruled] intentionally and acted inadvertently, he is exempt for the instruction of an anointed priest for himself is like the instruction of a court for the public.

Analysis:

The second chapter of *Horayot* opens with a discussion of what happens if an anointed priest rules incorrectly regarding the law. In order to understand this *Mishnah*, it is first necessary to understand the concept of the anointed priest and his sin. Leviticus says “If it is the anointed priest who has incurred guilt, so that blame falls upon the

¹⁰⁵ כהן-A priest. According the Leviticus, descendants of Aaron, the first High priest. The book of Leviticus deals with the life and livelihood of the priesthood, specifically their interactions with the people as the one who lead the Temple cult.

¹⁰⁶ משיח-Anointed. Specifically, in this case, a priest who had been anointed, through oil or perfume as described in Leviticus 8. The term, in other contexts, can also refer to the messiah.

¹⁰⁷ עצמו-Substance, essence, self. In this case, it means, for himself.

¹⁰⁸ Leviticus 4:3

¹⁰⁹ מזיד-*Hifil*. To plan evil, to act with premeditation, in full consciousness of doing wrong.

¹¹⁰ ציבור- Community, congregation, public.

people, he shall offer for the sin of which he is guilty a bull of the herd without blemish as a sin offering to the LORD.”¹¹¹ The Sages understand this verse to refer to “the high priest, who is anointed with the anointing oil, who erred in his teaching and permitted himself a transgression which if committed deliberately, carries the penalty of *karet* (excommunication), and if inadvertently, a sin-offering.”¹¹² The *Mishnah* then provides different situations of whether the priest incorrectly ruled and acted intentionally or ruled intentionally wrong and then acted inadvertently. In either case he is exempt from liability. The reason the *Mishnah* gives is very clear, that the instructions of the high priest are like the instruction of a court for the public. Kehati does point out that

there is, however, one difference between the public and the anointed. If the public acted inadvertently on a deliberate judgment of the *Bet Din*, they do not bring the communal offering of the bullock, but each individual who transgressed brings a sin-offering of a sheep or goat, see 1:4), but the anointed priest, if he deliberately made a wrong ruling for himself, but in the event his transgression was inadvertent, he is exempt from any offering, for they interpreted (Hor. 11a): “And if one of the common people,” (Lev 4:27)¹¹³ – as excluding the anointed priest, who does not bring a sacrifice for his inadvertent misdeed alone.¹¹⁴

Ultimately, what is important regarding the Rabbis and the development of their authority is that they claim the High Priest and his rulings to be on equal standing to the court. As Naftali Cohen points out, “In writing or talking about the Temple and its rituals, the Rabbis who created the *Mishnah* were arguing for their own authority over post-destruction Judaeen law and ritual practice.”¹¹⁵ By equating themselves with the High Priest, the Rabbis argue for their own authority. For just as the people, before the

¹¹¹ Jewish Publication Society’s 1985 translation of Leviticus 4:3.

¹¹² Kehati. p. 18.

¹¹³ This verse from Leviticus is used in this case to provide a demarcation between the High Priest and the common Israelite. For the verse specifically states that a common person must bring a sacrifice if liable for a guilt offering. Since it does not mention the High priest, the *Bavli*, and subsequent commentators, including Kehati, have understood there to be a difference between the High Priest and everyone else.

¹¹⁴ *Ibid.* p. 19.

¹¹⁵ Cohen. *Memory of the Temple*. p. 3.

destruction, followed the Temple cult, and the High Priest, the Rabbis state in this *Mishnah*, that the people since the High Priest's role was that of *halachic* judge for the community, now that the rabbis are occupying the same role, the people should follow them with equal fervor.

משנה ב

הורה בפני¹¹⁶ עצמו ועשה בפני עצמו מתכפר¹¹⁷ לו בפני עצמו הורה עם הצבור ועשה עם הצבור מתכפר לו עם הצבור שאין בית דין חייבים עד שיורו לבטל¹¹⁸ מקצת¹¹⁹ ולקיים¹²⁰ מקצת וכן המשיח ולא בעבודה זרה עד שיורו לבטל מקצת ולקיים מקצת :

Translation:

If [the High Priest] ruled on his own and acted on his own he atones for it on his own, if he ruled for the public and acted with the public he atones for it with the public, for a court is not liable unless it rules to abandon some [of the commandments] and fulfill some [of the commandments]. It is the same for the anointed [priest]. And he is not guilty of idolatry unless he instructs [the people] to abandon some [of the commandments regarding idolatry] and fulfill some [of these commandments].

Analysis:

This next *Mishnah* deals with the difference between the High Priest ruling incorrectly on his own and ruling incorrectly as part of the *Sanhedrin*. This is an important distinction to make since, as Maimonides points out

If we were to think that the high priest acted according to the *beit din* and will not atone with the community, because even on Yom Kippur he doesn't atone with the nation, rather with his own sacrifice, as it is written, "he presents his sin offering." We learn here that he atones with the nation if he erred with them, "his

¹¹⁶ בפני - In the face of, because of, for the sake of.

¹¹⁷ כפר - *Hitpa'el*. To be expiated, to be forgiven. Also found in *Yoma* 50b: "for whose atonement the animal is dedicated."

¹¹⁸ בטל - *Piel*. To abolish, suspend, cancel, undo, neglect, abandon.

¹¹⁹ קצת - Part, a few.

¹²⁰ קום - To lift up, fulfill.

sin which he has sinned” means to say that if his sin was specific to him he will bring his own sacrifice but if he sinned with the nation he will not.¹²¹

This statement shows a profound distinction between the role of the priest and the role of the court, for the priest can both sit on the court as well as make individual rulings for himself. Yet, there is a similarity between the two in that both the court and the priest are not liable for a sin offering unless they rule to abandon a commandment or fulfill one that should not be fulfilled. Furthermore, he is not guilty of idolatry unless he “instructs to abandon some and fulfill some. Kehati explains this in the following way:

If, for example, they said bowing down to an idol by prostrating hands and feet is forbidden, but bowing down without prostrating is permissible... The reason is explained in the *Gemara*: It says concerning all commandments (Lev. 4:13) “And a thing be hidden from the eyes of the congregation,” and concerning idol worship it says (Num. 15:24) “Then if it shall be done in error being hidden from the eyes of the congregation,” – just as in the case of all commandments, ‘a thing,’ but not the entire principle eluded them (see 1:3), so it is also with idolatry (Hor. 7b).¹²²

In other words, following the ruling from the *Bavli*, Kehati explains that due to the phrase “a thing hidden” in both biblical verses, when part of the principle of the commandment was mistaken, but the entire commandment was not nullified, they are still liable. The phrase “a hidden thing” refers to the part of the commandment that was nullified or added and shows that while the court or priest may have made a mistake, it is still a change to the commandment that ensures liability. Kehati makes it very clear that the High Priest and the court rule in a similar fashion, and in doing so helps provide further evidence to the argument that the Rabbis developed this system of courts modeled after the priesthood in order to strengthen their own legitimacy and authority. Once again, just as

¹²¹ *Rambam*. p. 310.

¹²² Kehati. p. 21.

in *Horayot* 2:1, the Rabbis place themselves in a similar role to those who led the Temple cult in order to put themselves in a similar position as leaders of the community.

משנה ג

אין חייבין אלא על העלם¹²³ דבר עם שגגת המעשה וכן המשיח ולא בעבודה זרה אין חייבין אלא על העלם דבר עם שגגת המעשה [ד] אין בית דין חייבין עד שיורו בדבר שזדונו כרת¹²⁴ ושגגתו חטאת וכן המשיח ולא בעבודה זרה עד שיורו על דבר שזדונו כרת ושגגתו חטאת :

Translation:

One is not obligated [for a sin-offering] except for a lack of awareness with a mistaken action. It is the same for the anointed [priest]. Also, for idol worship one is not obligated except for a lack of awareness with a mistaken action. The court is not obligated until it rules on something that if done purposefully requires excommunication and if done inadvertently requires a sin offering. So too for an anointed [priest]. And not for idolatry until [the court] rules on a thing that if done purposefully [requires] excommunication and if done inadvertently [requires] a sin offering.

Analysis:

This third *Mishnah* in chapter two gives further instances of similarity between the High Priest and the Rabbinical court, further strengthening the argument that the Rabbis drew these similarities to create their own legitimacy. The *Mishnah* states that for both the priest and the court, there is only liability present when there is a lack of awareness or an unwitting action. Bartenura explains this by stating:

¹²³ העלם - Forgetfulness.

¹²⁴ כרת - Excommunication. According to *Mishnah Karet* 1:1, there are thirty six transgressions in the Torah that require a punishment of *Karet*.

A court that ruled for the community on one of the commandments does not need to bring a bull for a communal error-in-judgment sacrifice for the community but only for the ignorance of the matter in which it ruled in error and because they did not realize that they were transgressing. [Additionally] the majority of the community erred and acted according to their ruling, as it is written, “they erred and the thing was hidden,” an act in error and the matter was hidden.¹²⁵

Bartenura’s explanation makes it clear that the court must be liable only when they do not know the correct answer and then act according to the wrong answer they have given.

The *Mishnah* makes it clear that this is the rule for the priest as well. There are a similar set of standards that are set for the commandments concerning idolatry as the standards for all of the other commandments. Additionally, the court and the High Priest are only obligated when they rule on something that, if done intentionally would require excommunication, but if done inadvertently requires a sin-offering. This is the same standard that was set forth in chapter one of Tractate *Horayot*, yet by including the priesthood in the standard in chapter two, the Rabbis attempt to connect their judicial system to that of the Temple. By doing this, they give authority to their system, which had no actual power, since the only rulings that were binding by Rabbinical courts were those that affected individuals who already respected the Rabbis and were intent on following them.

משנה ד

אין חייבין על עשה¹²⁶ ועל לא תעשה שבמקדש¹²⁷ ואין מביאין אשם תלוי על עשה ועל לא תעשה שבמקדש אבל חייבין על עשה ועל לא תעשה שבנדא¹²⁸ ומביאין אשם תלוי על עשה ועל לא תעשה שבנדא איזו היא מצות עשה שבנדא פרוש מן הנדה ומצות לא תעשה לא תבא אל הנדה :

¹²⁵ Bartenura. p. 270

¹²⁶ עשה-To do/make. In this case, עשה and לא תעשה refers to positive and negative commandments, specifically the two categories of commandments, מצוה תעשה and מצוה לא תעשה.

¹²⁷ קדש-Holy or set aside. The מקדש is the Holy Temple in Jerusalem. Specifically, the Rabbis were referring to the second Temple, which had been destroyed by Rome in 70 CE.

¹²⁸ נדה-As referenced in לג' ויקרא טו' נדה is the period of menstruation.

Translation:

One is not obligated [for a sin-offering] for a positive commandment or a negative commandment regarding the Temple, nor do they have to bring a conditional guilt-offering through a positive commandment or a negative commandment regarding the Temple. But, one is obligated for a positive commandment or a negative commandment regarding *nidah*, and they bring a conditional guilt-offering because of the positive commandment or negative commandment regarding *nidah*. What is the positive commandment concerning *nidah*? Separate yourself from a *nidah*. And what is the negative commandment? You shall not come to a *nidah*.

Analysis:

This *Mishnah* changes directions from the previous three in the chapter. Rather than making comparisons between the court and the High Priest regarding their authority to make rulings for, and issue instructions to, the community, this current *Mishnah* “enumerates transgressions which the Bet Din mistakenly allowed but for which they do not bring a communal offering.”¹²⁹ Specifically, the *Mishnah* discusses that the court is not obligated to bring an offering for a transgression of a positive or negative commandment regarding the Temple. Bartenura explains that these commandments that the *Mishnah* references refer specifically to an individual’s state of ritual purity while in the Temple. Regarding the positive commandment he states that this refers to

one who became impure while in the Temple and who is thus commanded to leave by the shortest route. If he left by a longer route, he is punished with excommunication. The *beit din* that ruled that he should leave by the longer route is not obligated to bring a sacrifice because on an error regarding this law one does not bring a sin-offering, i.e., an individual who erred in this commandment

¹²⁹ Kehati. p. 24.

and left by a longer route needs to bring a sliding scale sacrifice and not a sin-offering.¹³⁰

On the other hand, for a negative commandment, he explains this refers to the prohibition of one entering “the Temple while he is impure.” Even though this *Mishnah* does not explicitly compare the priesthood and the court, it does continue to make the connection between the Rabbis and the Temple, specifically, in this case, how the Rabbis would rule about laws concerning the Temple. Since the Temple did not exist when the *Mishnah* was codified, it can be deduced that this *Mishnah* is a further example of the Rabbis making a retrospective case about their role in the Temple in order to establish their own position within the community.

The *Mishnah* then discusses that for positive and negative commandments regarding menstrual purity, liability is placed and if guilty, then the court needs to bring a “conditional guilt offering.” Kehati explains that these commandments are used as an example for all commandments that involve excommunication, “if committed willfully, and a sin-offering, if inadvertently.”¹³¹ Albeck further explains that the conditional guilt offering is made “if there is a doubt that an individual made the positive or negative commandment regarding the menstruant.”¹³² This is due to the fact that if the doubt was cleared up and it was found that the individual had sinned, he would be liable for a sin-offering. However, Bartenura disagrees and says that, in fact the conditional guilt offering is the responsibility of the court, since if the individual is found to have sinned, the court will have needed the guilt offering and the individual the sin offering. He

¹³⁰ Bartenura. p. 270.

¹³¹ Kehati. p. 25.

¹³² Albeck. p. 398.

makes his case by commenting on this section of this *Mishnah*, regarding the positive commandment of menstrual purity, in the following way:

He was having relations with her when she was clean and in the midst of relations she tells him that she has become impure, the commandment is for him to withdraw. But he may not withdraw immediately because withdrawing is just as pleasurable as intercourse. Rather, he should dig his toenails in the ground and wait without moving until he loses his erection and then he should withdraw. And this is the positive commandment for the menstruant. If the *beit din* ruled erroneously that he should withdraw immediately, it is obligated to bring a bull for an error-in-judgment sacrifice, since the individual is obligated to bring a sin-offering for his error.¹³³

Whether Bartenura's explanation is correct, that the court is liable for the conditional guilt offering, or Albeck and Kehati are correct, and the conditional offering is a liability for the individual, this section of the *Mishnah* seems to be a safeguard. The entire concept of an *אשם תלוי*, or the conditional guilt offering, seems to be providing a method where the people or the court could provide a guilt offering just in case they were found to have sinned and therefore the previous offering could be used for the sin-offering that was now required. This seems like a way of protecting both the court of Rabbis and the individual from a possible mistake that was made by the court.

