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Thesis Summary

Title

"Acting for God": Rabbinic Reversals of Toraitic Mitzvot

Number of Chapters

5 (plus Introduction and Conclusion)

Goal of this thesis

This thesis set out to prove that the earliest Rabbis, particularly the *Tannaim* and the Palestinian *Amoraim*, believed that certain provisions of the Torah could be reversed. When circumstances demanded it, they could make law which was in direct opposition to *mitzvot* clearly laid down in the Torah, and they could do this openly, without apologetic or rationalization. The logical twists that we see in the Talmud which try, often with great effort, to prove that the Torah has always been in agreement with the current law, are more a characteristic of the Babylonian *Amoraim* and their successors than of the entirety of the early Rabbinic world. They felt the need to keep the Torah unchanged and unchangeable, a view which has been perpetuated in much of the Jewish world up until our own day. This view is not, however, inherent to Judaism, since it was not the view of some of our earliest Rabbis.

Contribution of this thesis

On the one hand, this thesis serves as a useful polemic against Jews who see the Torah, and Judaism, as monolithic and unchanging. That was not, however, the intent of this work. Rather, it is meant as a tool for studying Talmud. Accepting the *Bavli's* explanations of the Mishna's legislation as inherently correct will tell you little about what the authors of the Mishna truly intended, since the points of view of the authors of these two works were not identical. Each generation is inherently making comments about itself more than about those who came before it. By understanding each strata in its own context, at least to the extent which is possible, we can reach a more honest understanding of what the various Rabbis may have intended, and thus a more accurate understanding of these texts themselves.

How it is divided

This thesis is divided into five units, each dealing with one case or *halachic* construct in which the *Tannaim* were willing to overturn a Toraitic *mitzvah*, and in all but one case, in which Babylonian, but rarely Palestinian *Amoraim* did not accept a simple explanation of the Mishna's actions.

What kinds of material were used

This thesis is created almost entirely from primary texts: Mishna, Babylonian and Palestinian Talmud and *Sifrei D'varim*. The chapter on the Rebellious Son, basing itself on a historical analysis of the Ancient Near East, is the only section relying heavily on outside research.

"ACTING FOR GOD": RABBINIC REVERSALS OF TORAITIC MITZVOT

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Thesis Submitted in Partial Fulfillment of Requirements for Ordination

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I would like to thank Dr. Michael Chernick for his help in creating this thesis. From the selecting of a topic, all the way until the final details of this work, he has helped to make this document into something of which I can be proud. More importantly, though, he made the process of writing a thesis everything I hoped it would be: a learning experience done more for its own sake than to fulfill a requirement.

This thesis is dedicated to Hillary, my wife. She is my best friend and my constant support. Without her, very little would get done, and even less would be worth doing.

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Introduction

Change or Permanence?

The Torah is often referred to as the Constitution of the Jewish people. It defines the basic laws and legal system which form the foundation of the Jewish religion. The tradition views the Torah, though, as a constitution which contains no provisions for amending. The Torah, as handed down at Sinai, is seen as unchanging and inviolate. While most sectors of Judaism agree that the religion itself has changed, in one fashion or another, during its long history, fewer believe that changes to *mitzvot* explicitly contained in the Torah are possible. The Torah is on a different plane from Rabbinic authority; its dictates are absolute, and we can only work within the framework which it sets up.

The reality is not so simple. It is certainly true that the Torah possesses a special, unique sanctity, and, in general, its authority is much greater than that of the greatest religious authority. However, it is a legal document which comes from centuries before the Rabbinic period. It is unrealistic to think that so old a document would not have a single clause which was incompatible with some Jewish society and culture, down through the centuries. As time moved on, certain aspects of the Torah simply didn't fit the needs of the day, and had to be modified. Very often, small modifications would be enough to handle the problem, and interpretation of the Torah's text itself often facilitated these developments, allowing the constitutional text to be seen differently, and these interpretations provided a basis for modification that still could be viewed as based in the Torah. Occasionally, though, the changes that were required were much greater, even to the point of requiring a complete reversal of the law found in the Torah. As a result, there

are a number of laws in Judaism which are completely opposite from what the Torah says they should be.

There are some sectors of Judaism which do not share this point of view, believing instead that the Torah is an unchanging monolith, existing since Sinai in the exact same form that we see today. Of course, those who hold this view will admit, there are some laws which seem to us to be opposite of what the Torah says, but these can be explained through the Oral Law. According to this more traditionalist view, this Oral Law, which was eventually codified into the Mishna and then later commented on in the Talmud, was revealed at Sinai along with the Written Law, the Torah. Both the Oral and Written Laws are meant to be read and understood together. The Oral Law explains, in several places, how and why the Written Law doesn't mean what it seems to mean according its simplest reading. But, this is never an innovation; since the two bodies of law were revealed together; this more non-obvious interpretation of some specific Toraitic law has always been known, and in fact is and always was the only valid understanding of that law.

We will see a great deal of evidence which contradicts this latter view; in fact the laws found in the Torah are most definitely not understood today as they were in the past. However, what this more traditional view does accurately reflect is our religion's longstanding ambivalence towards these changes. Very often, once a change has been instituted by the *Tannaim*, the earliest generations of Rabbis, Rabbis from only a few generations later, mostly the *Amoraim*, would try to explain the changes away. Through various exegetical techniques, changes become non-changes, and the Torah remains constant.

Patterns of Change

Part of the goal of this thesis, then, is to bring examples which clearly show that the Torah has undergone change at the hands of the Rabbis. More than that, though, it will also attempt to find patterns in these changes. Some of these patterns are historical. As was already alluded to, it is the earlier generations of Rabbis who are most willing to assert their power in the face of Toraitic legislation. Those *Tannaim* had a much bolder, braver view of their authority, and seemingly had a much more fluid view of the nature of Torah. Similarly, we will see a geographic pattern emerge. Specifically, when the Rabbinic world splits into two major centers, Palestine and Babylonia, it also splits into two different ways to think, including thinking about how and why Toraitic laws might be modified. The *Amoraim* of the *Talmud Yerushalmi* show very little hesitation to embrace change; they are actually similar to the *Tannaim* in this respect, and are very unapologetic about their predecessors' willingness to modify the Torah. In contrast, the writers of the *Talmud Bavli* are extremely hesitant to allow any hint of Toraitic change to enter into the tradition. They will go to incredible lengths to avoid admitting that anything which previous Rabbis did was different from any Rabbi who came before them. These two patterns seem to be related in that the further one gets from the Mishna, either in time or in physical distance, the more the Torah is seen as unchangeable, and thus the more changes must be explained away.

Another pattern that we will see is *how* those Rabbis wrote Toraitic change out of the tradition. In many cases, rather than explain how a change wasn't a change, they instead attempt to prove that a Toraitic law wasn't Toraitic. They attempt to move the law in question from the purview of the Torah and into the realm of purely Rabbinic

legislation. Once they manage to do that, then there is no longer any problem with later Rabbis altering the law; Rabbis naturally have much more freedom in modifying their own laws than those of the Torah. It is a powerful technique, but not one without serious flaws, as we will see.

The final pattern which emerges from the texts is not one of method, but rather one of rationale. Reading motivation into these ancient texts is extremely difficult, especially in the case of the Mishna which is particularly terse and rarely gives reasons for what it does. However, there are enough examples to the contrary that we will be able to see that, the majority of cases, it is either an ethical consideration or concern for the community well-being which moves the Rabbis to modify or overturn Toraitic law.

Motivation for this thesis

The topic of this thesis is really a tool, not an end in and of itself. While, on the one hand, I wanted to have a chance to engage in more substantial Talmud study than I had in the past, I was also aware that merely going through a large section of Talmud, for example to explore the basis of some large *halachic* issue, would in fact give me a distorted view of reality. The traditional, more static view of the Talmud has found its way, in one way or another, into almost all successive commentaries, even to the point of informing and influencing various translations of the text. Learning to separate the various strata of Rabbinic writing, and trying to see the earlier layers as independent works with motivations which might be different from their successors, is a skill which will be necessary in all Talmud study which I will undertake in the future.

Method

The main technique which is used to analyze the various texts in this thesis is a historical deconstruction of the text. The traditional view is that the Mishna is a singular whole, and that the Talmud is likewise a unified document which, in addition, is never adding new insights to the Mishna or Torah but is instead always explaining how things have always been. Instead, I see them as separate, independent, and not necessarily internally consistent bodies of work. The Mishna is much more a commentary on its own time than on what came before, as is the Talmud. More than that, each document has layers which make the relationship between passages and even sentences within the same text uncertain. In other words, just because the Talmud might say that a certain Mishna passage means something, doesn't mean that I accept that as the final word on the Mishna. I will try instead to read the Mishna independently, and see if any conclusions can be drawn from it alone. Similarly, later generations of *Amoraim* do not have the final word on what earlier *Amoraim* may have been thinking or intending. Their words express their own understandings, not that of the Rabbis who came before them.

Obviously, this is an imperfect science. It is not always possible to define exactly what the different historical layers of any given text are. Quotes may be misattributed, making a tradition seem older than it really is, and there is rarely a way for us to be aware of this inconsistency. In addition, even if we *are* able to separate layers, we are often left with more questions than answers, particularly about the earlier texts. The reason that later writers were able to impose their views on earlier texts is that these texts, especially the *Mishna*, very rarely explain themselves in great detail. Later generations' explanations of these earlier works are often completely plausible, even if they aren't

definitive. Still, even with these limitations, we will see that a great deal can be learned from this technique. If we remove the assumption that later texts are always correct in their commentary on earlier texts, we will find alternate explanations which are much more persuasive, and even occasionally find evidence that those alternate explanations are more tenable. We will learn that, almost without a doubt, the oldest layers of Judaism saw the Torah, and their own authority, in a fundamentally different way than later generations did.

Chapter 1 – Prozbul

In Deuteronomy 15, the law of שמיטה is established. Every seven years, all creditors must release their debts, allowing those who had borrowed money to be freed of the obligation to repay that money, or at least as much as had not already been repaid. As the Ancient Near East moved from a primarily agrarian society to a more urban one, the practice of offering loans grew from a rare occurrence, mainly intended to help those in desperate times, to a normal, almost day-to-day business transaction. With that change, the שמיטה release must have become an incredible hardship on creditors, and surely made some, if not all of them reluctant to offer a loan when שמיטה was near. Rabbi Hillel discovered a way around this problem. Noticing that the law to release the debts was directed at the people, not at the courts, he instituted a legal construct known as the פרוזבול. Through this, creditors were able to transfer their loans to the courts, where they would not be released, until the end of the שמיטה year. Hillel had found a way to all but completely circumvent the laws of שמיטה.

Later generations of Rabbis were very uncomfortable with Hillel's legislation; they didn't believe that a Rabbi, even one as great as Hillel, had the right to essentially overturn a law found in the Torah. Since they were sure that Hillel would never have done such a thing, they had to search for alternate explanations for what exactly Hillel had done. The answer that is eventually settled on is that there are two different enactments of שמיטה. The original, Toraitic שמיטה long ago became invalid, and was later replaced by a purely Rabbinic שמיטה. This legislation, being entirely Rabbinic, could be overridden by Hillel with no discomfort, unlike the earlier, Toraitic שמיטה.

The problem with this explanation is that there is no evidence to support the later Rabbis' understanding. A look at the earliest sources which describe what Hillel did, starting with *Mishna Sheviith*, will show that there is no reason whatsoever to believe that Hillel wasn't working within the context of a Toraitic שמיטה. In fact, there are some passages which simply don't make sense otherwise. The explanations found in the *Bavli's* tractate *Gittin* are the product of a different generation of Rabbis with a different view of the relationship between Toraitic and Rabbinic power, retroactively placed onto an earlier discussion.

Mishna Sheviith, 10:3-4

פרוסבול אינו משמט, זה אחד מן הדברים שהתקין הלל הזקן, שראה את העם שנמנעו מלהלוות זה את זה ועברו על מה שכתוב בתורה +דברים ט"ו+ השמר לך פן יהיה דבר עם לבבך בליעל וגו', עמד והתקין פרוסבול;

וזה הוא גופו של פרוסבול: מוסרני לכם פלוני דיינין שבמקום פלוני, שכל חוב שיש לי אצל פלוני שאגבנו כל זמן שארצה, והדיינים חותמים למטה או העדים.

A *prozbul* isn't cancelled [by the *shmita* year]. This is one of the things which Hillel the Elder decreed; When he saw that the people refrained from [giving] loans to each other, and violated what was written in the Torah: *Guard yourself, lest there will be a base thought in your heart, etc.* (Deut 15:9), Hillel decreed *prozbul*.

This is the body of the *prozbul*: I transfer to you, persons so-and-so, the judges in such-and-such place, all obligations that I have, [so] that I may collect [from those obligations] whenever I wish. And the judges or witnesses sign at the bottom.

These *mishnayot* are the basis of the פרוזבול law, explaining how and when it came into being, its most basic functioning, and its basic form as well. As we will see, the simple formulation found here will give the later Rabbis more than enough room for interpretation, but the simplest reading of this law seems clear: any loan that is going to be cancelled out by the שמיטה year can be passed over to the judges, or other public figures, and thus not be cancelled. The laws of שמיטה can, in fact, be completely avoided. No conditions or restrictions are stated, or hinted at, here.

It seems that Hillel is doing something extraordinary: he is, in essence, canceling out a Toraitic commandment. The laws of שמיטה are rendered essentially null and void through the institution of the פרוזבול. How could a Rabbi, even one as important as Hillel, do such a thing? Although the Talmud will have a very different explanation, the Mishna explains this act by Hillel's finding another *mitzvah* that seems to be standing in opposition to שמיטה, and then prioritizing the two *mitzvot*.

That text that Hillel relies on, Deuteronomy 15:9, is interesting. The "base thought" that is referred to is defined in the next part of the verse: "... 'The seventh year, the year of remission, is approaching,' so that you are mean to your needy kinsman and give him nothing." Clearly, the proof text is perfect for Hillel – avoidance of loans near the שמיטה year is a negative commandment, and that is exactly what the Mishna told us the people of his day were doing. We are now faced with the need to pick which *mitzvah* would be better to violate: the injunction to obey the שמיטה laws or the injunction to not refrain from giving loans near the time of שמיטה. Without saying *why*, Hillel decides that giving the loans is the more important of the two.

As we shall see shortly, the later Rabbis, particularly the *Amoraim*, were very uncomfortable with Hillel negating a precept in the Torah, even if he did so by relying on another Toraitic law. To get around that situation, they will explain that the שמיטה that was in effect during Hillel's time was not truly the שמיטה found in the Torah, but a purely Rabbinic construct put into place after the שמיטה was already cancelled for other reasons. Thus, Hillel was acting only to modify Rabbinic law, not Toraitic.

What we see from the *Tannaitic* sources, though, is that there is no evidence for such a claim. Nothing is mentioned of "שמיטה in our time," or "Rabbinic שמיטה," or anything of the sort. Hillel just talks of שמיטה. Stronger evidence is found in the prooftext that Hillel relies on. He claims that his fear was that the people were "[violating] what was written in the Torah," namely the Torah's commandment not to avoid lending prior to the שמיטה year. If, in Hillel's mind, what was being violated was not a Toraitic law, then saying that the people were violating "*what was written in the Torah*" would be illogical, as would using the prooftext from Deuteronomy 15:9 to redress the matter. A reference to Rabbinic authority would be expected, instead.

There is also some historical evidence that the שמיטה being observed in Hillel's day was Toraitic. We will see that the Rabbis tie together observance of שמיטה with that of יובל, saying that one cannot be in force without the other (that linkage will be the ultimate cause for the claimed cancellation of the שמיטה). Josephus' accounts of life in the second Temple period shows no break in יובל observance, even though יובל was a much greater hardship than שמיטה, because it cut off the nation's food supply. Despite the hardship, Josephus relates that the יובל laws were rigidly observed. Even during times

of war, it seems that the Jews were observing *יובל*, because the famine produced by *יובל* observance was given partial credit for the Roman victory over *Beth Zur* in I Maccabees. Even as late as the reign of Julius Caesar, tax laws had to be modified to account for the *יובל*, sure evidence that it was still being observed.¹ Such fastidious observance, even in the face of famine, war and oppression, makes a strong case for *יובל* still being in effect with Toraitic authority; people would surely be more likely to ignore the laws when faced with massacre if they were merely Rabbinic enactments. That, tied with the lack of historical evidence of any break in *יובל* or *שמיטה* observance, and the lack of any reference to the non-Toraitic nature of *שמיטה* in the Mishna, makes it hard to support the view that Hillel was working in the context of a Rabbinic *שמיטה*. He was working within the framework of Toraitic law, and apparently was comfortable making the changes that the Mishna attributes to him.

Sifrei D'varim Piska 113

ואשר יהיה לך את אחיך, ולא של אחיך בידך מיכן אתה אומר המלוה על המשכון אין משמט. את אחיך תשמט ירך, ולא המוסר שטרותיו לבית דין מיכן אמרו התקין הלל פרוסבול מפני תיקון העולם שראה את העם שנמנעו מלהלוות זה את זה ועברו על מה שכתוב בתורה עמד והתקין פרוסבול וזהו גופו של פרוסבול מוסרני אני לכם פלוני ופלוני הדריינים שבמקום פלוני כל חוב שיש לי שאגבנו כל זמן שארצה והדריינים חותמים למטה או העדים

That which is yours and is with your brother (Deut 15:3). And not what is your brother's and is with you. From this, you learn that a loan given with collateral isn't released [by the *shmita*]. [*That which is with*] Your brother, your hand shall

¹ *Encyclopedia Judaica*, s.v. "Sabbatical Year and Jubilee."

release, and not a loan who's documents have been handed over to the *beit din*. From this they said "Hillel established *prozbul*."