There is a distinct difference noted in this *Mishnah* between a state of purity for the home and a state of purity for the Temple. The *Tannaim* make the state of purity for the home more stringent by requiring an offering for a transgression regarding the commandments of menstrual purity. The realms are different, since as Maimonides states, if one transgresses regarding the Temple, he is "permitted to exit."¹³⁴ Whereas one can exit the Temple and return when in a state of ritual purity, one is not permitted to exit

¹³³ Bartenura. p. 271.

¹³⁴ Maimonides. p. 312.

his household. Therefore, it is, in fact, more important to maintain a state of ritual purity in the home, since these relationships cannot be ended in as easy a manner as one can leave the grounds of the Temple.

משנה ה

אין חייבין על שמיעת הקול¹³⁵ ועל בטוי שפתים¹³⁶ ועל טומאת מקדש וקדשיו והנשיא¹³⁷
כיוצא בהם דברי רבי יוסי הגלילי רבי עקיבא אומר הנשיא חייב בכולן חוץ משמיעת הקול
שהמלך לא דן ולא דנין אותו לא מעיד ולא מעידין אותו :

Translation:

One is not liable because he hears public imprecation,¹³⁸ or swears an oath, or due to uncleanness concerning the Temple and its hallowed things. And the ruler is also exempt like them; these are the words of R' Yose the Galilean. R' Akiva says that the ruler is obligated in all of these cases except hearing public imprecation, for the king cannot judge or be judged. He cannot testify and none can testify against him.

Analysis:

This *Mishnah* further discusses the liability that is placed upon both an individual and the court and its leader for different transgressions stemming from the court's instructions. Albeck makes it clear that rather than referring to an individual this *Mishnah* is actually referring to "the court with its instructions."¹³⁹ By making this

¹³⁵ Leviticus 5:1

¹³⁶ Leviticus 5:4

¹³⁷ נשיא - Prince. While Blackman translates this word as "leader of the court," it probably refers to someone in society, such as a king, prince, or a descendent of the Davidic line, such as *Yehuda haNasi*, who had political power and authority that would place him outside of the realm of the courts. This can be seen through the *halachic* explanation that R' Akiva provides. For by comparing the *nasi* with a *melech* (prince or ruler with a king) it becomes evident that there is a political role that this individual fills.

¹³⁸ Jewish Publication Society's 1985 translation of Leviticus 5:1

¹³⁹ Albeck. p. 398.

clarification, Albeck leads the reader to the understanding that the *Mishnah* is still discussing how the court may not be liable due to its actions.

In discussing a public imprecation, the *Mishnah* is referring to the "oath of testimony. If there were witnesses who possessed evidence...and the plaintiff made them swear to come and testify for him, and the *Bet Din* mistakenly ruled that they need not testify"¹⁴⁰ the court would be exempt. Bartenura further explains this reference to a public imprecation by explaining that it refers to one who "adjured someone else to make a false oath."¹⁴¹ The court does not have the ability to nullify an oath or demand that someone make a false oath, yet what this *Mishnah* ultimately teaches is that the court and its member are exempt from any liability for such an action.

The *Mishnah* also rules that court is exempt from liability for swearing an oath. Bartenura clarifies this statement by giving an example of one who "swore he would not eat and he ate, or that he would eat and he did not eat. Or that he said, 'I ate' but he did not eat or he said, 'I did not eat' and he ate."¹⁴² This example shows that even for something as commonplace as eating, an oath is important, yet the court would be exempt from making this false statement.

Furthermore, the *Mishnah* teaches that the court is exempt regarding the Temple and ritual impurity. Kehati explains that this refer to a case where the "*Bet Din* erred, permitting an unclean person to enter the sanctuary or partake of sanctified food,-- in all these cases, if the people acted in accordance with the ruling of the *Bet Din*, the *Bet Din* is not liable for a communal offering for an individual who transgressed them is not liable

¹⁴⁰ Kehati. p. 27

¹⁴¹ Bartenura. p. 271. Reference to Leviticus 5:1.

¹⁴² *Ibid.*

for a regular sin offering but a graded one."¹⁴³ In other words, the court was not allowed to set a precedent or make a ruling allowing someone to act in a way that would desecrate the Temple, but even if the court did rule this way, the *Mishnah* rules that the court is exempt. "Therefore, even though the people erred by relying on the *Bet Din* ruling on these transgressions, they are considered as individual transgressors, each one having to bring the graded offering."¹⁴⁴ Rather than require that the court take responsibility for its actions, the *Mishnah* requires that the individual act according to the law, even if the court has ruled here in error.

The *Mishnah* then presents a dispute between R' Yose the Galilean and R' Akiva. The *Mishnah* explains that R' Yose says that the ruler is exempt just like the rest of the court, but R' Akiva rules that the leader is liable for all of these sins, except for a public imprecation, since the ruler cannot be judged nor be a judge, and therefore, he cannot testify nor be testified against. While R' Akiva does open up the ruler for more scrutiny, both of these opinions still protect the early rabbis and their leaders from guilt based on their mistakes. Furthermore, R' Akiva's opinion that the ruler cannot be judge or witness, in fact, further isolates him from a judicial process in which he could be deemed guilty of any sin, and he, therefore, may not, in fact, be deemed liable for any transgression. Both the opinion of R' Yose and R' Akiva are rejected because "both a king and a High Priest are also exempt from a sin-offering in the three cases cited."¹⁴⁵ This ruling isolates the people from the court and shields the rabbinic leadership from liability for many of the transgressions that are brought up in tractate *Horayot*. By doing this, the rabbis further

¹⁴³ Kehati p. 27. A graded offering, or one that is *oleh veyored*, is one that ascends or descends in value according to the transgression and the transgressor's status. For more information on offerings, see: Berenbaum and Skolnik. *EJ Vol.17, 2nd Edition*. p. 639-649.

¹⁴⁴ Kehati. p. 27

¹⁴⁵ Blackman. p. 568. The ruling can be found in *Sanhedrin* 2:2.

placed themselves in a position of authority over the people, by not allowing themselves to be subject to the same set of laws and rules as the average individual Jew. As will be seen in later *mishnayot*, the position of authority only truly exists while the rabbis are serving in the role of the judge.

משנה ו

כל המצות שבתורה שחייבין על זדון כרת ועל שגגתן חטאת היחיד מביא כשבה ושיערה¹⁴⁶
והנשיא¹⁴⁷ שער¹⁴⁸ ומשיח ובית דין מביאין פר¹⁴⁹ ובעבודה זרה¹⁵⁰ היחיד והנשיא והמשיח
מביאין שעירה¹⁵¹ ובית דין פר ושעיר פר לעולה¹⁵² ושעיר לחטאת¹⁵³ :

Translation:

All commandments that are in the Torah for which one is liable, if done purposefully, for excommunication, and if done inadvertently, for a sin offering, an individual brings a female sheep and a female goat. The leader of the court brings a male goat. The anointed [priest] and the court bring a bull. And for idolatry, an individual, a ruler, and an anointed [priest] bring a female goat and the court brings a bull and a male goat—the bull for the burnt offering and the goat for the sin offering.

Analysis:

This *Mishnah* summarizes the types of animals offered in cases of unintentional transgressions. Maimonides explains this *Mishnah* involves "Torah verses and have

¹⁴⁶ Leviticus 4:27

¹⁴⁷ נשיא - Leader of the court, chief, officer. In the case of this tractate, the נשיא refers to the head of the Great *Sanhedrin*.

¹⁴⁸ Leviticus 4:22

¹⁴⁹ Leviticus 4:3

¹⁵⁰ Leviticus 15:22

¹⁵¹ Leviticus 15:27

¹⁵² עלה - Infinitive. Literally "to go up." In this case it is used to mean a sacrifice or burnt offering.

¹⁵³ Leviticus 15:24

already been explained,"¹⁵⁴ previously in his commentary. Kehati further explains this *Mishnah* by pointing to the Torah verses that explain the different offerings. He explains that an individual brings a female sheep and female goat,

as it is written "As if one of the common people sin in error, committing one of the commandments of the Lord, which must not be done and become guilty...he shall bring as his offering a goat, a female without blemish for his sin which he has sinned...and if he brings a lamb as his sin-offering, it shall be a female without blemish."¹⁵⁵ A ruler brings a he-goat as is written "if the ruler sins and he did one of the things which the Lord commanded not to be done, and be guilty...he shall bring as his offerings a he-goat, a male without blemish."¹⁵⁶¹⁵⁷

What Maimonides comments on, and Kehati further explains with his citing of the Torah verses, is that there is nothing that furthers the rabbis case for authority in this *Mishnah*. Rather, this *Mishnah* serves as a proof text for the rest of the chapter, by explaining the sources for the sacrificial requirements that are placed upon the people. Additionally, the distinction between the types of sacrifices indicates, as will be examined further below, that there is a hierarchy that consists of the individual, followed by the court, then the high priest and finally the king.

משנה ז

אשם¹⁵⁸ תלוי¹⁵⁹ היחיד והנשיא חייבין ומשיח ובית דין פטורים אשם ודאי¹⁶⁰ היחיד והנשיא והמשיח חייבין ובית דין פטורין על שמיעת הקול ועל בטוי שפתים ועל טומאת מקדש וקדשיו

¹⁵⁴ Maimonides. p. 313.

¹⁵⁵ Leviticus 4:27-28,32

¹⁵⁶ *Ibid.* 22-23.

¹⁵⁷ Kehati. p. 30.

¹⁵⁸ A-Guilty. In this case, it is meant as a guilt offering, one of the types of offering made in the Temple.

¹⁵⁹ תלוי-Conditional, dependent. (Blackman, Phillip. *Mishnayoth: Nezikin*. New York: Judaica Press, 1963. p. 569: *Conditional or suspensive guilt-offering* (Leviticus 5, 18), to be offered when there is an uncertainty as to the commission of a transgression.)

¹⁶⁰ A guilt offering for the commission of certain offenses. (See Jastrow. p. 129). "The certain-guilt offering is brought in five cases of indubitable transgression: 1. Robbery; having first denied a monetary debt, sworn falsely and subsequently confessed (Lev. 5:21-25). 2. Unlawful use of sacred property; if he misappropriated or benefitted from sacred property or removed it from the authority of the Sanctuary (Lev 5:14-15). 3. Designated bondswoman; if he cohabited with a half-freed bondswoman (one of her two

בית הדין פטורין והיחיד והנשיא והמשיח חייבין אלא שאין כהן גדול חייב על טומאת מקדש
וקדשיו דברי רבי שמעון ומה הן מביאין קרבן עולה¹⁶¹ ויורד¹⁶² רבי אליעזר אומר הנשיא
מביא שעיר:

Translation:

The individual and the ruler are obligated to bring a conditional guilt offering, but the anointed [priest] and the court are exempt. The individual, ruler, and the anointed [priest] are obligated to bring an unconditional guilt offering, but the court is exempt. Through one who hears a public imprecation, or swears an oath, or uncleanness concerning the Temple and its hallowed things, the court is exempt, and the individual, leader of the court, and anointed [priest] are obligated. Although the High Priest is not obligated concerning the uncleanness of the Temple and its hallowed things. These are the words of R' Shimon. And what do they bring? An offering of higher or lesser value.¹⁶³ R' Eliezer says: the leader of the court brings a goat.

Analysis:

Having discussed the different offerings to be brought by the individual, the priest, the ruler, and the court itself, this final *Mishnah* of chapter two discusses the different liabilities regarding the guilt offering, conditional guilt offering and a graded offering.

The first concept to understand in this *Mishnah* is that of the אשם תלוי, or the conditional guilt offering. Bartenura explains this offering as one which is applicable to

owners having granted her freedom) who was designated to a Hebrew servant (Lev. 19:20-22). Nazarite; if he became ritually unclean during the period of his Nazarite vow. After purifying himself, he has to bring the Nazarite guilt offering (Num. 6:9-12). 5. Leper; after being cured of his leprosy and restored to a ritually clean state (Lev. 14:10-12). (See Kehati. p. 32).

¹⁶¹ In this case, עלה means "of greater value."

¹⁶² ירד - To go down. In this case it means "of lesser value."

¹⁶³ This ruling is in accordance with Leviticus 5:6-11.

"commandments for which willful transgressions receive the punishment of “*karet*” and accidental transgressions must bring a sin-offering. When there is doubt whether or not there was a transgression a conditional guilt offering must be brought.”¹⁶⁴ What the beginning of this *Mishnah* explains, then, is that the political ruler, along with an individual Jew, is liable for a conditional guilt offering but the anointed High Priest and the court are exempt "if the High priest transgressed in unwittingness or the court unwantonly permitted a transgression.”¹⁶⁵ Yet, within the next statement, the *Mishnah* teaches that there are, in fact, certain cases where the ruler, the individual, *and* the High Priest are liable for a guilt offering, but the court still maintains its exemption. The *Mishnah* makes a difference between the court and these three classes, using Leviticus 4:27¹⁶⁶, since the court is a collective body, while all of the others are individual persons.

Once again, the *Mishnah* presents a case where the collective group of rabbis is set apart from other authoritative figures within the Jewish community. By making a comparison to the individual Jew, the High Priest, and even political ruler, and by further using the purity of the Temple as the example, the *Mishnah* places the precedence of the rabbis above other groups. Furthermore, by making the comparison to the Temple, the rabbis are inserting their contemporary court "into the past...[and] are asserting the antiquity of and providing a myth of origin for the role they claim for themselves within society.”¹⁶⁷ It is this comparison, both to the High Priest and the to the Temple, which, more than anything else in this *Mishnah*, helps to solidify the rabbis’ view of their own

¹⁶⁴ Bartenura. p. 271. This concept is further elucidated in *Yevamot* 4:2, *Z’vachim* 5:5, *T’murah* 7:6, and *Keritot* 1, 3, 4, 5, and 6.

¹⁶⁵ Blackman. p. 569.

¹⁶⁶ "And if any one person sin through error, in doing any of the things which the LORD hath commanded not to be done, and be guilty." The *Bavli*, in *Horayot* 8a, explains that the use of the word "person" in this verse encompasses the individual, the priest, and the leader of the court, while leaving the entire body of the court as a separate category.

¹⁶⁷ Cohen. *Memory of the Temple*. p. 40.

standing in the community and expresses their desire to be *the* authoritative voice for the Jewish people.