Midrash Sifrei D'varim is a middle *Tannaitic* work, falling in between that redaction of the Mishna and the Talmud. It is in this period that we see the first signs of Rabbinic discomfort with Hillel's *takkanah*. Hillel's only explanation for his action was that he was favoring one commandment ("don't refrain from loans") over another ("release loans every seven years"). The writers of *Sifrei* were willing to accept his decree, but they wanted to better explain how it came to be that Hillel had the authority to make it, and so they turn to textual exegesis for their explanation. According to the *Sifrei* passage, there are two ways that the commandments of שמיטה can be circumvented, and both are hinted at in the text. First, the phrase "...and is with your brother" implies that if the lender has the loan in his possession, that is, he takes collateral, then the שמיטה release doesn't affect him. Similarly, the Rabbis noticed, the same wording also implies that the loan, that is, ownership of the loan, must be in the individual's possession. If it was to be handed over to the court, then the law of release again would not apply. It is this latter loophole which פרוזבול exploits. It is a form for moving the loan from private to public ownership, where the שמיטה laws inherently do not apply.

According to the *Sifrei*, then, Hillel was actually doing very little that was original. According to their exegesis, any loan that is handed over to the courts is exempt from שמיטה, and *it has always been this way*. This loophole is built directly into the Toraitic commandment. All that Hillel did was standardize a method for handing over the loan, and thus made it easier for people to make use of this escape clause. If Hillel was indeed working with a Rabbinic version of שמיטה, then these hermeneutic devices would

be both unnecessary and irrelevant; he simply would have modified a Rabbinic decree and been done with it. The very fact that *Sifrei* needed to justify Hillel's *takkanah* here, and did so through a scriptural verse, proves that he was working on the basis of a Toraitic commandment.

Yerushalmi Sheviit Perek 10, Daf 39, Amud 2, Halacha 2

It is in the *Talmud Yerushalmi* where we see the first real evidence that the Rabbis were troubled by Hillel's willingness to modify Toraitic law, and so it is here that we first see their attempt to explain it by relegating the discussion to the purely Rabbinic realm. But here we also see some evidence that not all Rabbis saw it that way, and some still may have believed that Hillel was acting to modify Toraitic law.

ג' פרוזבול אינו משמט זה אחד מן הדברים שהתקין הלל הזקן כשראה שנמנעו
העם מלהלוות זה את זה ועוברין על מה שכתוב בתורה שני השמר לך פן יהיה
דבר עם לבבך בליעל לאמר וגו' התקין הלל פרוזבול

ד' זהו גופו של פרוזבול מוסר אני לכם איש פלוני ופלוני הדיינים שבמקום
פלוני שכל חוב שיש לי שאגבנו כל זמן שארצה והדיינים חותמין למטן או
העדים

מיכן סמכו לפרוזבול שהוא מן התורה ופרוזבול דבר תורה כשהתקין הלל
סמכוהו לדבר תורה אמר ר' חונה קשייתא קומי רבי יעקב בר אחא כמאן דאמ'
מעשרות מדבר תורה והלל מתקין על דבר תורה אמר רבי יוסי וכי משעה שגלו
ישראל לבבל לא נפטרו מן המצות התלויות בארץ והשמט כספים נוהג בין
בארץ בין בחוצה לארץ דבר תורה חזר רבי יוסי ואמר וזה דבר השמיטה שמוט
בשעה שהשמיטה נוהגת דבר תורה השמט כספים נוהג בין בארץ בין בחוצה
לארץ דבר תורה ובשעה שהשמיטה נוהגת מדבריהן השמט כספים נוהגת בין
בארץ בין בחוצה לארץ מדבריהם תמן אמרין אפי' כמאן דאמר מעשרות דבר
תורה מורה בשמיטה שהיא מדבריהן דתני וזה דבר השמיטה שמוט רבי אומ' שני
שמיטין הללו שמיטה ויובל בשעה שהיובל נוהג שמיטה נוהגת דבר תורה פסקו
היובילות שמיטה נוהגת מדבריהן

Mishna: A *prozbul* isn't cancelled [by the *shmita* year]. This is one of the things which Hillel the Elder decreed; When he saw that the people refrained from [giving] loans to each other, and violated what was written in the Torah: *Guard yourself, lest there will be a base thought in your heart, etc.* (Deut 15:9), Hillel decreed *prozbul*.

This is the body of the *prozbul*: I transfer to you, persons so-and-so, the judges in such-and-such place, all obligations that I have, [so] that I may collect [from those obligations] whenever I wish. And the judges or witnesses sign at the bottom.

Gemara: From here we find support for *prozbul* being from the Torah, and if *prozbul* is Toraitic then when Hillel decreed it, he based it on Torah. Rav Huna said: I presented a problem before Rav Yaakov bar Aha. According to one who says that tithing is Toraitic, has Hillel decreed something which supercedes the Torah? Rabbi Yose said: and isn't it so that from the time that Israel was exiled to Bavel we were released from the *mitzvot* which depend on the land? The release of debts applies both in the land of Israel and outside of the land, according to the Torah.

Yose responded [to his own challenge] and said: *And this is the manner of the release* (Deut 15:2). Whenever the *yovel* laws apply by Toraitic authority, the *shmita* laws apply both in the land and outside the land, with Toraitic authority. And, when the *yovel* laws apply by Rabbinic authority, the *shmita* laws apply both in the land and outside the land, with Rabbinic authority. There [in Babylon], they

say that even one who says that tithing is Toraitic, they agree that *shmita* is Rabbinic, as it is taught: *And this is the manner of the release*. Rabbi says: there are two releases: *shmita* and *yovel*. Whenever *yovel* applies, *shmita* applies with Toraitic authority. They annulled *yovel*, so *shmita* applies with Rabbinic authority.

In this passage, we see for the first time what will be the dominant tactic taken in the *Bavli*: rather than starting by trying to understand the nature of Hillel's actions, the text instead tries to understand the nature of the שמיטה law on which Hillel was acting. If it turns out that the שמיטה that was in effect during Hillel's day had only Rabbinic authority, then anyone who is uncomfortable with Hillel modifying Toraitic law will be pacified. So, the question begins to circulate: when do the Toraitic laws of שמיטה apply? It seems that the first attempt to answer this is the most direct: possibly שמיטה is one of the laws which only apply so long as the Jewish community is living in Israel. It is important to note that these laws are not "laws that apply only in Israel," but laws that apply only when the community as a whole is living there. If some Jews were to remain behind while most went into exile, these laws would still not apply to them. However, this tactic doesn't seem to be of help at first, because Rabbi Yose informs us that שמיטה does not rely on our residing in Israel to be in effect.

But he isn't through. Yose immediately continues on, referring to a teaching from Rabbi (Judah HaNasi) discussing two different types of שמיטה. The original commandment detailing the laws of שמיטה, found in Deuteronomy 15:2, uses the root ט.מ.ש, meaning "cancel," twice. Using the standard Rabbinic hermeneutic which says that any repeated word must have an additional meaning, Rabbi infers that there were two

types of remission that were being described: remission of monetary loans every seven years, the שמיטה, and allowing the land to lie fallow every fifty years, the יובל. However, the יובל is one of the laws that was only considered to be in effect as long as the Jewish people, as a whole, or at least as a majority, were still living *Eretz Yisrael*. Furthermore, since the two remissions are linked in the Torah by the doubling of ש.מ.ט, when one of them doesn't apply, both are negated. Thus, even though the שמיטה laws are not themselves tied to the land of Israel, they are indirectly dependent on the land, through their connection with יובל.

The Yose being referred to here is most likely Rabbi Yose ben Zevida, a fourth generation Palestinian *Amora*. He seems to be the one working out the details of the argument, even starting from the position that שמיטה could actually be in force, despite the Diaspora. He appears to be bringing in a teaching known in *Bavel*, but not well known in Palestine. This definitely seems to be a moment of transition, where the understanding of Hillel's *takkanah* moves from the realm of Torah into one of strictly Rabbinic authority.

Gittin 36a-b

ומי איכא מידן, דמדאורייתא משמטא שביעית, והחקין הלל דלא משמטא?

And is there such a thing [is it possible], that according to Torah the *shmita* year cancels [debts], and Hillel decreed that it doesn't cancel [those debts]?

It is in the *Bavli* where we see most clearly the later Rabbis discomfort with Hillel's *takkanah*. The *Mishna* handled the effective cancellation of the שמיטה regulations in an almost matter-of-fact way: Hillel decreed it, and it was done. There is

no record of any discomfort or disagreement. The *Yerushalmi* text questions the simple understanding, but seemingly in a calmer, almost academic way. The passage in *Gittin* in the *Bavli*, in contrast, immediately expresses a problem with Hillel's *takkanah*. The idea that a Rabbi could overturn something in the Torah, even by using an opposing commandment, isn't taken as a given. In fact, it seems a near impossibility. The stock rhetorical phrase *מי איכא מיד*, "can there be such a thing such as...", seems to show that the Talmud is not accepting the simple explanation as a possibility. There is no way that Hillel would be allowed to overturn a Toraitic *mitzvah*, so an alternate explanation will have to be found.

אמר אביי: בשביעית בזמן הזה, ורבי היא; דתניא, רבי אומר: +דברים ט"ו+ וזה
דבר השמיטה שמוט - בשתי שמיטות הכתוב מדבר, אחת שמיטת קרקע ואחת
שמיטת כספים, בזמן שאתה משמט קרקע - אתה משמט כספים, בזמן שאי אתה
משמט קרקע - אי אתה משמט כספים.

Abaye said: In *shmita* during our time. And that opinion is from Rabbi. As it is taught in a *baraita*, Rabbi says: *This shall be the nature of the remission: every creditor shall remit...*(Deut 15:2). The scripture speaks of two "remits" – one is the remission of land, and one is the remission of money. During a time when you remit land, you remit money. During a time when you don't remit land, you don't remit money.

The Rabbis decreed that [we shall] cancel [debts], as a remembrance of *shmita*. Hillel saw that the people refrained from [giving] loans to each other, he stood and decreed *prozbul*.

The Rabbis of the *Bavli* begin to explain Hillel's action in the same way as in the *Yerushalmi*: by changing the nature of the שמיטה itself. They, too, rely on Rabbi's explanation of the two different types of שמיטה, which are inferred from the repetition of the root ט.מ.ט in the Torah verse, and then the cancellation of יוכל which now leads to the cancellation of שמיטה. A slight change comes when the *Bavli* explains that rather than keep the שמיטה around, just now under a different authority, as the *Yerushalmi* explains it, the Rabbis established a wholly new thing: a זכר, a remembrance of the שמיטה. It was explicitly this שמיטה upon which Hillel was acting: the זכר, not the true שמיטה. While not stated explicitly, it is understood that while Hillel would never be allowed to overturn a *mitzvah* that is found in the Torah, he certainly has the power to overturn or "tailor" a Rabbinic injunction.

So, where did this explanation come from, and how authentic can it be? Could the *Bavli* be passing on a true tradition, one that Hillel himself was aware of and used to justify his actions? It is impossible to say 'no' definitively; the lack of direct evidence to the contrary leaves that possibility open. However, that kind of argument from silence, especially in the face of other evidence, pushes the limits of credibility.

The dates of the Rabbis involved in the discussion are very instructive. Hillel was, of course, one of the earliest Rabbis, usually being dated as living between 30 B.C.E and 40 C.E. Rabbi, Yehuda HaNasi, was a member of the last generation of *Tannaim*, and probably flourished between 170-200 C.E (and if, as some sources claim, we are actually hearing from Yehuda Nesi'a in this case, those dates would get pushed forward another 50 years), and Abaye was a 4th generation *Amora* (matching up with Yose, his parallel in the *Yerushalmi* text), which places him chronologically between 320-350 C.E. So, there

is at least 150 years between Hillel's enactment of פרוזבול and the first reference to the Rabbinic שמיטה, and then another 150 years before Abaye (or Yose) uses that distinction to explain Hillel's actions. In addition, this passage in *Gittin* is the only place in the entire Talmud where this double שמיטה is mentioned. It is not a generally accepted tradition that is applied here as it is elsewhere, but a unique statement used only to prove this one point: that Hillel's שמיטה wasn't Toraitic. Again, it is certainly possible to make the argument from silence that just because we don't know of this tradition outside of this context doesn't mean that it didn't exist. But it is also at least equally possible that the tradition to which Yehuda HaNasi and Abaye refer was unknown to Hillel, and only applied *ex post facto* to his creation of פרוזבול. Perhaps the only evidence that offers some support to the "two שמיטה" theory is its appearance in both the *Bavli* and *Yerushalmi*. That proves that the teaching was at least old enough for both communities to know of it. However, that doesn't mean that it goes as far back as Hillel. The Mishna's and *Sifrei*'s exclusion of the "two שמיטה theory," along with *Sifrei*'s inclusion of an alternative, wholly Toraitic exposition of the *takkanah* makes it hard to contend that Hillel knew of two different types of שמיטה. It is simpler and more logical to assume that Hillel was speaking of the only שמיטה that he knew: the one commanded in the Torah. The attempt to change that, found both in the *Bavli* and *Yerushalmi* can easily be seen to reflect a later generation's discomfort with the earliest Rabbi's willingness to modify Toraitic law.

As it continues to analyze the *takkanah* of פרוזבול, the *Bavli* truly shows how reluctant it is to grant Rabbis any power over the Torah. The text continues to try to limit the applicability of the פרוזבול, knowing that the more it limits the scope and radicality of

Hillel's actions, the more it clearly defines the Torah as authoritative and unchanging.

We will see that this is not the only place the Rabbis of the Talmud use this approach: explaining what seems to be inappropriate application of Rabbinic authority by limiting the entire discussion to the realm of Rabbinic enactments, thereby keeping the Torah separate and, hence, unsusceptible to change.

שב ואל תעשה

Strangely, by resolving the issue of פרוזבול and Rabbinic authority, the Talmud introduces a new, very similar problem. This new debate will show how greatly opposed the *Amoraim* were to any intrusion into Toraitic authority. It is now well established in the Talmud that no Rabbi could overturn a Toraitic שמיטה. What, then, would give any Rabbi the right to institute a new שמיטה? If the Torah declared that it should be null and void under certain circumstances, then wouldn't instituting a new, Rabbinic שמיטה also be a modification of Toraitic law? The *Bavli* will now have to attempt to explain how Hillel was able to do so.

ומי איכא מירי, דמדאורייתא לא משמטא שביעית, ותקיננו רבנן דתשמט? אמר אביי: שב ואל תעשה הוא. רבא אמר: הפקר ב"ד היה הפקר, דאמר ר' יצחק: מניין שהפקר ב"ד היה הפקר? שנאמר: +עזרא י'+ וכל אשר לא יבוא לשלשת הימים כעצת השרים והזקנים יחרם כל רכושו והוא יבדל מקהל הגולה. רבי אליעזר אמר, מהכא: +ויהושע י"ט+ אלה הנחלות אשר נחלו אלעזר הכהן ויהושע בן נון וראשי האבות וגו', וכי מה ענין ראשים אצל אבות? לומר לך, מה אבות מנחילין את בניהם כל מה שירצו, אף ראשים מנחילין העם כל מה שירצו.

And is there such a thing, that according to the Torah the *shmita* year doesn't cancel [debts], and the Rabbis decreed that [this new *shmita*] does cancel [debts]? Abaye said: it is [a case of] sit and do nothing. Rava said: That which the

beit din declares ownerless is ownerless, as Rabbi Yitzhak said: From where do we learn that 'that which the *beit din* declares ownerless is ownerless?' As it is said: *And that anyone who did not come in three days would, by decision of the officers and elders, have his property confiscated and himself excluded from the congregation of the returning exiles* (Ezra 10:8). Rabbi Elazar said: From here: *These are the portions assigned by lot to the tribes of Israel by the priest Eleazar, Joshua son of Nun, and the heads of the ancestral houses, etc.* (Joshua 19:51). Now, what is the issue [connection] between heads [leaders] and houses [lit. fathers/ancestors]? Just as fathers bequeath to their children all that they wish, so to do leaders bequeath to the people all that they wish.

Having limited the authority of the פרוזבול to the purely Rabbinic realm, the Talmud faces the problem of the basis of the right to re-institute שמיטה. The argument made before was that, in essence, the suspension of שמיטה outside of Israel was an inherent part of the law, contained, albeit subtly, in the original text. What right, then, would anyone have to re-institute שמיטה? The Talmud offers two separate explanations: "שב ואל תעשה" and "הפקר בית דין הפקר." The first is the principle that it is always better to sin by *not* doing something, an act of omission, rather than by actively doing something, an act of commission. So, although it could be considered a sin to cancel loans which should not be cancelled, the effect of such a cancellation is merely an *inaction*: the non-collecting and non-payment of owed debt. This logic isn't completely sound, though. שב ואל תעשה makes the most sense when trying to decide which of two laws must be violated; if one is an active violation and one passive, choose the passive one. In this case, by contrast, we are not choosing between two laws; the choice is simply

whether or not to obey to cancellation of שמיטה. Passively breaking that law is indeed better than breaking some other law through active means, but it is still worse than obeying that law and breaking no other. A minor sin is still worse than no sin!

The Rabbis seem to agree that שב ואל תעשה is not a particularly useful argument here, so they resort instead to using הפקר בית דין הפקר, literally “That which is appropriate by the court is [validly] appropriated. According to this principle, the *beit din* has the right to appropriate money as it sees fit (often referred to as the Rabbinic right of eminent domain). That right, well founded by *two* separate proof-texts, give the Rabbis a way to simulate an active שמיטה: they simply declare any money which, under the old laws, would have been owed to the lender to instead be ownerless, and then pass that money onto the one who took out the loan. This is all being done independent of any true שמיטה regulation, and all according to Toraitic law. In other words, the Torah may have said that if you are not in the land of Israel, then debts are not automatically cancelled. However, even in that situation, still according to the Torah, the Rabbis and the courts will *always* have the right to cancel anyone’s debts. This seems to be the argument that the Rabbis settle on, even if it contradicts the earlier passage which explicitly called this a new שמיטה made as a remembrance of the first.