Mishnah Tractate Horayot, Chapter 3

משנה מסכת הוריות פרק ג

משנה א

כהן משיח שחטא¹⁶⁸ ואחר כך עבר ממשיחותו וכן נשיא שחטא ואחר כך עבר¹⁶⁹ מגדולתו כהן משיח מביא פר והנשיא מביא שעיר:

Translation:

An anointed priest who sins and afterward finishes his anointment (his term), or a ruler who sins and afterward finishes his position, the anointed priest brings a bull and the leader of the court brings a goat.

Analysis:

This first *Mishnah* of the third chapter in tractate *Horayot* discusses the laws regarding the community's political leader and High priest who had sinned, but were no longer in office when they were found to be liable. In other words, the transgression had occurred when they were in office, but they had not yet brought their sacrifice when their term had ended. Thus, the question is whether they are treated according to their previous role or as common Jews when the sacrifice is eventually brought. Regarding the High Priest, if a sin that he committed while still the High Priest is brought to his attention, he is still liable to bring a bull as a guilt offering, while the leader of the court, in a similar situation, is liable to bring a goat. Maimonides explains that this *Mishnah*

¹⁶⁸ חטא-A failure or sin.

¹⁶⁹ עבר-To pass. In this case, it signifies the passage of time or the ending of an event, specifically, the ending of the priest's time of service.

further clarifies the ruling from Leviticus which states, "in case it is a chieftain who incurs guilt by doing unwittingly any of the things which by the commandment of the Lord his God out not to be done and he realizes his guilt-- or the sin of which he is guilty is brought to his knowledge-- he shall bring as his offering a male goat without blemish."¹⁷⁰ Therefore "he will bring the sin offering that he obligated to bring as a ruler, even though he was removed from the position at the time he brought the sacrifice, but because he was the ruler when he sinned."¹⁷¹ This *Mishnah* teaches that for both the High Priest and the ruler, sins that were committed in office do not become absolved upon leaving office. The liability remains until the guilt offering is made. Additionally, the sacrifice accords with their previous status rather than with their new position.

משנה ב

כהן משיח שעבר ממשיחותו ואחר כך חטא וכן הנשיא שעבר מגדולתו ואחר כך חטא כהן משיח מביא פר והנשיא כהדיוט¹⁷²:

Translation:

An anointed priest who ends his anointment (by resignation or by becoming ineligible to maintain his status) and afterwards sins, or a political ruler who finishes his position and afterward sins, the anointed priest brings a bull and the ruler is like a layman.

¹⁷⁰ Leviticus 4:22-23

¹⁷¹ Maimonides. p. 314.

¹⁷² A private man, commoner, ignoble, or ignorant.

Analysis:

This *Mishnah* is very similar to the first one in chapter three, however this one discusses what happens if the ruler or the High Priest sin after they have already vacated their respective offices. Bartenura explains this *Mishnah* in the following way:

Even if he no longer performs the high priest's work he maintains his sacred status. There is no difference between the acting and past high priests except for the role [in the act of making a sacrifice] and the bull brought on Yom Kippur and the tenth of an *ephah* that he offers every day. But a ruler who is no longer in power has the status of a regular person.¹⁷³

Bartenura explains that the difference between the priesthood and the rabbinate is that once an individual has been anointed with oil, the holiness that is placed upon him can never be taken away, while the ruler does not maintain his position of authority once the court is led by someone else. Ultimately, the rabbis, through their writings, seem to respect the institution of the priesthood due to its existence being mandated biblically, however, there seems to be a greater respect for the individual who is in a position of power and authority due to other means, and for a temporary time, than for the individual who has earned their authority through hereditary means that cannot be taken away.

Legal authority in general and rabbinic authority in particular can be profitably thought of a distinction between being *in* authority and being *an* authority. One how is *in* authority derives power from the position that he holds within a certain social or political structure. In contrast, *an* authority derives his or her power from certain inherent qualities or abilities that he or she displays.¹⁷⁴

In other words, the rabbis see themselves *in* authority due to their position in the community that, while based on their knowledge and understanding of Torah, is temporal. The priests, on the other hand are *an* authority, since other than through death or resignation, their status is permanent. The rabbis seem to view the former as being

¹⁷³ Bartenura. p. 272.

¹⁷⁴ Simon-Shoshan. *Stories*. p. 131.

more important since it takes effort and knowledge to reach a state of being *in* authority, while the priesthood, *an* authority, is gained through a person's birthright.

משנה ג

חטאו עד שלא נתמנו¹⁷⁵ ואחר כך נתמנו הרי אלו כהדיוט רבי שמעון אומר אם נודע להם עד שלא נתמנו חייבין ומשנתמנו פטורין ואיזהו הנשיא זה המלך שנאמר ועשה אחת מכל מצות ה' אלהיו¹⁷⁶ נשיא שאין על גביו אלא ה' אלהיו:

Translation:

If they transgressed before they were appointed, and afterward were appointed, then each is considered an ordinary individual. R' *Shimon* says: If it was known to them before they were appointed, they are obligated [for a sin offering], but if after they were appointed, they are exempt. And who is meant by the ruler? This is the king, as it is said, "and does any one of the things which the Eternal his God has commanded,"¹⁷⁷ a ruler who has none above him save the Eternal his God.

Analysis:

This *Mishnah* continues the discussion of whether or not a priest and political leader should be held liable for transgression or exempted from it if they were not yet in their position of authority when the sin was committed. The *Mishnah* makes it clear that if an individual sinned prior to becoming anointed as a priest or prior to becoming the leader, then they are treated as an ordinary Jew "because it is the time of the transgression that is the determining factor...and when they sinned they were ordinary people."¹⁷⁸ This explanation is followed by a statement from R' *Shimon* who states that the time that

¹⁷⁵ מני - *Nitpael*. To be appointed, designated as a deputy, to be ordained.

¹⁷⁶ Leviticus 4:22

¹⁷⁷ Leviticus 4:22.

¹⁷⁸ Kehati. p. 36.

awareness of the sin is important as well, for if they became aware of the sin before they attained their position, then they are liable, but if they became aware afterwards, they are exempt. Blackman explains that they are exempt "even from the special *sin-offering* of the High Priest or the ruler."¹⁷⁹ This ruling by R' *Shimon* disagrees with the ruling in the first *Mishnah* of this chapter "regarding the ruler who had sinned and was subsequently removed, for if he had become aware of his sin after his removal, he would not have to bring a he-goat, because the transgression and the awareness of it must both be during the period of liability for the offering."¹⁸⁰ By changing his status to that of an anointed priest or a ruler, the one who has transgressed is no longer liable for an offering. This is due to the fact that the offering that is made relies on an individual's status in the community, and by changing a status, one no longer possesses the same traits as when the transgression was committed and therefore cannot make an appropriate offering any longer.

The *Mishnah* then poses a different question by asking who the *nasi* is. The *nasi* is "the king, as it is said, "and does any one of the things which the Eternal his God has commanded," a leader of the court who has none above him save the Eternal his God."¹⁸¹ By providing this proof text from Leviticus, the *Mishnah* is clear that it is using the word מלך (king) as a metaphor for an individual who has none above him except God. Kehati provides an example from the *Bavli* which provides clarification to this point.

The Gemara quotes a *baraita* (Hor. 11a): A "ruler"-- I might think that this verse refers to the prince of a tribe like *Nachshon ben Aminadav*? Therefore, the verse states: from one of the commandments of the Lord his God. Later on it says (in the section regarding the king--Deut. 17:19): "In order that he may learn to fear the Lord his God." As in the latter passage, the reference is to one above whom

¹⁷⁹ Blackman, p. 571.

¹⁸⁰ Kehati, p. 37.

¹⁸¹ Horayot 3:3.

there is none except the Lord his God, so also the ruler in the former passage refers to one, who has none above him except the Lord his God.¹⁸²

Through the presentation of this *baraita*, it can be understood that the ruler is to be feared and respected over all others in the community. For the ruler is to be to the community, the rabbis explain, like a king, who only has God above him. While there is a temporal, and not permanent, status that the leader holds above the community, as evidenced from the first two and half *mishnayot* of chapter three, while in the position of the leader, the rabbis claims that everyone else in the community must adhere to the authority of that position. Therefore, by extension, the rabbis who are also in a position of authority, should be held in such esteem and given such great authority.

משנה ד

ואיזהו המשיח המשוח בשמן¹⁸³ המשחה לא המרובה בבגדים אין בין כהן המשוח בשמן המשחה למרובה בגדים אלא פר הבא על כל המצות ואין בין כהן משמש לכהן שעבר אלא פר יום הכפורים ועשירית האיפה זה וזה שוין בעבודת יום הכפורים ומצוין על הבתולה ואסורין על האלמנה ואינן מטמאין בקרוביהן ולא פורעין ולא פורמין ומחזירין את הרוצח:

Translation:

And who is the anointed? One who is anointed with oil of anointing,¹⁸⁴ and not by a larger amount of clothing. There is no difference between the priest anointed with anointing oil and one who has a larger amount of [official] clothing, other than the bull brought for any of the commandments. And there is no distinction between an officiating priest and a priest that is a substitute other than the bull of the Day of Atonement and the tenth of the *ephah*. The former and the latter are equal in the service of the Day of Atonement and they are both enjoined to a virgin and forbidden from a widow, and they

¹⁸² Kehati. p. 37.

¹⁸³ Oil, fat. In this case, the oil used for anointing.

¹⁸⁴ Exodus 25:6

must not contact uncleanness for their close family, and may not let their hair go loose or rend their garments, and [at their death] the return of the one guilty of manslaughter is permitted.

Analysis:

Throughout this tractate of the *Mishnah*, the High Priest is referred to as כהן משיח, the anointed priest, rather than כהן גדול (High Priest). This *Mishnah* opens with the question of what is meant by referring to the High Priest as the anointed one. It is written in the Torah, "if the anointed priest sins to the guilt of the people, he shall offer for his sin which he has sinned a young bullock without blemish as a sin offering to the Lord."¹⁸⁵ Kehati comments that "the sages explained that this verse refers to the high priest, who is anointed with the anointing oil."¹⁸⁶ However, after the destruction of the first Temple, the oil was lost and a new way to designate the High Priest was needed. Albeck explains that in the time of the "second temple there was no anointing oil so the High Priest was ordained to the High Priesthood by wearing the eight garments of the priesthood."¹⁸⁷ Yet the *Mishnah* distinguishes between the two different manners of ordination for the High Priest when discussing the manner of obligation and liability that falls on the priest.

For the anointed priest has to bring a bullock as his sin-offering, if he transgressed one of "all the commandments of the Lord which must not be done" by both errant decision and deed, whereas one appointed by the increase in garments does not offer a bullock...because, with respect to the bullock the Torah says "the *anointed* priest." However, with respect to the other commandments relating to the high priesthood, both are equal.¹⁸⁸

¹⁸⁵ Leviticus 4:3.

¹⁸⁶ Kehati. p. 18.

¹⁸⁷ Albeck. p. 400. This citation makes reference to *Makot* 2:6; *Yoma* 7:5.

¹⁸⁸ Kehati. p. 38.

This *Mishnah* may seem out of place here. However, while discussing the role of the High Priest compared to that of the rabbis of the court, it is important to distinguish between the Priest who was anointed and one who increased his garments. For in the previous *mishnayot* only the *anointed* High Priest was mentioned as an authoritative figure who can make *halachic* decisions like the rabbis, and since the practice of anointing the High Priest ended with the destruction of the first Temple, the "garment" priests have become a substitute for the anointed priests. The rabbis have become, then, in their opinion, also substitutes for the priesthood, and therefore, the *de facto* leaders of the Jewish community and the only ones vested with the authority to make *halachic* decisions for the people. It is important to note the *Mishnah's* "repeated claims that the rabbis were in full control of the ritual in the Temple. This claim allows the *Mishnah* to assert that its teachings about the Temple ritual reflect not only the proper practice but actual historical reality."¹⁸⁹ While there is actual little historical evidence outside of rabbinic writings to prove this claim, the rabbis were nonetheless seen through their own work as instructors of and subsequent inheritors of the authority of the priesthood.

משנה ה

כהן גדול פורם מלמטה וההדיוט מלמעלה כהן גדול מקריב אונן ולא אוכל וההדיוט לא מקריב ולא אוכל:

Translation:

A High Priest rends his garments from below, but an ordinary person [rends] from above.

A High Priest, before the burial (of his close relatives) may offer a sacrifice but may not eat, while an ordinary person may neither offer a sacrifice nor eat.

¹⁸⁹ Simon-Shoshan. *Stories*. p. 120.

Analysis:

Near the end of the previous *Mishnah*, it was stated that the High Priests " may not let their hair go loose or rend their garments"¹⁹⁰ However, this *Mishnah* clearly states that a method for rending the garments is customary for the High Priest. Following this explanation, another rule for the High Priest as an *onen*, one who is in the period before burial of his close relatives, is explained. Bartenura explains this period of being an *onen* very clearly:

If one of the high priest's seven close relatives for whom he is obligated to mourn (father, mother, brother, sister, son, daughter or wife) dies, he is considered a mourner by the Torah for the entire day when the death took place, whether the deceased is buried or not. From the day of death onwards, if the deceased is not buried he is considered a mourner according to the rabbis. On the day of burial he is considered a mourner by the rabbis even after the burial. The rabbis included the night after the death in the mourning period.¹⁹¹

The High Priest is considered a mourner on this day so that there is an acknowledgement that on such a day the laws governing the priest and his purity may be set aside in order for him to be allowed to experience the base human emotion of mourning. This mourning period is marked by a number of laws and rituals, most visibly is the rending of garments as a public display of the state of grief. Kehati explains that the priest is not forbidden by the verse in Leviticus¹⁹² from rending all of his garments, rather, "he shall not rend it as others do for he rends, below."¹⁹³ This difference continues to set the High Priest apart from the average individual, yet still allows him to partake in a very important and symbolic ritual within the practice of mourning.

¹⁹⁰ *Horayot* 3:4.

¹⁹¹ Bartenura. p. 273.

¹⁹² Leviticus 21:10. "and his garment he shall not rend."

¹⁹³ Kehati. p. 40.