The fact that they were able to explain the Rabbis’ new זכר doesn’t change the important fact: they felt that they *needed* to explain it. To the late Babylonian *Amoraim*, even the seeming reinstatement of a (to them) Biblically defunct institution makes them uncomfortable. This was not true of those living in Palestine; the *Amoraim* of that area seemed to have no problem granting their predecessors the right to continue the שמיטה. The progression that we have seen finds a climax here: the further we move away from

the *Tannaim*, both in time and in location, the more unchangeable and unquestionable the Torah is.

Chapter 2 – The Rebellious Son

In Deuteronomy 21:18-21, the Torah lays down the law of the Wayward and Rebellious son. According to that law, a son who has proven himself to be incorrigibly defiant can be brought before the city elders and, after some process is gone through, be stoned to death by the entire town.

This law provides us with a very different case of how Rabbinic power can interact with Toraitic *mitzvot*. To the earliest Rabbis, this law is actually a law which was never meant to be followed, at least in its plain-sense understanding. There is almost complete unanimity among them that this law was simply not meant to be taken simply or literally. We will see that their writings thus become a progressive limitation of the law to the point where it is all but completely nullified. However, it is not the case, as it was with *Prozbul*, that the Rabbi see *themselves* as the ones limiting or altering the law. Rather, they are expressing what they see as the true and eternal intention of the law, even if that intention isn't obvious to the casual reader.

Standing in opposition to those Rabbis is the historical context from which the Biblical text came. Although there are no direct parallels in the Ancient Near East to the law of the Rebellious Son, the law does fit well into the ancient legal systems from which Judaism grew, as well as other Toraitic legislation regarding the family and filial obedience. It would appear that while the Rabbis believe that a law such as this could never be intended to be an active piece of legislation might seem sensible to us, their legal and ethical heirs, there is no reason whatsoever to deny the possibility, or even the probability that this law was originally intended to be implemented as written, or at least nearly so.

Biblical Material

Deuteronomy 21:18-21

כי יהיה לאיש בן סורר ומורה איננו שמע בקול אביו ובקול אמו ויסרו אותו ולא ישמע אליהם: ותפשו בו אביו ואמו והוציאו אותו אל זקני עירו ואל שער מקמו: ואמרו אל זקני עירו בננו זה סורר ומורה איננו שמע בקולנו זולל וסבא: ורגמזו כל אנשי עירו באבנים ומת ובערת הרע מקרבך וכל ישראל ישמעו ויראו

When a man has a wayward and rebellious son, who does not heed his father or mother and does not obey them even after they discipline him, his father and mother shall take hold of him and bring him out to the elders of his town at the public place of his community. They shall say to the elders of his town, "This son of ours is disloyal and defiant; he does not heed us. He is a glutton and a drunkard." Thereupon the men of his town shall stone him to death. Thus you will sweep out evil from your midst: all Israel will hear and be afraid.

Although the section of Torah that lays down the law of the Rebellious Son is very small, and very little is known about the historicity and implementation of the law in reality, some details can be uncovered. By putting this seemingly strange law in the context of familial dynamics in the Ancient Near East, we can come to understand quite a bit about it, including *why* such a law might have made sense to our ancient counterparts, and therefore why we don't have to doubt that this law could once have been meant as true, active legislation.

The Ancient Near East

One of the defining characteristics of the Ancient Near East was the centrality of the family unit. Many laws that we now consider to be civil matter, such as marriage, at that time were completely in the domain of the family and, more specifically, the head of the household. The family unit, especially in terms of obedience, was seen both as the prototype as well as the basic building block for society in general. That information is critical for understanding laws forbidding disobedience within families. These acts of rebellion are not just rude or improper; they are seen as the first steps down a slippery slope which could eventually lead to societal ruin. Preserving the family structure was seen as the same as preserving the societal hierarchy of the time.²

Children's obligations towards parents extended beyond what we would normally consider to be included by the typical word "honor," as in "honor your father and mother." It was a more active pursuit. The Akkadian cognates to the Hebrew root כ.ב.ה probably implied some level of care-taking, not just speaking well of and showing deference to, as the English would imply.³ One of the best examples of a text showing this relationship is the Ugaritic "The Tale of Aqhat," which reads in part:

Surely there's a son for him like his brethren's,

And a scion like unto his kindred's!

He give oblation to the gods to eat,

Oblation to drink to the holy ones,

...

² Tigay, Jeffrey H., *Deuteronomy*, vol. 5 of *JPS Commentary*. Philadelphia: The Jewish Publication Society, 1989, 196.

Who sets up the stelae of his ancestral spirits,
In the holy place the protectors of his clan;
...
Who smothers the life-force of his detractor,
Drives him off who attacks his abode;
Who takes him by the hand when he's drunk,
Carries him when he's sated with wine;
...
Who plasters his roof when it leaks,
Washes his clothes when they're soiled."

Clearly, in that society, at least, a son was expected to be as much a helper to his father as anything else.

In contrast to this one example, most of the evidence that we have speaks not of what a son must do for his father, but rather of what happens when a son does not live up to his filial obligations, whatever they may be. The code of Hammurapi, for example, says that any child of a courtier who disowns his parents shall have his tongue cut off or his eye gouged out.⁴ Striking his father results in loss of the hand.⁵ Clearly, the general attitude was that a child *must* act with proper deference to his or her parents. It is worth noting that, as we will see, the Torah actually calls for a harsher punishment in cases of parental disrespect, including execution. This could reflect a greater importance of the family in Israelite society, or it could be a simple rhetorical exaggeration, as many

³ Ibid., 70.

⁴ Roth, M., *Law Collections from Mesopotamia and Asia Minor*, laws 192-193, 120.

⁵ Ibid., law 195.

suspect. Hammurapi also allows explicitly for leniency in some cases. First offences, in particular, do not always receive the same punishment as repeated transgressions.⁶ The harshest punishments seem to be reserved for repeat offenders, an idea which will come up in the Toraitic, and Rabbinic, legislation as well. Other nations in that area had similar legislation. Egypt and Assyria, for example, both had laws regarding respecting parents, some of which were very similar to legislation found in Proverbs,⁷ which we will examine later.

Laws in the Torah

That then, was the context in which the Torah was written; one where family was a central unit whose hierarchy had to remain undisturbed, especially the power dynamic between parents and children, and severe corporal punishments could be used to protect that hierarchy. So, it should come as no surprise that the Torah demands that all due honor and care be given to one's parents. Although there is little saying exactly *what* must be done (as in The Tale of Aqhat), there are many pronouncements of general attitude and behavior. The most famous, and in essence, the base law from which all others flow, is from the Decalogue. Exodus 20:12 (The retelling in Deuteronomy 5:16 has very similar language) reads "Honor your father and your mother, that you may long endure on the land that the Lord your God is assigning to you." The simplicity of this statement hides some powerful elements: firstly, the only two things that we are ever told to honor are God and our parents, from which we can infer some special importance for

⁶ See Ibid., laws 168-169, 113.

⁷ Scott, RBY, *Proverbs*, vol 18 of *Anchor Bible Commentary*. Garden City: Doubleday & Co., 1965, 122.

the latter, as well as the former.⁸ Secondly, this is the only law in the Decalogue which includes its reward and punishment. Interestingly, the punishment, not living long on the land, makes sense when you consider the social implications of not honoring one's parents; a breakdown in the family can lead to a breakdown of society, leading to some type of non-peaceful life. It can almost be read as a prediction, more than a punishment or reward.

More specific laws are given in Exodus 21:15, 17 and Leviticus 20:9. Here, we learn that striking a parent, or insulting a parent, is punishable by death. Of course, it must be realized that "insult" is probably a poor translation of the root ל.ל.ק. That root can be used as an antonym for the roots כ.ב.ר and כ.ב.ר (see Deut. 13:9, 20:16), so it probably has a much stronger meaning, along the lines of "curse." Since in the ANE curses were believed to have a great deal of actual power, it makes sense to legislate strongly against them; this isn't capricious legislation. The harshness can also be explained from ל.ל.ק being the opposite of כ.ב.ר; insulting/cursing a parent is, then, a direct violation of the Decalogue, so a very serious crime.⁹ Striking the parent is the specific case which was alluded to before, where the code of Hammurapi is actually more lenient than the Torah, calling only for dismemberment, not death.

The largest number of statements about honoring parents can be found in Proverbs, and through them, some idea of how the relationship between father and son was viewed can be discerned. Proverbs 10:5 demands that the son work hard for the father (the closest we have to a positive, detailed description of expectations). 3:12 ¹⁰

⁸ Tigay, loc. Cit., 113.

informs us that it is a loving relationship (as does Psalms 103:13). 1:8 puts a demand on the father, that he teach his children the correct path, and not let them fall in with sinners. Interestingly, the idea of keeping them away from other sinners will find mention in the Talmudic discussion of the Rebellious Son laws, discussed below. 13:1 makes it clear that discipline is part of the father's job. The overall image is that of a father who is a mentor and teacher, showing his child the correct path and being responsible for their journey along it (see 19:26 and 28:7). That responsibility can explain why we learn, several times, that a father receives joy when his child behaves properly, and embarrassment when he or she doesn't (see 10:1, 15:20, 17:25, 19:13). The child's actions are a direct reflection on the parents, who are trying to turn the child into one who will be a functioning member of their society.

The Law of the Rebellious Son

Given all of that background, the law of the Rebellious Son can start to make some sense. What might seem a strange, unfair law when viewed in isolation, especially from our modern context, begins to logically fit into a larger pattern of demanding absolute filial loyalty. In fact, rather than being incredibly harsh, as it might seem at first, the legislation which the Israelites were living under may have been more conciliatory than that found in many surrounding societies. Given the seriousness of violations of family order, the norm in the ANE for dealing with troublesome children may have been even harsher. These laws could have been intended to *limit* parental authority.¹⁰ In much

⁹ Murphy, R., ed. *Proverbs*, vol. 22 of *World Biblical Commentary*. Nashville: Thomas Nelson Publishers, 1998, 323.

¹⁰ *Encyclopedia Judaica*, s.v. "Rebellious Son."

of the ancient world, the prevailing rule was that of *patria potestas*,¹¹ a system where the head of the house, the father, of course, would have almost complete control and authority over the other members of the family, even extending to life and death. It is possible that *patria potestas* even finds echoes in the Torah. In Genesis 38:24, after Judah hears news that his daughter-in-law Tamar had been playing the harlot, he orders her to be burned, without any formal process being noted. It is entirely possible that this is an accurate description of how the matter could have unfolded; nothing would have stopped a man in Judah's situation from imposing such a punishment. At this later stage of legal development, however, the situation has changed. The father no longer has limitless power over his family.¹² Not only must the father go through a legal process before the court before any punishment can be handed out, but he must be acting in concert with his wife, an extraordinary rule in that time period.

The necessity for a legal process requires some attention. The most literal reading of the text does not actually make the court an active player in this process. It merely seems to require a declaration before the court by both parents. However, almost all scholars seem to believe or assume that the textual implication is that a full legal process is involved.¹³ This is a reasonable assumption; in the *Tanakh*, going before the men or elders of the town almost always means a legal process.¹⁴ Other examples can be found in Deuteronomy 17:5 and 22:21, as well as Ruth 4:1-2. Given that it is in fact a full legal process, it is probably safe to assume that the quoted text in the Torah is just a

¹¹ Tigay, loc. cit., 196.

¹² von Rad, G., *Deuteronomy*, from *Old Testament Library*. Philadelphia: The Westminster Press, 1966, 138.

¹³ For example, see *Encyclopedia Judaica*, s.v. "Rebellious Son," 1604 or Tigay, loc. cit., 196.

prototypical statement, an example of what the parents might say to the judges, not a required formula that they have to say every time this law was to be invoked.¹⁵

In verse 18, the new JPS translation reads "...and [he] does not obey them even after they discipline him." The root נ.ו.י is translated as "discipline" here, but the word is probably a bit stronger than that. It probably implies flogging or some other corporal punishment, as it is translated in verse 18 of the same chapter.¹⁶ Besides just being a translation note, the importance here is that it implies that serious efforts have been taken to alter this behavior *before* we arrived at this point. It should be intuitive, but it is also implicit in the law, that these drastic measure can never be a first recourse, but rather a last resort, reserved for the most serious of cases.

The last line of the section, the injunction to "sweep out evil from your midst" serves as an apt summary. What at first reading might seem a disproportionate idea, that a rebellious son is "evil in our midst," now makes sense. The importance of family structure and hierarchy works as the background, and the serious, repetitive nature of the child's transgression make serious action necessary. Although we, as the Rabbis who came before us, would never approve of actually administering the death penalty in this case, we can definitely see why those who came earlier still truly saw a rebellious son as evil.

¹⁴ Driver, Rev. S., ed. *Deuteronomy*, vol. 5 of *International Critical Commentary*. New York: Charles Scribner's Sons, 1903, 247.

¹⁵ Tigay, loc. cit., 197.

¹⁶ *ibid.*

Talmudic Material

When the Rabbis begin to discuss the issue of the Rebellious Son, they have, without any doubt, one primary direction in their writing: they are attempting to limit the applicability of this law that must have seemed quite bizarre and inexplicable to them, since they obviously knew nothing of Ancient Near Eastern family dynamics. There are some attempts to understand the law – the rationale behind the harsh punishment – but that takes up only a tiny section of what is a very long, multi-generational discussion. There is hardly a discernable attempt to read the law even the slightest bit strictly. In the end, the Rabbis limit the law to such an incredible degree that they are forced to wonder aloud why the law even exists in the first place.

Sanhedrin 68b

משנה. בן סורר ומורה, מאימתי נעשה בן סורר ומורה - משיביא שתי שערות, ועד שיקיר זקן, התחתון ולא העליון, אלא שדברו חכמים בלשון נקיה. שנאמר +דברים כ"א+ כי יהיה לאיש בן, בן - ולא בת, בן - ולא איש. קטן פטור, שלא בא לכלל מצות.

Mishna: A rebellious son, from what time can one become a rebellious son? From when he produces two hairs and until he grows a beard – the lower, not the upper, but the sages spoke in chaste language. As it is said, *When a man has a son* (Deuteronomy 21:18), "a son," and not a daughter, "a son," and not a man. A minor is exempt, because he hasn't come under the *mitzvot*.

The Mishna's first tactic is to directly limit the range of applicability of the law, with their argument based primarily around the meaning of the word "son." Obviously, you must be a "son" before you can be a "rebellious son," so the Mishna will use a very

narrow reading of that word to limit the applicability of the law. If you are too young, defined here as not having yet produced two pubic hairs, you can't be a rebellious son, because minor's are never liable for the death penalty, and if you are too old, having fully grown pubic hair, then you must no longer be a boy, therefore not a "son" in the purest sense, but now a "man." Obviously, daughters would also be exempt by this language – they are quite distinctly not "sons." The Mishna, naturally, doesn't feel the need to explain itself, for example, as to why the pubic hair delineation is used, instead of talking about minors and adults, as per usual. The Gemara will pick up on this issue later on.

This will be the general tactic of our text: by finding technicalities in the source text, we will limit the types of people who this law could ever apply to, all but ensuring that it will never be invoked. Already, just in these few lines, we have immediately cut out half of the population, girls, and then limited the boys who might be liable to those who fall within a very limited window of time.

גמרא. קטן מנלן דפטור? - מנלן? כדקתני טעמא: שלא בא לכלל מצות! ותו: היכא אשכחן דענש הכתוב, דהכא ליבעי קרא למיפטריה? - אנן הכי קאמרינן: אטו בן סורר ומורה על חטאו נהרג? על שם סופו נהרג, וכיון דעל שם סופו נהרג - אפילו קטן נמי. ועוד: בן ולא איש - קטן משמע. אמר רב יהודה אמר רב: דאמר קרא וכי יהיה לאיש בן - בן הסמוך לגבורתו של איש.

Gemara: From where do we learn that a minor is exempt? From where?!? As it [the *Mishna*] has said, "he hasn't come under the *mitzvo*!" And furthermore: where do you find scripture holding [a minor] responsible, so that you here you [want] to bring a verse to exempt him? We meant to say thus: is a rebellious son killed only because of his sin? Because of his end [i.e. what he will become] he is killed, and since he is killed for his end, perhaps even a minor is responsible. And

also: "a son" and not a man – I learn a minor [is responsible] from this. Rav Yehuda said that Rav said: since scripture says "and when a man shall have a son [or, if a son shall be to a man]" – a son who is upon the strength [i.e. almost as strong as] a man.

Here we clearly see the layered, developmental nature of the Gemara; no single author would open up with a question and then have themselves challenge that question as being ridiculous. Here, however, someone asks how we know that a minor is exempt, and the text goes on to rail against that question – there are two completely obvious reasons (including an explicit reason given in the Mishna!) for this. The resolution heads off a potential argument: since we will learn later on in the Mishna that a Rebellious Son is killed not for what he did, but for what he might become and what he might do, you might mistakenly think that a minor *is* liable, since he, too, will have a future. The Gemara is just being explicit, so that you will never make that mistake.

ועד שיקיף זקן התחתון כו'. תני רבי חייה: עד שיקיף עטרה. כי אתא רב דימי
אמר: הקפת גיד, ולא הקפת ביצים.

"and until he grows the lower beard, etc." Rabbi Hiya taught: until he can grow the crown [of the beard]. When Rav Dimi came he said: around the member, and not around the testicles.

Having made sense of the first part of the Mishna, and of the first part of it's own discussion of that Mishna, the Gemara now begins its task of adding to the legal requirements of the Rebellious Son, making it harder and harder to find a valid candidate. Not only do we have only until the "pubic beard" is formed, now we limit that even

further. Once the earlier growing part of the pubic hair, that around the penis itself, is fully grown, the boy is ineligible. The text could have been read to mean that we had to wait for the later, testicular growth, but that is not so. Several more months are thus cut off of the window of opportunity.