Additionally, this *Mishnah* discusses the practice of how a sacrifice should be made by an *onen* and how the practice is different for the High Priest and for an ordinary Jew. In explaining this ruling, Maimonides makes reference to the death of Aaron's sons:

Aharon said on the day that *Nadav* and *Avihu* died that he was a mourner: “and if I had eaten the sin-offering to-day, would it have been well-pleasing in the sight of the LORD?”¹⁹⁴ For the high priest, eating from the offering was problematic and the sacrifice itself was acceptable. This is only because he is the high priest. The law for his sons is that they do not eat and do not sacrifice.¹⁹⁵

By making the comparison to the biblical text, it become clear that there is a different rule for the High Priest, as represented by Aaron, and his sons, the other priests. All the more so, this ruling makes it clear that the ordinary Jew would not be allowed to offer a sacrifice or eat a sacred meal as an *onen*.

It is important to note that, opposed to the previous *mishnayot* in the tractate, the High Priest is referred to in this *Mishnah* as the specifically as the High Priest, the *kohen gadol*, as opposed to the anointed Priest, the *kohen mashiakh*. This could be an allusion to other authoritative structures, in that the rabbis, who saw themselves in the role of the king or priest, would not want their authority to be lessened under any circumstances, even that of being an *onen*, and therefore, they may have used this metaphor here to help solidify their own power and authority. This is the case, even as the rabbis use the priesthood as a metaphor for their own authority, they are still keenly aware, as shown in the previous *mishnayot*, that they were not the priests and therefore the method and source of their authority was different.

¹⁹⁴ Leviticus 10:19.

¹⁹⁵ Maimonides. p. 315.

כל התדיר¹⁹⁶ מחבירו קודם¹⁹⁷ את חבירו וכל המקודש מחבירו קודם את חבירו פר המשיח ופר העדה עומדים פר המשיח קודם לפר העדה בכל מעשיו:

Translation:

Anything that is more frequent than its peer, precedes its peer [in recognition].¹⁹⁸

Anything that is holier than its peer precedes its peer. The bull of the anointed and the bull of the community standing [together]: the bull of the anointed is first before the bull of the community in all actions.

Analysis:

This *Mishnah* opens with two *halachic* principles in order to introduce the ruling over which sacrifice comes first. The first is that anything that occurs more frequently than its "peer" precedes its peer. This principle guides all manners of Jewish life, most notably the order of blessings. For example, on Shabbat and festivals, the sanctification of the wine precedes the sanctification of the day, since wine is blessed more frequently than the day that is sanctified. The next principle that is introduced is similar, in that anything that is holier than its peer precedes its peer. This leads into the main argument of this *Mishnah*, that the bull of the anointed Priest has precedent over, and is therefore sacrificed before, the bulls of the community. Maimonides explains that the high priest atones for the nation and therefore, his offering should take precedence "to their offering so he can atone for himself and then atone for everyone else, as it is said: the law is that the person doing the atonement should take precedence on those being atoned for, just as

¹⁹⁶ Frequent.

¹⁹⁷ Precedes, comes before in precedence.

¹⁹⁸ Other examples of this *halachic* precedent can be found in *Gemara Brachot* 27a, 51b, *Pesachim* 114a, *Megillah* 29b, *Sukkah* 54b, and *Zevachim* (*Mishna* 10:1).

God commanded on Yom Kippur."¹⁹⁹ This discussion of precedence will continue over the remaining *mishanyot* of the tractate and, as will be seen, the discussion of precedence will lead back to the authority of the rabbis and their knowledge of Torah while reinforcing a social hierarchy.

משנה ז

האיש קודם לאשה להחיות ולהשיב אבדה והאשה קודמת לאיש לכסות ולהוציאה מבית השבי
בזמן ששניהם עומדים לקלקלה האיש קודם לאשה:

Translation:

A man precedes a woman to be kept alive and to return a lost object. A woman precedes a man to clothe and to release from prison. If they both stand to be defiled, the man precedes the woman.

Analysis:

This penultimate *Mishnah* in tractate *Horayot* discusses the precedence of men and women. As we will discuss, there are cases where the man has precedence over the woman, and there are cases where the opposite is true.

Maimonides comments on this *Mishnah* by relating it to the principle that is given in the previous *Mishnah*. He teaches that, "it is already known that men are obligated in all the commandments and women only in a few of them, as is explained in the tractate *Kiddushin*, because he is more sanctified than she and is, therefore, the first to be saved."²⁰⁰ However, in the case of clothing, the woman takes precedent over a man,

¹⁹⁹ Maimonides. p. 316.

²⁰⁰ *Ibid.*

since, according to Bartenura, "her embarrassment will be greater than that of a man."²⁰¹

The issue of shame and embarrassment also seems to dictate the precedence regarding release from captivity as well. A woman is given precedent usually when both are in captivity because of a fear of her being put in a position where she is forced to become a prostitute.²⁰² However, "when both are exposed to degradation in captivity, both are in captivity and both are at risk of being raped the man is redeemed before the woman because he is being used in an unnatural way."²⁰³ Maimonides and all of the other subsequent commentators that have been examined comment on this *Mishnah* in a similar way: due to the increased shame the man would receive due to his forced sodomy, he needs to be redeemed before the woman, who, while being shamed through prostitution, would not suffer the same shame as having been forced to have "unnatural" relations.²⁰⁴ Additionally, while this *Mishnah* does introduce some interesting concept, it, in a way, serves as a bridge from the previous *mishnayot* which were discussing the role of the High priest, and the following *Mishnah*, which will conclude the tractate with a discussion of how precedence can be changed.

²⁰¹ Bartenura. p. 273.

²⁰² See Kehati, p. 43

²⁰³ Maimonides. p. 316.

²⁰⁴ See: Boyarin, Daniel. *Carnal Israel: Reading Sex in Talmudic Discourse*. Berkeley: University of California Press, 1993. p. 107-134 for a further discussion of "natural" sexual relations. Specifically, "male sexual desire and pleasure are as crucial as female sexual desire and pleasure in the conduct of conjugal relations, for sex is only proper when it is the product and producer of intimacy" (128). In reference to the case mentioned in the current *Mishnah*, not only is the sexual relation unnatural and improper since it is not pleasurable and the product of mutual desire, it is also prohibited by a *Toraitic mitzvah* (Leviticus 18:22).

כהן קודם ללוי לוי לישראל לישראל לממזר וממזר לנתין ונתין לגר וגר לעבד משוחרר²⁰⁵
אימתי בזמן שכולן שוין אבל אם היה ממזר תלמיד חכם וכהן גדול עם הארץ ממזר תלמיד חכם
קודם לכהן גדול עם הארץ:

Translation:

A priest precedes a Levite, a Levite [precedes] an Israelite, an Israelite [precedes] a *mamzer*, a *mamzer* [supersedes] a descendent of Gibeon, a descendent of Gibeon [precedes] a convert, and a convert [precedes] a freed slave. When? In a time where they are all equal, but if a *mamzer* is the student of a sage and the High Priest is a commoner (in knowledge) then the *mamzer* who is the student of a sage supersedes the High Priest who is a commoner.

Analysis:

This last *Mishnah* in tractate *Horayot* concludes the discussion of precedence by looking at the order of precedence within the Jewish community.²⁰⁶ By providing a caveat to this order, the *Mishnah* also provides a final proof text within the tractate for the authority of the rabbis.

²⁰⁵ חרר - To set free or emancipate. Passive participle.

²⁰⁶ See: Washofsky, Mark. *Jewish Living: A Guide to Contemporary Reform Practice: Revised Edition*. New York: URJ Press, 2010. p. 257. "Some passages in our sources indicate that we do set priorities in the performance of moral duties based upon the 'worth' of persons or upon their position in society. [*Horayot*] declares that when the lives of a man and a woman are simultaneously in danger, we are to save the man first. The man takes precedence over the woman as well with respect to our obligations to return a lost object. A woman precedes a man in being provided with clothing and being redeemed from captivity. If both persons are men, then we adopt a scale of priorities that follows the traditional structure of genealogical status: the *kohein* precedes the *Levi*, followed by the Israelite, and so forth. The Talmud explains these priorities in terms of each person's correspondence to the religious ideals of biblical and Rabbinic Judaism. Thus the man takes precedence over the woman because he has more *mitzvot* (religious obligations) to perform; the *kohein* comes first because of his high cultic standing. And given that the highest of all Jewish religious values in the eyes of the Rabbis is the study of Torah, it is no surprise that the text teaches that 'a *mamzer* [a child born of an adulterous or incestuous union] who is a Torah scholar takes precedence over a high priest who is an ignoramus.'"

This *Mishnah* begins with a list of the order of precedence in Israel, and while there are no proofs offered, a study of both the underlying biblical texts as well as the words of the commentators on the tractate can show how the rabbis developed this list. First, the rabbis begin by stating that a priest supersedes a Levite. This can be seen within the Bible, which says, "the sons of *Amram*: Aaron and Moses, and Aaron was set aside to sanctify the most holy things, he and his sons forever."²⁰⁷ Yet, while the priest supersedes a Levite, the Levite supersedes the rest of the nation of Israel, for it says, "at that time God separated the tribe of Levi."²⁰⁸

These categories have been very clear so far. Yet, once the line of precedence moves past the next step, that of an Israelite ahead of a *mamzer*, the proofs become a little more convoluted. Bartenura explains that the Israelite does, indeed, take precedence over the *mamzer*, since, "One is of a distinguished lineage and the other is not of a distinguished lineage."²⁰⁹ The *mamzer*, however, supersedes a *natin*. The classification of *natin*, which refers to those who were the descendants of the Gibeonites and who became proselytes in the time of Joshua,²¹⁰ is discussed in the *Bavli*. "One came from holy seed, the other from defective seed, that is to say, a *mamzer* is of Jewish descent, a *natin*, from a foreign people."²¹¹ The *Bavli* also explains why the *natin* takes precedence over the convert. For "this one (the *natin*) grew up with us in holiness, the other did not grow up with us in holiness."²¹² In other words, since the *natin*, has been integrated, to an extent, within the Jewish people, there is a certain historical familiarity that he has,

²⁰⁷ I. Chron. 23:13.

²⁰⁸ Deut. 10:8.

²⁰⁹ Bartenura. p. 273.

²¹⁰ See explanation above to *Horayot* 1:4.

²¹¹ *Horayot* 13a.

²¹² *Ibid.*

that a convert does not possess. Therefore, he is more familiar, and the one that is more familiar takes precedence. Finally, Bartenura explains the last link in the chain: the convert taking precedence over the freed slave. He explains that, "the convert was never part of a lowly occupation and this one was part of a lowly occupation."²¹³ In other words, the freed slave is compared to one who was set apart by a curse, and therefore, he may not be above any of these other individuals in the precedence of Israel.²¹⁴

This order of precedence is, overall, not very surprising. The order makes sense when examining both biblical and *tannaitic* societies, yet the caveat that is offered at the end of the *Mishnah* changes the order and provides a way for the learned rabbi to gain authority. The *Mishnah* provides for the opportunity where a *mamzer* may take precedence over the High Priest; if the former is more learned in Torah than the latter. Maimonides explains:

If the high priest is an ignoramus, as discussed at the beginning of Tractate *Kippurim*, or if the high priest was only slightly learned and the *mamzer* was a scholar, the scholar *mamzer* takes precedence over the ignorant high priest]. As it is said: "She is more precious than rubies,"²¹⁵ more precious than the high priest.²¹⁶

By using the verse from proverbs, Maimonides, and other commentators after him, make it very clear that knowledge of Torah is more important, and can affect precedence, in a way that is more profound than wealth or hereditary portion. Therefore, by adding this caveat to the order of precedence, the rabbis have placed Torah scholars at the forefront of society, in a position of authority over all other Jews while also attempting to encourage other Jews to come to them to learn Torah and, therefore, improve their own

²¹³ Bartenura. p. 273.

²¹⁴ Genesis 9:25. "Cursed be Canaan: A slave of slaves shall he be to his brethren."

²¹⁵ Proverbs 3:15.

²¹⁶ Maimonides. p. 316.

status in society. While this *Mishnah* does a very nice job ending the discussion of both the role of the High Priest and the order of precedence that take place within this chapter, the rabbis, in composing this *Mishnah* put a very nice bookend onto the tractate, which allows them greater authority than even the anointed High Priest, since they are represented by the scholarly individual referenced therein. It is through their knowledge of Torah that the rabbis sought to place themselves in a position of authority amongst the Jewish people, and it is very clear from this *Mishnah*, that they viewed this specific knowledge as the path to power and authority.

נשלמה מסכת הוריות

We have now completed Tractate Horayot.

Chapter Three:

Conclusion

In her book, *Transmitting Mishnah: The Shaping Influence of Oral Tradition*, Elizabeth Shanks Alexander claims that, "“Judaism as we know it today is essentially a product of the Talmudic world, from which its fundamental beliefs and rituals derive. The influence of the *Mishnah*, then, has been profound.”¹ As the seminal document of the Talmud, the heart of the corpus of the oral Torah, and a primary source in the development of *halachah*, the *Mishnah* has provided the Jewish world with a paradigm for rabbinic life and scholarship. However, as this thesis has shown, both through the examination of the evolution of the study of the *Mishnah*, and by way of a commentary on tractate *Horayot*, the understanding of the *Mishnah* and its place in rabbinic Judaism has changed as a result of recent academic scholarship. Therefore, it must be asked if the understanding of Judaism, and at its core, the role of the rabbis should be revised by Jews who are committed both the value of Judaism and of scholarship.

Historically, the role of the rabbi, and his (more recently hers as well) authority, stemmed from an understanding shaped by accepting the *Mishnah* and its teachings at face value; both through debates and dialogue as found in *Horayot* and through the שלשלת הקבלה, the chain of tradition as described in tractate *Avot*.² While "the talmudic rabbi was an interpreter and expounder of the Bible and the Oral Law, and almost invariably had an occupation whence he derived his livelihood," it was only in the Middle Ages that "the rabbi became—in addition to, or instead of, the interpreter and decisor of the law—the teacher, preacher, and spiritual head of the Jewish congregation or

¹ Shanks. *Transmitting Mishnah*. p. 3.

² Pirkei Avot 1:1-- Moses received the Torah from Sinai and gave it over to Joshua. Joshua gave it over to the Elders, the Elders to the Prophets, and the Prophets gave it over to the Men of the Great Assembly. They [the Men of the Great Assembly] would always say these three things: Be cautious in judgment. Establish many pupils. And make a safety fence around the Torah.

community."³ The rabbi claimed his authority as the teacher of the community who provided *halachic* decisions and instructions based on his knowledge of Torah.

Today, the role of the rabbi, especially in liberal communities, has changed.

Writing in 1982, Rabbi Harold Saperstein claimed:

Rabbis can claim authority on the basis of scholarly qualifications. This no longer implies mastery of *halacha* which carries no compulsion for the liberal Jew. Nor does it imply, as it did several generations ago, ability to transmit general culture. Many of our congregants are our equals or superiors in this regard. Nor is it measured by the ability to discuss timely issues. Here we face competition or public media professionals. Torah for the modern Jew must be the total spectrum of Jewish values. It is from this context that the rabbi must be able to deal with problem of life and society. The rabbi is the expert in Judaism.⁴

The role of the rabbi has changed. Instead of master of rabbinic discourse and *halachic* decisor, in a liberal setting he or she must be the expert in Judaism, and therefore one who can transmit Judaism. Today's liberal rabbi acts as leader and guide: teaching and inspiring the congregation to live lives according to Jewish values and tradition. In fact, Rabbi Jacob Shankman observed in his essay, *The Changing Role of the Rabbi*, that "the inevitable substratum of the rabbinate is scholarship and teaching."⁵ Yet the scholarship of the modern rabbi must include contemporary scholarship and research, as opposed to solely that of the ancient rabbis.

Then does the *Mishnah* still play a role in the life of a rabbi? And if so, how can it be used as a source document for the modern, liberal rabbi?

The *Mishnah*, although based on a paradigm no longer valid with the modern, liberal Jew, is still a valid source for discussion, a valid source for inspiration, and a

³ Berenbaum and Skolnik. *EJ Vol.17, 2nd Edition*. p. 11.

⁴ Knobel, Peter S. *Rabbi, An Interpreter of Religious Experience*. In *Rabbinic Authority*. Edited by Elliot L. Stevens. New York: Central Conference of American Rabbis, 1982. p. 47

⁵ Gottschalk, Rabbi Alfred. *To Learn and To Teach: Your Life as a Rabbi (Revised by Rabbi Gary P. Zola)*. New York: The Rosen Publishing Group, 1988. p. 25.

starting point for the discussion of Jewish values and ethics. Dr. Michael Meyer, who serves as the Adolph S. Ochs Professor of Jewish History Emeritus, writes that,

My conception of Jewish Education flows from an idea of Judaism that recognizes and affirms the value of modernity, represented especially by personal autonomy, while insisting upon the priority of Jewish religious faith. It is critical of the excesses of modern life: the self-absorption and the arrogant certainties. But it also casts a critical eye upon Judaism, recognizing its texts to be imperfect and sometimes totally wrong expressions of our ancestors' sincere desire to understand the obligations that flow from the diving mystery. Hence my conception is, in the last analysis, focused upon the individual who stands within the multiple tensions of autonomy and obligation, integration and separations, peoplehood and religion, dispassionate knowledge and life-determining commitment.⁶

What Meyer is claiming is that in order to be a learned Jew, and for rabbis this is all the more important, it is necessary to examine the texts of the Jewish tradition, including the *Mishnah*, with a critical eye, to be able to discern what is still valid and binding, and what obligations are no longer necessary. Due to the fact that the texts can be explored and understood to be imperfect, allows the liberal rabbi to use the text as a guiding light, rather than a text that has dogmatic authority.

Furthermore, it is important to remember that the *Mishnah* should not be discounted as a source. For as former President of the Hebrew Union College-Jewish Institute of Religion, Rabbi Alfred Gottschalk writes, "Reform Judaism is often misunderstood and misrepresented as being minimal in its demands."⁷ Rather, Reform Judaism, and its rabbis especially, require a "warmer devotion to, the fundamentals of our faith. Reform Judaism remains and has always been concerned with the totality of all

⁶ Meyer, Michael A. *Reflections on the Educated Jew from the Perspective of the Reform Judaism*. As found in: Fox, Seymour; Et. Al. *Visions of Jewish Education*. Cambridge: Cambridge University Press. 2003 p. 150.

⁷ Gottschalk. *Learn and Teach*. p. 42.

Israel, in whose destiny it is intertwined and in whose hope it sees its brightest future."⁸

Therefore, modern, liberal rabbis need to pay heed to the lessons of the *Mishnah*, for even though there is, in certain circles, the rejection of the premise that the "student of a sage supersedes the High Priest who is a commoner,"⁹ the *Mishnah* and other early rabbinic works have laid the foundation, even though they were not based on historical fact, for the evolution of the Jewish people and the values that are adhered to today.

Modern rabbinic teachings must pay heed to their ancient predecessors in order to maintain a source of authenticity, even if the authority that *Horayot* so clearly tries to establish does not exist anymore for the modern rabbi. For it is within *Horayot* that it is possible to see the ancient rabbis striving to claim authority, by placing themselves in a position as *halachic* decisor, acting in a way that is above reproach from error, and seeing themselves as above even the High Priest in precedent within the Israelite community. Not surprisingly then, this text is important to the modern, liberal rabbi, who is in a similar place-- trying to convince a community that what he or she says has value. So, while there is no longer the need for the liberal rabbi to be the ultimate authority in a community, it is important to learn from the *Mishnah* that the rabbi's role still is important and that the rabbi still has a voice that matters among the Jewish people.

⁸ *Ibid.*

⁹ *Horayot* 3:8.

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Appendix A:

Maimonides' Commentary on *Mishnah Horayot*

The following commentary has been translated for use in writing the preceding thesis. It is a working copy and has not been independently checked or vetted by thesis advisor, Dr. Jason Kalman, or anyone else. Maimonides' numbering of the *mishnayot* within the tractate does not always match with the numbering used by Bartenura, the contemporary commentaries cited above, or the author of the thesis.

Maimonides on Tractate Horayot (Decisions)

Chapter 1

(1) The decision regarding the liability of the beit din that ruled (i.e. said to the people): “You are permitted to do such and such.” A person acted in error (גגג in accordance with the beit din’s ruling. If he acted in error but not according to the ruling they are obligated to bring a sacrifice. The lesson here is that if the beit din ruled that forbidden fat is permitted, if a person intended to eat forbidden fat and did so based on the beit din’s ruling, he is not obligated to bring a sacrifice. But if he intended to eat permitted fat and ate forbidden fat, he must bring a sacrifice, since the error was not based on the beit din’s ruling because he did not eat the forbidden fat because of the beit din’s ruling. But if he did eat it according to the beit din’s ruling he has no obligation at all [for a sacrifice], even if he did it together when they announced their ruling, or if he did it before they made the ruling and even if he did it and they did not do anything, he is exempt [because he relied on the court] as discussed in the introduction: “An act is dependent on the community and the ruling of the beit din.” And this is the *Mishnah* of Rabbi *Yehuda*, who supposes that an individual who acted based on the beit din’s ruling is exempt. But the sages’ opinion, which is correct, is that an individual who acted based on the beit din’s ruling is obligated until the majority of the residents of the Land of Israel act according to their ruling and then their actions will be exempt and the beit din will be obligated to bring the sacrifice, as we explained. It is written: “And all Israel was with him from the entrance to Hamat to the river of Egypt,” [Kings I 8:65] which is to say that those in the Land of Israel determine the status of the ruling and we do not consider those who leave the Land of Israel. And one who knows they erred and acted according to their ruling, it says that he is obligated and means that he is obligated to bring a sacrifice but there is a problem: if he knew the beit din erred, it means that he sinned willfully and a willful sinner is not obligated to bring a sacrifice. And the solution is as they clarified, that he sinned in error as it is said, “according to the law that they teach you,” [Deuteronomy 17:11], and he thought that he is obligated to obey the beit din’s ruling even if the ruling was mistaken and he knew it was mistaken and, therefore, he acted according to their words even though he knew they were wrong and he is therefore obligated in an individual sacrifice and does not join those who sinned in error according to the ruling. He who acts according to his own judgment, even if he did not know that they erred, but does not usually accept the beit din’s rulings, even if it is not clear to him that the ruling was cancelled, the matter remains for him as though no ruling was made: if he acted thus he is obligated.

(2) Rabbi *Shimon* exempts the one who acted from having to bring a sacrifice, because it was a ruling that became publicly accepted and if one acted then likely the majority acted thus. And Rabbi *Elazar* declares his case to be doubtful because he should have asked [if the beit din reversed its decision] and as the person who ate and did not know if he ate the forbidden fat or the permissible fat that he must bring a *asham talui* offering. The Talmud clarifies that we rule according to Rabbi *Elazar*. The *Mishnah* continues with an explanation that Rabbi *Elazar*’s doubt was whether the person was at home, in which case he would be obligated to bring an *asham talui* offering, or whether he was travelling, in which case he is not obligated to bring a sacrifice. The *Mishnah* continues with a debate between Rabbi *Akiva* and Ben *Azzai* of the case of a person who was about to travel but

had not yet left, but he left for his trip and acted [i.e. acted according to the mistaken ruling]. Rabbi *Akiva* says because the person was busy preparing to go abroad could not have asked [if the beit din had reversed its decision] and it is like he was already abroad; Ben Azzai says that if he is still in the city it is like he is at home. And we rule according to the Rabbi Elazar and Rabbi *Akiva*.

(3) A beit din is not obligated to bring a sacrifice and people who act according to the beit din's ruling are exempt unless the error is in a matter that the Sadducees disagree [with the Pharisees]. But if the matter is one where the Sadducees concur with the Pharisees on the law the beit din is exempt because this cannot be termed a sin in error, rather it is absentmindedness, as it is written: Go read it in the school house. And every person who acted according to the beit din's absentmindedness must bring an individual sacrifice, as we said earlier. And we already clarified "keeping a day for each day" [i.e. keeping niddah and yamim levanim for each day the woman spotted blood] at the beginning of the book, and clarified the laws of niddah and zavim. An example of an error: "She only keeps a day for each day if she saw blood during the day, but if she saw the blood at night, she does not, as a zava is not a zava until she sees traces of blood for three days, they will sin by mistake, saying: Days of zava means during the daylight hours, and if they err in this way and if the majority of the community's wives see blood at night, they will be obligated to bring a cow as a sin-offering." And this is the case on Shabbat as well, as it is said: Only the person who exits is obligated, as it is written, "Let no man go out of his place," (Exodus 16:29) but if he handed or threw [something] then no. It is the same with idol worship: "The person who bows down is obligated," as it is written, "You shall not bow down to any other god," (Exodus 34:13). Bowing means spreading one's arms and legs on the ground and being prostrate but if he bows down for idol worship without spreading out his arms and legs it is considered as though he has not bowed. And if there was sin in error with these types of matters, then he should bring a sacrifice and the ones who acted according to the ruling are exempt. But if they forget a precept written in the Torah or another matter that is commonly understood in the Torah, they are exempt and those who acted according to their ruling are liable as it is written, "only rulings where the Sadducees disagree with the Pharisees."

(4) The expert of the *Sanhedrin* (mufla) is the head, even if there are seventy-one members. If the beit din said in error: "And if it be done in error by the congregation," etc. and the beit din said: "And the congregation was judged." And we already clarified in Tractate *Sanhedrin* that those who are referred to [in the *Mishnah* in *Sanhedrin*] are not fit to teach in the *Sanhedrin*, as was said to Moshe: "That they may stand there with you," and similar to you, which means of distinguished lineage. And an old man who does not have children is not fit to rule on people's lives, because he is hard-hearted and is not sympathetic to people because he doesn't have a love for children. And we need to rely on the teaching, as it is said, "And if the whole congregation of Israel shall err." (Leviticus 4:13)

(5) It is written the entire congregation, which mean the majority and I want to say the majority of residents of the Land of Israel, which are called the congregation, as clarified. And the first part, that the beit din erred slightly in one commandment of the all the commandments that were remembered and permitted something forbidden in error and

the majority of the congregation acted according to the beit din's ruling, as it is written: "And the entire congregation acted in error," the meaning is that they acted in error according to the beit din's ruling. As previously, the beit din alone is obligated to bring a sacrifice and the nation is exempt because they are dependent on the beit din. And the second part, that the beit din knew it was something forbidden and willfully permitted it (even if it is unlikely I'm showing both cases) and the entire congregation acting in error according to the beit din's ruling, every person who acted thus must bring an individual sacrifice and the beit din is exempt from bringing a sacrifice, because they acted willfully. And the third part, where the beit din ruled to permit an act in error and the congregated acted according to the ruling and the congregation knew that the beit din was wrong and in error and there is no obligation to adhere to its ruling but they did so willfully, everyone is exempt from a sacrifice: the beit din is exempt from the sacrifice because no one acted in error due the ruling and were not dependent upon it, and the congregation is exempt from the sacrifice because someone who sins willfully does not bring a sacrifice. And the fourth part is clear, when the beit din willfully provides a mistaken ruling and the people act upon it and sin willfully, it is very clear.

(6) We already clarified in the introduction to this tractate that when a congregation sins erroneously in idol worship it must bring a young bull and a young male goat for a sin offering and an individual must bring a young female goat. And of the commandments for which there is no "karet" for transgression the beit din brings a young bull and an individual brings a ewe or a female goat. And it is written, "the congregation sacrificed," and there is an argument. Rabbi *Yehuda* believes that it means every congregation on its own and Rabbi *Meir* states that it is only the congregation received the ruling and it is the *Sanhedrin*, which is like the entire congregation of Israel, and Rabbi *Shimon* says every congregation on its own and the *Sanhedrin* is added to the number of tribes that sinned, because every tribe was called a congregation, as it is written: "And Yehoshaphat stood before the congregation of *Yehuda*." And seven tribes comprise the majority of the tribes as was clarified in the introduction. Even if a majority of the people of Israel, even if they are not from a majority of the tribes, acts. We know that Rabbi *Yehuda* says that each and every congregation must bring the sacrifice and that the main beit din has no obligation whatsoever, because there are many sacrifices being brought. The opinion of Rabbi *Yehuda* is that one tribe acted according to the beit din's ruling and the rest of the tribes bring if it was the majority of the congregation. Therefore, I say here that the rest of the tribes are exempt because that tribe acted upon its own ruling. And Rabbi *Shimon* says, if the entire congregation acted, the beit din will bring the sacrifice the special sacrifice for a beit din together with them, because they provided the ruling and it cannot be that someone who did not sin at all will bring a sin offering. And it seems from the discussion that even though it is not stated clearly that if a part of the tribe is the majority of the congregation that acted according to the beit din's ruling that the beit din alone brings only a young bull and for idol worship a bull and a male goat. The law is according to Rabbi *Yehuda*'s ruling that each and every congregation brings a sacrifice. This is the rule that the bull is called the ha'elem and the goat is for avoda zara. And the law goes according to the sages. And even though blood is that of bulls and goats, as it is said, "A bull for an error-in-judgment (para ha'elem davar) sacrifice and goats for sacrifices for idol worship, at the beginning money is demanded and it is not taken from

“trummat ha’lishka”.” And the bulls and the goats shall be burns as discussed in Zvachim in Chapter 5.