... גופא, אמר רבי כרוספדאי אמר רבי שבתי: כל ימיו של בן סורר ומורה אינן אלא שלשה חדשים בלבד. - והאנן תנן: משיביא שתי שערות ועד שיקיף זקן! - הקיף זקן - אף על גב דלא מלו שלשה חדשים, מלו שלשה חדשים - אף על גב דלא הקיף.

... Back to our main point, Rabbi Cruspedai said that Rabbi Sabtai said: All the days of the [eligibility for a] rebellious son only amount to 3 months. But haven't we learned in the Mishna: from when he produces two hairs and until he grows a beard! If he grows a beard, [he is exempt] despite the fact that he hasn't finished three months; if he finished three months, [he is exempt] despite the fact that he hasn't grown a beard.

Now, this chain of argument reaches its pinnacle. Rabbi Cruspedai comes right out and says that there are only *three months* where a boy is eligible to be labeled a Rebellious Son. It is worth noting that there is no explanation given with this statement, nor with most of the claims that limit the time-window for the Rebellious Son. The Torah is simply limited, without justification. In this extreme case, however, the statement is at least questioned vis-à-vis other related statements. It seems that we have two overlapping but independent criteria for when the law may be applied: the pubic hair measurement, and this three month rule. Not surprisingly, given the texts inclination to limit this law in any way possible, the strictest reading here is used: both criteria must be fulfilled.

Starting from the time two pubic hairs grow, either a full pubic beard *or* the passing of three months exempt the boy from being a Rebellious Son. The window of time is now set at a *maximum* of three months, but potentially even shorter than that.

... בן ולא בת. תניא, אמר רבי שמעון: בדין הוא שתהא בת ראוייה להיות כבן סורר ומורה, שהכל מצויין אצלה בעבירה, אלא גזירת הכתוב היא: בן ולא בת.

... "A son and not a daughter." We have learned in a *Baraita* that Rabbi Shimon said: it is logical that a daughter should be suitable for execution like a rebellious son, because all will visit with her in her sin [her harlotry], but it is a scriptural decree: a son and not a daughter.

Somewhat strangely, the Gemara closes out this section by making sure that don't think that our internal logic should override a Divine decree. Logic might say to you that a girl is just as liable for this type of punishment as a boy. Rabbi Shimon wants to make sure that you realize that the "son not daughter" law is a Toraitic matter. It is interesting that he quotes Mishna and calls it a scriptural decree. It is clear from this that to Shimon, the Mishna's explanation of what the Torah text means is inherently correct – it is itself scripture.

משנה. מאימתי חייב - משיאכל תרטימר בשר וישתה חצי לוג יין האיטלקי. רבי יוסי אומר: מנה בשר ולוג יין. אכל בחבורת מצוה, אכל בעיבור החדש, אכל מעשר שני בירושלים, אכל נבילות וטריפות שקצים ורמשים, (אכל טבל ומעשר ראשון שלא נטלה תרומתו ומעשר שני והקדש שלא נפדו). אכל דבר שהוא מצוה ודבר שהוא עבירה, אכל כל מאכל ולא אכל בשר, שתה כל משקה ולא שתה יין - אינו נעשה בן סורר ומורה, עד שיאכל בשר וישתה יין, שנאמר +דברים כ"א+ זולל וסבא, ואף על פי שאין ראיה לדבר - זכר לדבר, שנאמר +משלי כ"ג+ אל תהי בסבאי יין בזללי בשר למו.

Mishna: When is he liable? From when he eats a *tartermar* of meat and drinks half a *log* of Italian wine. Rabbi Yossi says: A *manna* of meat and a *log* of wine. If he ate it in a gathering for a *mitzvah*, if he ate it at the intercalation of the month, if he ate the second tithe in Jerusalem, if he ate carrion, non-kosher food or an abominable creature, if he ate untithed food, or food from the first tithe whose *terumah* offering has not been taken yet, or food from the second tithe or Temple food that had not been redeemed, if he ate a thing which was a *mitzvah* to eat or a thing which was an *averah* to eat, if he ate all kinds of food and didn't eat meat, if he drank all kinds of drink and didn't drink wine – he doesn't become a rebellious son, until he eats meat and drinks wine, as it said, *a glutton and a drunkard*. And, even though there is no proof for this, there is a textual hint for this, as it is said *don't be of the guzzlers of wine and the gluttonous eaters of meat*.

An entirely new tactic is now engaged. The Torah text includes what most commentators to be merely an example of the type of declaration which a father must make before the court in order to accuse his son. Nowhere does the text actually say that the son must actually be a drunkard and glutton to qualify. That, however, is now taken as a given – only sons who are both can be called rebellious. So, now the rabbis can explore the exact meaning of those two words, again making sure that few if any people will fill all of the requirements.

As usual, the Mishna gives little if any reasoning or support for its claims. However, it sets forth heretofore unheard of rules about the situation of the eating, the type of food and wine that was eaten and drunk, as well as the amounts. The closest that

the Mishna comes to for offering justification is a verse which warns us against eating and drinking too much. That verse doesn't in any way imply a connection with the laws of the Rebellious Son, nor does it explain the added requirements, any more than the original text does. They must stand on their own as revealed, Oral Law.

גמרא. אמר רבי זירא: תרטימר זה איני יודע מהו, אלא מתוך שכפל רבי יוסי ביין - נמצא כופל אף בבשר, ונמצא תרטימר חצי מנה. אמר רב חנן בר מולדה אמר רב הונא: אינו חייב עד שיקח בשר בזול ויאכל, יין בזול וישתה, דכתיב +דברים כ"א+ זולל וסבא. ואמר רב חנן בר מולדה אמר רב הונא: אינו חייב עד שיאכל בשר חי וישתה יין חי. איני? והא רבה ורב יוסף דאמרי תרווייהו: אכל בשר חי ושתה יין חי - אינו נעשה בן סורר ומורה. אמר רבינא: יין חי - מזיג ולא מזיג, בשר חי - בשיל ולא בשיל, כבשר כיבא דאכלי גנבי. רבה ורב יוסף דאמרי תרווייהו! אכל בשר מליח ושתה יין מגיתו - אין נעשה בן סורר ומורה. תנן התם: ערב תשעה באב לא יאכל אדם שני תבשילין ולא יאכל בשר ולא ישתה יין. ותנא: אבל אוכל הוא בשר מליח ושותה יין מגיתו. בשר מליח עד כמה? אמר רבי חנינא בר כהנא: כל זמן שהוא כשלמים. ויין מגיתו עד כמה? כל זמן שהוא תוסס. והתניא: יין תוסס - אין בו משום גילוי, וכמה תסיסו - שלשה ימים. הכא מאי? - התם משום שמחה הוא, כל זמן שהוא כשלמים. נמי אית ביה שמחה, הכא משום אימשובי הוא, ובכל שהוא לא מימשיך. ויין עד ארבעים יום.

Gemara: Rabbi Zera said: I didn't know what a *tartemar* is, but from Rabbi Yossi's doubling of the wine, we find a doubling of the meat, and we find that a *tartemar* is half of a *manna*. Rav Hanan bar Molada said that Rav Huna said: he isn't liable until he buys meat cheaply and eats, [buys] wine cheaply and drinks, as it is said: *a glutton and a drunkard*.¹⁷ And Rav Hanan bar Molada said that Rav Huna said: he isn't liable until he eats raw meat and drinks unmixed wine. Really? But didn't Rabba and Rav Yosef both say: one who eats raw meat and drinks unmixed wine, does not become a rebellious son. Ravina said: Unmixed

¹⁷ The translation misses the play on *zol* which can mean "cheap" or "glutton."

wine – mixed but not fully mixed. Raw meat – cooked but not fully cooked, like the scorched meat eaten by a thief. Rabba and Rav Yosef both said: if he ate salted meat and drank newly pressed wine, he doesn't become a rebellious son. We learned in a Mishna: on *Erev Tisha b'Av* a person should not eat two cooked foods and he shouldn't eat meat and he shouldn't drink wine. And it is taught: however, he may eat salted meat and drink newly pressed wine. How long is salted meat allowed? Rabbi Hanina bar Cahana said: as long as it is like the *shlaimim*. And how long is pressed wine allowed? As long as it is fermenting. And it is taught: fermented wine doesn't have the essence of uncovered wine, and how long does it ferment? Three days. What do we learn from this? There it is because of joy – as long as it is like the *shlaimim* – also there is in that joy. But here, it is because it draws him in, but all [this] will not draw him in. And [that includes] wine up until 40 days.

The new requirements continue to be added at a rapid pace. For the first time, though, a new restriction is examined in some depth. According to Rabba and Rav Yosef, salted meat and freshly pressed (non-fermented) wine don't qualify a boy as a Rebellious Son, presumably because they are less appealing than cooked meat and fermented wine, and therefore won't lead the boy into the long-term practice of gluttony and drunkenness. This is especially relevant since it is the long-term abuse that results from early experimentation that the Rabbis are concerned about here. This leniency is compared to a similar leniency found in the *Tisha b'Av* regulations, even though the reasons for the two similar statutes are identified as being different. This lenience towards people's actions is, of course, actually a strictness in relation to the laws of the Rebellious Son; one more

requirement, that the meat and wine required to become a rebellious son must be unsalted meat and fermented wine, has been added to our growing list of criteria that must be fulfilled before the Rebellious Son laws may be applied.