Chapter 2

(1) Leviticus 4:3 states, “If it is the anointed priest who has incurred guilt, so that blame falls upon the people, he shall offer for the sin a bull of the herd without blemish as a sin offering to the Lord.” And this is the bull that is brought for all the commandments. And it is written, “the blame falls on the people” because he made a ruling for the community, and the community only brings in the case where ignorance of the law led to a sin in error. Just like before, there had to be a mistaken ruling that the community followed and sinned in error, so that the ruling is only because of ignorance of the law with the erroneous action, and he himself acted in error because he made a mistake how he ruled for himself. It has already been explained that if the beit din rules in error and the nation acts willfully, or the beit din rules willfully and the nation acts in error, the beit din is exempt in both cases; the priest is also exempt in both cases from bringing a sacrifice because someone who acts willfully doesn’t bring a sacrifice. And this condition means that the anointed priest must be an extremely wise person and ruled for himself, meaning that he is obligated to bring his own atonement. But if he is not wise or if he participated with the beit din in the ruling and each person who acted relied on his ruling together with that of the beit din, just like the person from the beit din who relies on the general ruling, the law is like that for an individual : if the majority of the congregation acted, the entire nation must atone and if it was a minority, it is exempt. Furthermore, the bull is not required except in cases of the commandments whose transgression leads to “karet,” if the ruling in one of these is to do a little less or do a little more as was discussed earlier regarding the beit din, but in the case of an error regarding idol worship a female goat must be brought but he must also bring the bull for an error-in-judgment (para ha’elem davar) sacrifice to atone for his transgression. And he isn’t obligated to bring an asham talui-offering if he is in doubt, just like the beit din with the community, as will be clarified.

(2) If we were to think that the high priest acted according to the beit din and will not atone with the community, because even on Yom Kippur he doesn’t atone with the nation, rather with his own sacrifice, as it is written, “he presents his sin offering.” We learn here that he atones with the nation if he erred with them, “his sin which he has sinned” means to say that if his sin was specific to him he will bring his own sacrifice but if he sinned with the nation he will not. And we learned about idol worship from the other commandments, as it is written about the other commandments: “the thing [sin] will be hidden from the eyes of the congregation,” as it says “from the eyes” and not from the entire body, so too with idol workshop “from the eyes” and not from the whole body. And we do not need to clarify that anywhere we say the rest of the commandments or all the commandments, wherever it appears it means the thirty-one negative commandments that one receives “karet” for transgressing willfully or to bring a sin-offering in error.

(3) Earlier, we discussed the priest who appoints himself as a beit din for the community and that idol worship is like all transgressions. And acting in error based on the ruling is like we explained.

(4) We already clarified what is written in parsha Shlach Lecha, “When you shall err and not observe all the commandments” is talking about erring in idol worship. And it was written before it, “there shall be one law to do in error and the person will do with a high hand” we learn that one who acts in error is like acting in error in idol worship. Willful idol worship has a punishment of “karet” and in error a person must bring a sin-offering and the beit din is obligated if its ruling is for a sin-offering, and every person who acts in error until a matter for which willful transgression begets “karet”, and then he will be obligated for erring with a sin-offering and if in this matter the individual receive “karet” for his willful transgression and his error a sin-offering, so the beit din will be obligated if it ruled on the matter, or if the priest, a sin-offering is obligated, for all who must receive “karet” for willful transgression, an individual will be obligated for erring with a sin-offering and the beit din and the priest will be obligated on their ruling according to the previous condition, except for five things: Pesach, brit mila, making an oath, and impurity of the Temple and its contents. Korban Pesach and brit mila both have a punishment of “karet” – “because he brought not the offering of the LORD in its appointed season, that man shall bear his sin.” (Number 9:13), but they do not require a sin-offering if they are performed in error because they are positive commandments, and we found that the Torah does not obligate a sin-offering except for negative commandments, as it says, “and they do any of the things that the Lord commanded not to be done” (Leviticus 4:13). The sin of an oath does not obligate a sin-offering if performed in error as it is written, “to act in error” and making an oath is not considered an act, so no transgression has been committed. And likewise impurity in the Temple and its contents do not correspond to what is written, “One of all of God’s commandments”, that the Torah explicitly states must bring a sliding scale (korban oleh ve’yored) sacrifice. There are thirty-six commandments that have a punishment of “karet” and as was counted in the Tractate Kretot and they are all explicitly listed and after the five exceptions of there remain thirty-one commandments, which require a sin-offering if transgressed in error, according to this division in the tractate. And it has been explained that an individual brings a sin-offering for only one of these, whether he is an ordinary person, a high priest or the ruler. But if the community is in error in one of these thirty-one, the error must be in idol worship, as we explained.

(5) The principle that for laws where a willful sin is punished with “karet”, a sin in error has to bring a sin offering. If he doesn’t know if he sinned willfully or in error he is obligated to bring an asham talui offering, which we learn from the verse, “And if anyone of the common people sin through error, in doing any of the things with the Lord has commanded not to be done and be guilty” (Leviticus 4:27) and the law has already been explained that the commandment alluded to here is one for which a willful transgression receives “karet” and an error must bring a sin offering. Regarding an asham talui offering: “And if any one sin, and do any of the things which the LORD hath commanded not to be done, though he know it not, yet is he guilty, and shall bear his iniquity.” (Leviticus 5:17) and this is the asham talui offering. We learn from the verses “doing any

of the things with the Lord has commanded not to be done and be guilty” and “do any of the things which the LORD hath commanded not to be done, though he know it not, yet is he guilty”. But transgressions that require sliding scale sacrifices do not obligate an asham talui offering, because the Torah requires sliding scale sacrifices for them and does not say guilt for God’s commandments that are not heeded. The matters that require sliding scale sacrifices and do not required sin offerings: heeding the voice of adjuration, an oath made by an expression, and impurity relating to the Temple and its contents, as it is said, “And if anyone sin, in that he heard the voice of adjuration” (Leviticus 5:1) until the end of the parsha. These principles do not obligate an asham talui offering if a person did not know if he transgressed willfully or in error the laws of purity in the Temple and its contents. A beit din is not obligated to bring the error-in-judgment (para ha’elem davar) sacrifice if it ruled in error on matters related to the impurity of the Temple and its contents. If they ruled on a matter willfully there is a punishment of “karet” but does not obligate a sin offering if ruled in error. I want to say that a sin offering, like for the other commandments, as was clarified above, rather there is an obligation to bring sliding scale sacrifices if one acted in error. If one brought impurity inside the Temple and then was commanded to leave the Temple (which is a positive commandment) he must leave by the shortest way, as is explained in chapter 2 of the Tractate of Shavuot. If he left by the long way, which will extend his time in the Temple, he will be punished with “karet,” because it is a negative commandment to not enter the Temple when it is desecrated and if he entered he will be punished with “karet.” The negative commandment of niddah, that one should not have relations with a niddah, and if he did he becomes unclean during sex and is commanded to remove himself from her, just like the explanation with the Temple, which is a positive commandment. He is told, “Remove yourself from her/it.” But it is a problem because withdrawing is as pleasurable for him as entry. If he withdraws while he is still erect, he is liable for “karet” like one who enters into relations with a *niddah*. What should he do? Implant his toenails in the ground and wait without moving until he loses his erection. Afterwards, he should withdraw. It does not matter if he ejaculated because ejaculation does not add to or lessen the prohibition [against relations with a niddah], as is explained in Tractate *Sanhedrin*, chapter 7. When he loses his erection he should withdraw and then he should be told to withdraw. It is clear that this is not positive commandment regarding the Temple or the niddah, rather it is a command needed to warn a person, just like we say to someone wearing shatnez: “Remove the garment.” It is a command used to warn someone that he is transgressing. There is no doubt that someone who willfully has relations with a niddah is liable for “karet” and in error must bring a sin offering. Therefore, he is obligated if he was commanded to perform a positive commandment that contains within it a negative commandment that would be transgressed in error. As discussed in the first chapter, if the ruling is on a negative commandment it is clear, that a niddah or zava keeps one day for each day of bleeding, if she is called a “minor zava” or a woman who gave birth – sexual relations with any of these is forbidden to the same extent and “karet” is the punishment for relations with any of them, even though the laws pertaining to them are divided into purity and impurity only. Even if the ruling is in the form of a positive commandment, like saying to the man that he must withdraw while erect, they must bring a bull for a sin offering because they ruled in a matter that requires a punishment of “karet” if willful and a sin offering if in error. But if they said in warning that someone impure was allowed to

enter a place, which is a ruling on a negative commandment with regards to the Temple, or if they ruled that someone who became impure in the “azara” (part of the Temple) is permitted to exit using a long route and does not need to take the shortest way out, this is a ruling on a positive commandment with regards to the Temple – they are not obligated to bring an error-in-judgment (para ha’elem davar) sacrifice, even though they permitted something for which the punishment is “karet” because there is no sin offering for transgressing these in error. It is important to understand all these concepts because they are the core of this tractate and will be discussed again in Tractate Kodashim.

(6) The beit din and the anointed priest are not obligated if they ruled on one of these matter and we already explained the reason. And Rabbi Yossi Ha’Glili said that the ruler is exempt from these things as well, and will never be obligated to bring a sacrifice, even if he erred in their performance without the basis of a ruling and according to Rabbi Yossi the priest is also exempt from bringing an individual sin offering if he erred in one of these laws. The Torah states: “And if his means do not suffice” (Leviticus 5:7,11), meaning one who is poor. The high priest and the ruler are not poor because one of the requirements for their positions is wealth. Rabbi *Akiva* says that the ruler is obligated, as it is written, “And the priest shall make atonement for him concerning his sin” and at the end of this parsha he is obligated to bring a sacrifice for not heeding the voice of adjuration, making an oath by expression and impurity related to the Temple and its contents: “And the priest shall make atonement for him concerning his sin.” Although the high priest is not obligated to bring these sacrifices according to Rabbi *Akiva*, as it is written, “This is the offering of Aharon” (Leviticus 6:13) etc. The tradition from Sinai understands here is the obligation, which is to say the obligation of the high priest. He is obligated to bring an offering for these sins if he cannot afford the tenth of the ephah of semolina. He is prevented from bringing the obligatory mincha offering and also from bringing two doves or the ewe or the female goat, as it says at the end of the parsha: “in one of these things” (Leviticus 5:13), if he does not atone for one he does not atone for these things. The meaning is that a person should bring an appropriate sacrifice, either a beast or a bird or grain, according to his financial ability. The law is not like Rabbi Yossi or Rabbi *Akiva*’s opinions. The high priest and the ruler are both obligated to bring a sliding scale sacrifice for not heeding the voice of adjuration, or for making an oath by expression or regarding impurity in the Temple and its contents, as will be explained below.

(7) These are Torah verses and have already been explained.

(8) The sins for which willful sinning receives “karet” and a sin in error must bring a sin offering, if an individual or the ruler did or did not act, he must bring a *asham talui* offering, as is explained in the Tractate Kretot. But an anointed priest and a beit din are never obligated to bring a *asham talui* offering when there is doubt about their ruling, but must bring a sin offering if their sin is confirmed, as it is written: “When the sin they sinned is known” (Leviticus 4:14), etc., and the concept was discussed previously. An *asham vadaï* offering is required for five matters that an individual may do, whether he is a layman or the ruler or an anointed priest and the beit din’s ruling is not applicable. An *asham* offering cannot be obligated for a ruling. And the types of guilt offerings are: for robbery (Leviticus 5:21-25); 2) for illegal use of sacred property (Leviticus 5:14-16); 3)

for relations with a betrothed slave woman (Leviticus 19:20-22); 4) a *nazir* (Numbers 6:9-12); 5) a person who had tzara'at (Leviticus 14:10-12).

And the anointed priest is obligated for not heeding the voice of adjuration and on making an oath with an expression, and impurity in the Temple and its contents does not contradict what was said earlier that the priest and the beit din are not obligated on the voice of adjuration, etc., we said they do not have to bring a bull for sacrifice for the commandments if they ruled for themselves with previous conditions because none of these commandments are relevant to these laws. But he is obligated to bring the necessary sacrifice if he transgressed one of them. This is the meaning of the statement made by Rabbi *Shimon*, regarding the verse "But the man that shall be unclean, and shall not purify himself, that soul shall be cut off," (Numbers 19:20). One who sinned is equal to the congregation but his sin is not equal to the congregation because he is not obligated to bring a bull for sinning in error like the congregation but until there is a ruling for an error-in-judgment (*para ha'elem davar*) sacrifice, as previously. And Rabbi Eliezer believes that the ruler who sinned in error with regard to the purity of the Temple and its contents brings a goat, just like he would bring if he sinned in a matter for which he should receive "karet" if he sinned willfully or that he should bring a sin offering if he sinned in error, because transgressing the purity of the Temple and its contents is liable for "karet". The law does not follow the opinion of Rabbi Eliezer or Rabbi *Shimon*.

Chapter 3

(1) "When a ruler sins, and does in error any one of all the things which the LORD his God commanded not to be done, and is guilty . . . he shall bring for his offering a goat, a male without blemish." (Leviticus 4:21-22) and it is written "on the sin which he sinned" (ibid) he will bring the sin offering that he obligated to bring as a ruler, even though he was removed from the position at the time he brought the sacrifice, but because he was the ruler when he sinned.

(2) A high priest, even if he was removed from office due to a blemish or old age, retains his holiness because the anointing oil poured on him cannot be removed and there is no difference between him and the sitting high priest except in the service and what's involved in it. I want to say the bull brought on Yom Kippur and the tenth of an ephah that was brought every day, as will be explained. But the ruler has no greatness that remains after he leaves his position, at which point he becomes a layman.

(3) "When the ruler sins," i.e. he sinned when he was the ruler. And it is written: "When the anointed priest sins," i.e. he sinned and he was anointed. We still must explain the ruler's sacrifice. Even though we already explained this we will add further explanation. If the ruler acted along with the nation according to the beit din's ruling, he must atone with the nation, but he himself erred in one of the commandments that a layman would be obligated to bring a ewe or a female goat as a sin offering, he must bring a male goat as a sin offering. This is the only way that the ruler is different from ordinary people. The ruler does not require a ruling like the anointed priest, but only due to a sin in error is he obligated to bring a male goat, like a layperson must bring a ewe or a female goat.

(4) The priest with more garments is not the one anointed with the oil, only the priest who wore eight garments, which is more than the ordinary priests wear, as it is explained: “and is consecrated to put on the garments.” High priests in the second Temple were identified by the garments because they were no longer anointed with the oil, as has been said a number of times. The tenth of the ephah is learned from the phrase, “this is the offering of Aharon and his sons” etc. and it is also called the “chavitin” of the high priest because it is done in a pan (“machvat”). A high priest who must abdicate because of blemish or who is appointed for the service on Yom Kippur because the sitting high priest has been found unfit on Yom Kippur and after will return to his duties, as we explained.

(5) A high priest tears [his clothes] from below if a person dies for whom he is obligated to tear his clothes. An ordinary priest tears from above an outer garment like an ordinary person, as is explained in the laws of tearing in the Tractate Moed. We have already explain that the Torah-required laws of mourning apply only on the day of death, meaning that if someone dies for whom the high priest must mourn, he is called a mourner on that day only, and only the Torah laws of mourning. If the burial is delayed, he is considered by rabbinic law to still be a mourner and when the body is buried he is a mourner on the day of burial only according to rabbinic law, as it is written, “the day of death is Torah law, the day of burial is rabbinic law.” If the death and burial occur on the same day, on that day he is a mourner by Torah law and at night he is a mourner according to rabbinic law, since the day of burial is counted for the night by rabbinic law. And Aharon said on the day that Nadav and Avihu died that he was a mourner: “and if I had eaten the sin-offering to-day, would it have been well-pleasing in the sight of the LORD?” (Leviticus 10:19). For the high priest, eating from the offering was problematic and the sacrifice itself was acceptable. This is only because he is the high priest. The law for his sons is that they do not eat and do not sacrifice.

(6) It is written, “Ye shall offer these beside the burnt-offering of the morning, which is for a continual burnt-offering” (Numbers 28:23), which means the continual burnt offering should take precedence. From this we learn that the more frequent precedes the less frequent. It also is written, “Thou shalt sanctify him therefore; for he offers the bread” (Leviticus 21:8). This comes to teach that for every matter in holiness you should open first and bless first and do first and we learn that something in holiness takes precedence. The high priest atones for the nation and his offering should take precedence to their offering so he can atone for himself and then atone for everyone else, as it is said: the law is that the person doing the atonement should take precedence on those being atoned for, just as God commanded on Yom Kippur. The offering for the error-in-judgment (para ha’elem davar) takes precedence over the offering to atone for idol worship as we learned earlier from the principle: all the sin offerings take precedence over the other offerings; even a bird sacrifice for a sin offering takes precedence over a beast for a different offering. “And the priest will offer the sin offering first.” A bull being sacrificed for the offering on the sin of idol worship takes precedence over the goat offering for the sin of idol worship, even though the tradition is that the goat sin offering

does not take precedence. The goat for an offering for the sin of idol worship of the ruler is when the ruler is an individual. The female goat takes precedence over the ewe because the female goat is offered for all the commandments and for idol worship and for an individual's sin, while the ewe is only used for all other commandments.

(7) It is already known that men are obligated in all the commandments and women only in a few of them, as is explained in the Tractate Kiddushin, because he is more sanctified than she and is, therefore, the first to be saved. When both are exposed to degradation in captivity, both are in captivity and both are at risk of being raped the man is redeemed before the woman because he is being used in an unnatural way.

(8) Know that they said: A learned person takes precedence over a king, and the king over the high priest and the high priest takes precedence over the prophet, under the following assumptions.. The learned person takes precedence over the king because the learned man's faith boosts the king's faith, but in practice nothing takes precedence over the honor that must be paid to the king, even if he was an ignoramus, "set over yourselves a king," whom you will fear. A high priest takes precedence over a prophet if he is equal to him in knowledge, but when one is more knowledgeable than the other, the wiser one takes precedence. The order of precedence among people is as follows, if they are equal in knowledge and deeds: the one anointed with oil takes precedence over the one with more garments and the one with more garments take precedence over the previously anointed one removed because he is a ba'al kerai, who takes precedence over the anointed one removed because of a blemish, and he takes precedence over one anointed for war, who takes precedence over his deputy, who takes precedence over the administrator, who takes precedence over the treasurer, who takes precedence over the head of the watch, who takes precedence over the head of a household, who takes precedence over a regular priest, who takes precedence over a Levi, who takes precedence over an Israelite, who takes precedence over a "chalal" - man deprived of the priesthood (child of a forbidden priestly marriage), since the daughter of a chalal is unfit to marry into the priesthood but the daughter of a regular Israelite is fit to marry into the priesthood, as is explained in Tractate Kiddushin. And the chalal takes precedence over someone whose father is not known ("shitooki"), who takes precedence over someone whose mother is not known ("assufi"), who takes precedence over a bastard ("mamzer") because a mamzer is known then there is doubt about the others. A mamzer takes precedence over a subject, i.e. someone under the rule who is not of the same nation ("natin") because a mamzer is at least Jewish and is fit, and a natin takes precedence over a convert because a natin grew up among us in holiness. A convert who is part of the congregation takes precedence over an Egyptian and an Edomite, who themselves take precedence over Ammonites and Moabites, who take precedence over a freed slave because the freed slave had been doomed. I want to say, "Doomed Canaan – arur C'naan." If the high priest is an ignoramus, as discussed at the beginning of Tractate Kippurim, or if the high priest was only slightly learned and the mamzer was a scholar [the scholar *mamzer* takes precedence over the ignorant high priest]. As it is said: "She is more precious than rubies," more precious than the high priest.

Thanks to Heaven that I completed this work.

Appendix B:

Rabbi Ovadia m'Bartenura (Bartenura)'s Commentary on *Mishnah* Horayot

The following commentary has been translated for use in writing the preceding thesis. It is a working copy and has not been independently checked or vetted by thesis advisor, Dr. Jason Kalman, or anyone else.

Rabbi Ovadia from Bartenura on Tractate Horayot

Chapter 1

Mishna 1

If the court ruled that [one of the commandments mentioned in the Torah] may be transgressed – The beit din told the people that they are permitted to do (i.e. to transgress a commandment) one of the things for which the punishment is “karet”.

And an individual proceeded and acted – Rabbi Yehuda says that one who acted based on the beit din’s ruling is exempt. This is not the law. The rabbis said that an individual who acted based on the beit din’s ruling is obligated. He is not exempt until the majority of residents in the Land of Israel, or the majority of the tribes, act according to the beit din’s ruling, and then the beit din brings the bull for a communal error-in-judgment (para ha’elem davar) sacrifice, and those who acted according to the beit din’s ruling are exempt.

Acted through error in accordance with their ruling – To exclude the case of one who does not rely on the beit din’s ruling, such as a case where the beit din ruled that forbidden fat (chelev) is permitted and the forbidden fat was switched with permitted fat (shuman) and he ate it; he is obligated because he did not eat it based on the beit din’s ruling.

Or even if they did not act – If the beit din acted, i.e. upon its erroneous ruling, the individual is exempt and the beit din is obligated. The beit din does not bring an offering/sacrifice except when a person acted on an erroneous ruling, where the community acted and the beit din ruled.

He is liable, since he did not rely upon the court – Even though he transgressed willfully, in that he knew the beit din ruled erroneously and still acted according to its ruling, he is not considered a willful sinner who must bring an offering because in the gemara it says that he sinned in error, because he thought it was a positive commandment to act according to the beit din’s ruling, even when he knows the beit din is wrong.

This is the general rule – That he rejects their ruling, that he does not usually act according to their ruling, but he acted according to the beit din’s ruling not because he relied on it but because in his own opinion it was permitted to do – therefore, he is obligated.

Mishna 2

Rabbi Shimon exempts him – Because the ruling had reached the majority of the community.

Rabbi Eleazar declares this case doubtful – Since he should inquire any time there are new rulings by the beit din and he didn’t inquire, this is similar to the case where he is in doubt whether it is a sin or not and he brings an asham talui. The law is according to Rabbi Eleazar’s opinion.

Which case may be regarded doubtful – For example, like what Rabbi Elezar said, the matter being discussed is that he was satisfied with the ruling, whether a sin or not a sin and he is obligated to bring an asham talui.

One who remains at home – When a person is at home in the country where the beit din ruled, he could have heard that the beit din reversed its ruling.

If he went abroad – This does not necessarily mean he already set out, but if he was preparing to travel but had not yet left, Rabbi Akiva holds the opinion that a person who is preparing for a journey will not be able to inquire whether the beit din reversed its ruling and he is exempt from bringing an asham talui. Ben Azzai thinks that since he had not yet set out on the journey, he should have inquired. This is the disagreement in the Gemara. And the law goes according to Rabbi Akiva's opinion.

Mishna 3

An entire principle has to be uprooted – The essence of the commandment, as is explained.

They are exempt – As it is written (Leviticus 4) “the thing being hidden”, read it as if it said “and it was hidden from the thing, i.e. part of it [the commandment], not its entirety.

But if a man has relations with a woman that awaits a day corresponding to a day he is exempt – The gemara answers that she who keeps a day for each day, as it is written in the Torah (Leviticus 15) “she shall count for herself” comes to teach that she counts one day for each day [of bleeding], and if something is written in the Torah the beit din does not bring a sacrifice. The Gemara explains, for example, that they are talking about a zava, which is only a case during the day, i.e., when she sees blood during the day and not when she sees at night, as it is written there, “all the days of her issue.”

If a man carries anything from a private domain to a public domain he is exempt – It is forbidden to take things in and out, as it is written (Exodus 16) “let no man go out of his place,” but throwing and proffering are permitted.

Bows down [to an idol] he is exempt - They state that bowing down means stretching out arms and legs and is forbidden, as it is written (Exodus 34) “you shall bow down to no other god” but if the bowing is without stretching out arms and legs it is permitted. The rule of the matter is, not beit din is obligated until it rules on a matter on which the Sadducees do not concur. But if it rules on a matter on which the Sadducees concur, the beit din is exempt from a communal sacrifice, and the majority that acts according to the beit din's ruling, each one must bring a sacrifice for his erroneous transgression. What is the reason? Go read it in the school house [i.e. every school child understands].

Mishna 4

And one of them knew that they had erred, etc. – As it is written (Leviticus 4) “And if the whole congregation of Israel shall err, until they will all agree that they acted in error.

Mufla of the beit din – the most important/knowledgeable, the head of a yeshiva.

An elder who did not have children – He is not fit to judge in capital cases because he is cruel and will not be compassionate.

It says later on “congregation” – the congregation was judged.

Just as the “congregation” further on, etc. – As it is said that in the *Sanhedrin* (Numbers 11) “that they may stand there with you,” meaning like you, with a distinguished lineage like you. Except for a convert, a nateen (variously translated as “subject” and “Temple slave”) and a mamzer (child of an illicit marriage) who are not fit to judge in capital cases.

Intentionally – The beit din knew that the matter was forbidden and is exempt from bringing a communal sacrifice because one who willfully transgresses does not bring a sacrifice. Those who transgress in error bring a ewe or a female goat as an individual sin-offering.

[If the court ruled] unwittingly and [the people] acted willingly accordingly, they are exempt – The beit din is exempt because they did not act, the people acted according to the ruling and not did not make their actions dependent on the beit din because they knew the beit din ruled wrongly. Everyone who acted is exempt because they acted willfully and those who sin willfully do not bring a sacrifice.

Mishna 5

They bring a bull – It says in Leviticus that the congregation sacrifices a bull.

And in the case of idolatry they bring a bull and a goat – And if the beit din ruled to permit the prohibition of idol worship, they bring a bull and a goat, as it says in the parasha Shlach Lecha, “When you shall err and not observe all the commandments” the commandment that is equal to all the other commandments is idol worship, as it is written (Numbers 15) “then it shall be, if it be done in error by the congregation, it being hid from their eyes, that all the congregation shall offer one young bullock for a burnt-offering . . . and one he-goat for a sin-offering.” And Rabbi *Meir* believes that that if the congregation brings a bull, in Leviticus it is referring to transgressing in error all the other commandments, but that in Shlach Lecha when the congregation brings a bull and a goat the error is idol worship, and it is the congregation that ruled, i.e. the beit din gadol [*Sanhedrin*], that brings the sacrifices.

The twelve tribes bring - Rabbi *Yehuda* understands that each and every tribe is called a congregation, as it is written (Chronicles II 20), “And Yehoshephat stood before the congregation of *Yehuda*.”

Thirteen bulls – Rabbi *Shimon* understands that the beit din that erred in its ruling cannot atone through the bulls and goats brought by the tribes but must bring their own bull and goat.

Seven tribes – Which comprise the majority of the tribes, even if they contain a minority of the people of Israel. Or a majority of the people of Israel even if they form a minority of the tribes, and even if only one tribe acted and it comprises the majority of the people

of Israel. Every other tribe that did not sin must bring a sacrifice to atone for those that did sin.

Eight bulls – Rabbi *Shimon* believes that the tribes that did not sin need not bring sacrifices to atone for those that did sin. And the law goes according to the opinion of Rabbi *Yehuda*.

That tribe acted accordingly – That tribe's beit din ruled for it and it acted and it does not comprise the majority of the people of Israel or the majority of the tribes.

But the Sages say: there is no liability etc. – The law goes according to the opinion of the Sages.

Chapter 2

Mishna 1

An anointed priest who rendered a decision – A high priest who was anointed with the anointing oil ruled on a leniency for himself and acted by himself on a matter whose transgression is liable with “karet.”

Mishna 2

He makes his atonement alone - He alone must bring a bull for a sin-offering.

If he rendered his ruling together with [the court of] the congregation – He was a member of the *Sanhedrin* that ruled in error.

He makes his atonement together with the congregation – With the congregation’s bull for an error-in-judgment (*para ha’elem davar*) sacrifice and is not obligated to bring any other sacrifice. It would have occurred to you that I might say that on Yom Kippur he does not atone with the congregation, as it is written (Leviticus 16), “and shall kill the bullock of the sin-offering which is for himself,” so too he will need to bring his own sacrifice; here it teaches us that he does not. He derives it from the Torah (Leviticus 4), “on the sin which he sinned.” For a sin that is unique to him he brings his own sacrifice, but for a sin that is not unique to him he does not bring his own sacrifice.

For the court is not liable – I.e., the law is that the high priest atones with the congregation, that the *beit din* is not liable, etc. but that the high priest is. It follows that the high priest is equal to the *beit din* on all matters. If he issued a ruling for the congregation he is equal to them and must atone with the congregation.

Nor [are they liable] for idolatry unless they ruled to annul the law in part – As it is written about all the other commandments (Leviticus 4), “the thing being hidden from the eyes of the congregation.” And about idol worship it is written (Numbers 15), “If it be hidden from their eyes . . .”, in all the commandments the matter will be hidden but not from the entire body, so too with idol workshop it will be hidden [from the eyes] and not from the whole body.

Mishna 3

The [court] is not obligated [to bring a sacrifice] except where ignorance of the law – A *beit din* that ruled for the community on one of all the commandments does not need to bring a bull for a communal error-in-judgment (*para ha’elem davar*) sacrifice for the community but only for the ignorance of the matter in which it ruled in error and because they did not realize that they were transgressing.

Was accompanied by an unwitting action – The majority of the community erred and acted according to their ruling, as it is written, “they erred and the thing was hidden,” an act in error and the matter was hidden.

So it is with the anointed priest – The high priest that was anointed with the anointing oil is not obligated to bring a sacrifice unless he forgets the law and he acts and rules in

error, as it is written (Leviticus 4), “to bring guilt on the people,” which comes to teach that the anointed priest is like the people.

Nor [is obligation incurred] in the case of idolatry – The beit din issued a mistaken ruling regarding idol worship and they are obligated to bring a bull and a goat.

Nor [is obligation incurred] in the case of idolatry unless ignorance of the law was accompanied by an unwitting action – Like all the other commandments. We learn about idol worship from the other commandments from a g’zeira shava (“equivalent form”) of “eyes” and “eyes”, as written above.

The court is not obligated unless they ruled concerning a prohibition the punishment for which is karet, if it was transgressed intentionally, and a sin offering if transgressed unwittingly – There are 36 commandments in the Torah for which the punishment is “karet” and for each one a sin offering is required if the commandment was transgressed unwittingly, except for five that do not require a sin offering if transgressed in error: brit mila and the Passover sacrifice, since they are positive commandments. Even though willfully transgressing them has a punishment of “karet” no sin offering is required if they are transgressed in error, as it is written about a sin offering (Leviticus 4), “do any of the things which the LORD hath commanded not to be done.” And making an oath, because there is no action and the Torah says about a sin offering to transgress in error: if an oath was uttered there was no action. And impurity in the Temple and of its contents create no obligation if transgressed in error, but rather a sliding scale sacrifice (oleh ve’yored), as said in Leviticus. And a beit din does not have to bring a sin offering if these are transgressed in error and neither does a high priest. There are 31 commandments for which the punishment is willful transgression is “karet” and for erroneous transgression is a sin-offering, for which a beit din and a high priest have to bring a sacrifice.

Mishna 4

[The court] is not obligated [to bring a sacrifice] for the transgression of a positive or a negative commandment relating to the Temple – A beit din that issued a ruling and erred regarding impurity in the Temple and of its contents is not obligated to bring a communal offering.

For the transgression of a positive commandment – I.e. one who became impure while in the Temple and who is thus commanded to leave by the shortest route. If he left by a longer route, he is punished with “karet.” The beit din that ruled that he should leave by the longer route is not obligated to bring a sacrifice because on an error regarding this law one does not bring a sin-offering, i.e., an individual who erred in this commandment and left by a longer route needs to bring a sliding scale sacrifice and not a sin-offering.

For the transgression of a negative commandment – That he should not enter the Temple while he is impure.

Nor [does anyone] bring an asham talui, etc. – For every commandment transgressed in error one is obligated to bring a sin-offering and an asham talui must be brought if he is in doubt whether or not he transgressed. Because transgressing in error the commandment regarding impurity in the Temple does not require a sin-offering, if it there is doubt whether he sinned he does not bring an asham talui.

For the transgression of a positive commandment relating to the menstruant – He was having relations with her when she was clean and in the midst of relations she tells him that she has become impure, the commandment is for him to withdraw. But he may not withdraw immediately because withdrawing is just as pleasurable as intercourse. Rather, he should dig his toenails in the ground and wait without moving until he loses his erection and then he should withdraw. And this is the positive commandment for the menstruant. If the beit din ruled erroneously that he should withdraw immediately, it is obligated to bring a bull for an error-in-judgment sacrifice, since the individual is obligated to bring a sin-offering for his error.

Mishna 5

[The court] is not obligated [to bring an offering] for [an errant ruling relating to] the hearing of the voice [of adjuration] – That he adjured someone else to make a false oath that he does not know any testimony, as it is written (Leviticus 5), “And if any one sin, in that he heard the voice of adjuration, he being a witness.”

For an oath made by an expression – He swore he would not eat and he ate, or that he would eat and he did not eat. Or that he said, “I ate” but he did not eat or he said, “I did not eat” and he ate.

For impurity relating to the Temple and its holy contents – Someone who entered the Temple when he was impure or at something sanctified. If there was a ruling in error on one of these commandments, there is no obligation for the beit din or the high priest to bring a sacrifice because individuals are not obligated to bring a sin-offering when they sin in error.

And the ruler is similarly [exempt] – A king who accidentally transgressed one of these commandments does not bring a goat and is exempt from bringing any sacrifice, because it is written, “And if his means do not suffice” (Leviticus 5:7,11), meaning one who is poor. A king and the high priest will never be poor.

Rabbi Akiva says the ruler is liable – Regarding the ruler it is written, (Leviticus 4) “and the priest shall make atonement for him” and the sliding scale sacrifice for hearing the voice of adjuration, making an oath and impurity in the Temple, it is written (Leviticus 5), “and the priest shall make atonement for him” to teach that the ruler is obligated regarding these commandments. The high priest is exempt from the sacrifice needed for hearing the voice of adjuration, making an oath and impurity in the Temple, according to Rabbi Akiva, as it is written, (Leviticus 6) “This is the offering of Aharon . . . the tenth part of an ephah. This excludes it, the “chavitin” offering is required of the high priest and he is not obligated in any other tenth of an ephah, except the tenth of an ephah required for hearing the voice of adjuration, etc. that the high priest does not bring. Because the Torah excludes him from the tenth of an ephah, he is also excluded from bringing two doves and any other sacrifice on this issue. At the end of the parasha it is written, “and the priest shall make atonement for him as touching his sin that he hath sinned in any of these things.” If one atones for one of these commandments he must atone for all of them, because it cannot be that atonement is needed for one but not for all. The law does not follow Rabbi Akiva

or Rabbi Yossi's opinions. Rather, the high priest and the ruler are obligated to bring a sliding scale sacrifice for hearing the voice of adjuration, making an oath and impurity in the Temple, as will be explained in our *Mishnah* below. When it teaches not obligated on hearing the voice of adjuration, etc., the meaning is not the beit din and not the high priest, both are not obligated to bring a bull for the other commandments, but are obligated to bring a sliding scale sacrifice.

Mishna 6

In the case of idolatry, the individual and the ruler and the anointed priest bring a goat – In the parasha Shlach Lecha, the sacrifice for idol worship, it is written “And if one person sin through error, then he shall offer a goat.” And it is written, “you shall have one law for him,” meaning that this sacrifice is for all of them [high priests, rulers, regular people].

Mishna 7

Asham talui – Commandments for which willful transgressions receive the punishment of “karet” and accidental transgressions must bring a sin-offering, when there is doubt whether or not there was a transgression an *asham talui* must be brought, i.e. two amounts, one of forbidden fat and one of permissible fat and he does not know which one he ate.

But the anointed priest and the court are exempt – As it is written about a communal sacrifice (Leviticus 4), “when the sin wherein they have sinned is known, then the assembly shall offer.” There is no obligation to bring a sacrifice unless the sin is clearly known. And the law for the high priest is like that for the beit din.

Asham vadai – An *asham vadai* offering is required for five matters: for robbery (Leviticus 5:21-25); 2) for illegal use of sacred property (Leviticus 5:14-16); 3) for relations with a betrothed slave woman (Leviticus 19:20-22); 4) a *nazir* (Numbers 6:9-12); 5) a person who had *tzara'at* (Leviticus 14:10-12).

The individual and the ruler and the anointed priest are obligated – Because each of these is the act of an individual. There is no difference between a layman, a high priest and a ruler.

But the court is exempt – Because a beit din ruling has no bearing on these acts. And the beit din does not bring an *asham* offering.

Except that the anointed priest is not liable for impurity relating to the Temple and its holy things; these are the words of Rabbi Shimon – Rabbi Shimon's meaning is that it is written “impurity relating to the Temple” (Numbers 19) and a person who is impure and transgresses, his soul will be cut off from the congregation. One who sins is equal to the congregation, but the high priest's sin is not equal to the congregation. If any of the congregation accidentally transgresses by entering the Temple or transgressed accidentally, he is obligated only for the accidental transgression. The high priest is obligated only to bring a bull for an error-in-judgment (*para ha'elem davar*) sacrifice when he accidentally transgresses, as proven above. The law does not follow Rabbi Shimon's opinion; rather, the high priest brings a sliding scale sacrifice even for impurity in the Temple and of its contents.

Rabbi Eliezer says: the ruler brings a goat – For impurity in the Temple and of its contents, because willful transgression of these is liable for “karet.” Just as the ruler brings a goat for transgression of other commandments for which the punishment is “karet.” The law does not follow Rabbi Eliezer's opinion because there is no obligation to bring a sin-offering for accidental

transgression of impurity in the Temple and the ruler brings a sacrifice in the same way as an individual.

Chapter 3

Mishna 1

If an anointed priest transgressed and afterwards relinquished his high priesthood – He did not have time to bring the necessary sacrifice before he relinquished his high priesthood.

The anointed priest brings a bull – Even if it's after he relinquished his high priesthood. Later in our *Mishnah* it says he brings a bull. The priest was only mentioned because the *Mishnah* mentioned that the ruler brings a goat before he relinquishes his position, it teaches also that the high priest brings a bull.

And the ruler brings a goat – As it is written (Leviticus 4), “for the sin which he sinned,” which comes to teach that he brings a sin-offering just like the time at which he sinned.

Mishna 2

If the anointed priest relinquished his high priesthood, etc. – Even if he no longer performs the high priest's work he maintains his sacred status. There is no difference between the acting and past high priests except for the role and the bull brought on Yom Kippur and the tenth of an ephah that he offers every day. But a ruler who is no longer in power has the status of a regular person.

Mishna 3

They are regarded as regular people – As it is written (Leviticus 4), “when a ruler sins.” This means that he sins when he is the ruler. And the same for a high priest, as it is written (ibid), “when the high priest sins,” i.e. he sins while he is the high priest.

Mishna 4

He that has more garments – After there was no longer the anointing oil (i.e. after the destruction of the First Temple) the high priest entered the role wearing eight garments, as it is written (Leviticus 21), “that is consecrated to put on the garments.

Is the bull that is offered for [the unwitting transgression of] any of the commandments - One who merely wears more clothing does not bring a bull, the text is speaking of the high priest.

The service of the Day of Atonement – Only the high priest is fit to perform the Yom Kippur service. A serving priest and a former priest are equal.

They do not let their hair grow long, nor do they rend their clothes – It is written that the high priest does not grow his hair long and does not tear his garments.

They return the [accidental] killer [from the city of refuge] – If one of them dies, the killer leaves the city of refuge, as it is written (Numbers 35), “until the death of the high priest.”

Mishna 5

A high priest rends [his clothes] from below – If one of the high priest’s seven close relatives for whom he is obligated to mourn (father, mother, brother, sister, son, daughter or wife) dies, he rends his clothes at the bottom, from the hem that is close to his feet. When the Torah (ibid) states that the high priest shall not rend his clothes, meaning is that he should not rend them in a normal fashion.

From above – The chest close to the shoulder, like ordinary people.

Mourner (onen) – If one of the high priest’s seven close relatives for whom he is obligated to mourn (father, mother, brother, sister, son, daughter or wife) dies, he is considered a mourner by the Torah for the entire day when the death took place, whether the deceased is buried or not. From the day of death onwards, if the deceased is not buried he is considered a mourner according to the rabbis. On the day of burial he is considered a mourner by the rabbis even after the burial. The rabbis included the night after the death in the mourning period.

A high priest offers sacrifices while an onen but does not eat them – The sanctified parts. We learn this from Aaron’s words on the day that his sons, Nadav and Avihu, die, “Had I eaten sin offering today would the Lord have approved?” He was stringent about not eating but not about the sacrifice. Aharon was the high priest but his sons were ordinary priests and they were forbidden to sacrifice or to eat on that day.

Mishna 6

Whatever is more frequent than takes precedence – As it is written (Numbers 28), “Ye shall offer these beside the burnt-offering of the morning, which is for a continual burnt-offering.” Since it is written “the morning burnt offering” why does it say “the continual burnt offering”? The Holy One says that the more frequent takes precedence.

And whatever is more sacred than another – In this manner, we derive the priest because the *Mishnah* says “sacred.” We mean to begin first and to bless first and receive the first portion.

The bull of the anointed priest - If the high priest must atone and the community must atone, the law is that the one who performs the atonement must take precedence, as it is

written (Leviticus 16), “make atonement for himself, and for his house” and afterwards for the congregation of Israel.

Mishna 7

A man takes precedence over a woman – He is more sanctified than she is, because a man is obligated to perform all the commandments and a woman is not obligated in positive time-linked commandments.

A woman takes precedence over a man in respect of clothing – Because her embarrassment will be greater than that of a man.

Degradation – Rape/sexual assault. Sodomy.

The man takes precedence – Because it is natural for a woman and unnatural for a man.

Mishna 8

A Levi takes precedence over an Israelite – As it is written (Deuteronomy 10), “at that time the LORD separated the tribe of Levi” from the nation of Israel.

An Israelite over a mamzer (child of illicit marriage) – One is of a distinguished lineage and the other is not of a distinguished lineage.

Mamzer over a nateen (A nateen is a descendent of the Gibeonites who converted during the time of Joshua) – This one is not of impure descent and this one is of impure descent.

Nateen over a convert – This one was part of our nation and was raised in holiness while this one was not raised in our nation in holiness.

Convert over a slave – The convert was never part of a lowly occupation and this one was part of a lowly occupation.

The scholar mamzer takes precedence over the ignorant high priest – As it is written (Proverbs 3), “more precious than rubies,” more precious than the high priest.