... אכל בחבורת מצוה. אמר רבי אבהו: אינו חייב עד שיאכל בחבורה שכולה סריקין. והאנן תנן: אכל בחבורת מצוה אינו נעשה בן סורר ומורה. טעמא - דמצוה, הא לאו מצוה - אף על גב דלאו כולה סריקין! - הא קא משמע לן: דאף על גב דכולה סריקין, כיון דבמצוה קא עסיק - לא מימשיך.

... "If he ate it in a gathering for a *mitzvah*..." Rabbi Abahu said: he isn't liable until he eats in a gathering where everyone is a scoundrel. But we have learned in the Mishna: if he eats in a gathering for a *mitzvah* he doesn't become a rebellious son. The reason is the *mitzvah*, for if there isn't a *mitzvah*, even if they aren't all scoundrels [he is still liable]. This comes to teach us: that even if they are all scoundrels, since they are doing a *mitzvah*, he won't be drawn in.

What was alluded to before now comes into the forefront: the real problem with a Rebellious Son is that he grows up into a generally bad person, who makes a habit of his inappropriate acts. The Rabbis seem to derive this principle both from the seeming disproportionality between the offences and the punishment and the problems with giving the death penalty to minors. Now that we know *why* we have this *mitzvah*, we can cut out situations that don't fit; if there are other factors, such as the performance of a *mitzvah* or the presence of a good person, that will keep this boy from falling into these bad habits, then there is no need, and therefore no option, to declare him Rebellious and have him killed. Of course, overlapping statements are unified by limiting the law in the

strongest possible way: it is the non-scoundrel *or* the *mitzvah*, not both, which are required to nullify the Rebellious Son laws.

אכל בעיבור החודש. למימרא דבשר ויין מסקו? והתניא: אין עולין לה אלא
בפת דגן וקטנית בלבד! - הא קא משמע לן: אף על גב דאין עולין לה אלא
בפת וקטנית, ואיהו אסיק בשר ויין ואכל, כיון דבמצוה קא עסיק - לא ממשיך.

"If he ate it at the intercalation of the month..." Do you say that meat and wine were brought up? And we have been taught that they only bring up grain bread and beans! This comes to teach us that even though they only brought up grain bread and beans, but *he* came with meat and wine [he is not liable] since he was involved in a *mitzvah* and won't be drawn in.

Here we have one of the few times that the text will bother to question one of the restrictions on the law. Based on its previous explorations which revealed the requirement for meat and wine, it seems that no meal surrounding the intercalation of the month could ever qualify – the menu was too limited, traditionally. Luckily, the seeming contradiction is quickly resolved, keeping the pattern of never relaxing the law intact.

...משנה. גנב משל אביו ואכל ברשות אביו, משל אחרים ואכל ברשות אחרים,
משל אחרים ואכל ברשות אביו - אינו נעשה בן סורר ומורה, עד שיגנוב משל
אביו ויאכל ברשות אחרים. רבי יוסי ברבי יהודה אומר: עד שיגנוב משל אביו
ומשל אמו.

... Mishna: If he steals from his father and eats in his father's domain, [steals] from others and eats in other's domain, [steals] from others and eats in his father's domain – he doesn't become a rebellious son, until he steals from his father and eats in other's domain. Rabbi Yossi says in the name of Rabbi Yehuda: until he steals from his father *and* his mother.

The next class of requirements and restrictions given by the Mishna again find little if any basis in the Torah text. Dividing the world into domains that belong to his father and other areas, a son must steal something from his father and eat it somewhere not his father's. Any other situation does not qualify. We will have to leave it to the Gemara to provide a rationale.

נמרא. גנב משל אביו ואכל ברשות אביו, אף על גב דשכיח ליה - בעית. משל
אחרים ואכל ברשות אחרים, אף על גב דלא בעית - לא שכיח ליה. וכל שכן משל
אחרים ואכל ברשות אביו, דלא שכיח ליה ובעית. עד שיגנוב משל אביו ויאכל
ברשות אחרים - דשכיח ליה ולא בעית.

Gemara: He steals from his father and eats in his father's domain – even though it [the money] is available to him, he is afraid [of his father]. From others and eats it in other's domain – even though he isn't afraid, it is not [easily] available to him. And just the same, from others and eats it in his father's domain for it is not readily available to him and he is afraid. Until he steals from his father and eats in other's domain – since it is available to him and he is not afraid.

Here again we see that it is the ultimate outcome of this child which prompts such, by now mostly theoretically, strict treatment. A child who has temptation ever before him, since he lives in the place where he finds his food to steal, and has no fear of being caught, since he hides his theft outside his parents' view, is clearly on the road to ruin. Anyone who shows fear, or isn't in danger of stealing every day, still has hope, and therefore must not be called a Rebellious Son.

רבי יוסי ברבי יחודה אומר עד שיגנוב משל אביו ומשל אמו. אמו מנא לה? מה
שקנתה אשה קנה בעלה! - אמר רבי יוסי ברבי חנינא: מסעודה המוכנת

לאביו ולאמו. והאמר רבי חנן בר מולדה אמר רב הונא: אינו חייב עד שיקנה
בשר בזול ויאכל, יין בזול וישתה! - אלא אימא: מדמי סעודה המוכנת לאביו
ולאמו. איבעית אימא: דאקני לה אחר, ואמר לה: על מנת שאין לבעליך רשות
בהן.

משנה. היה אביו רוצה ואמו אינה רוצה, אביו אינו רוצה ואמו רוצה - אינו נעשה
בן סורר ומורה עד שיהו שניהם רוצין. רבי יהודה אומר: אם לא היתה אמו
ראויה לאביו - אינו נעשה בן סורר ומורה.

Rabbi Yossi says in the name of Rabbi Yehuda: until he steals from his father
and his mother." What does his mother have? Whatever a woman acquires her
husband acquires. Rabbi Yossi said in the name of Rabbi Hanina: from a meal
that was prepared for his father and his mother. And didn't Rabbi Hanan bar
Molada say that Rav Huna said: he isn't liable until he buys cheap meat and eats
it, and cheap wine and drinks it? Rather I will say: [he stole] from the money for a
meal for his father and mother [to buy the meat and wine]. Or, if you prefer, I will
say: when someone else gave her money and said to her "on the condition that
your husband has no authority over it."

Mishna: If his father wanted [to accuse him of being a rebellious son] and his
mother didn't want to, or his father didn't want to and his mother wanted to – he
doesn't become a rebellious son, until both of them want to. Rabbi Yehuda says:
if his mother wasn't fit for his father – he doesn't become a rebellious son.

The Mishna here is playing off of the unusual plural nature of the Torah text: the
son must "not heed his father and mother," and then "his father and mother shall take
hold of him," bring him to the gates and "They shall say... This son of ours." The
language of the original text clearly talks about both parents being involved, so the

Mishna uses this as a chance to make things even more strict. If one of them is not willing to take this step, then it can't be taken.

גמרא. מאי אינה ראוייה? אילימא חייבי כריתות וחייבי מיתות בית דין, סוף סוף אבוב - אבוב נינהו, ואמיה - אמיה נינהו! אלא: בשה לאביוקאמר, תניא נמי הכי, רבי יהודה אומר: אם לא היתה אמו שוה לאביו בקול ובמראה ובקומה אינו נעשה בן סורר ומורה. מאי טעמא - דאמר קרא: איננו שמע בקלנו מרקול בעינן שוין מראה וקומה נמי בעינן שוין

Gemara: What is "not fit"? If you say that it is liable to excision [i.e. it is an illegal marriage], or that it is liable for execution, in the end, his father is his father and his mother is his mother. Rather, equality with the father is what is meant. This was taught in a *baraita*: Rabbi Yehuda says: if his mother isn't equal to his father in voice and in appearance or in height, he doesn't become a rebellious son. What is the reason? Scripture said: *he does not listen to our voice*, from which [we derive], their voices are similar, and so too their appearance and height must be similar.

Rabbi Yehuda seems to be taking a hyper-literal reading with respect to "our voice [singular]..." Once the parents' voice must be the same, Rabbi Yehuda insists that everything be the same: their voice, their appearance, even their height. If they are different, then *they* can't truly say anything. At this point, we have proposed a requirement which could never be met. The law of Rebellious Son has thus been completely nullified. What is incredible is that neither the Mishna, nor the Gemara makes the slightest protest. Each and every new restriction, up until and including this last, most strict of all, is accepted without any argument, despite an almost complete lack of justification or support. Instead, the text goes on to admit that this is a commandment

which (at least as they understood it) can *never* be fulfilled, and was never meant to be.

So, then, why is it in the text at all? Why wasn't it just left out?

כמאן אזלא הא דתניא: בן סורר ומורה לא היה ולא עתיד להיות, ולמה נכתב -
דרוש וקבל שכר, כמאן? כרבי יהודה, איבעית אימא: רבי שמעון היא, דתניא,

אמר רבי שמעון: וכי מפני שאכל זה תרטימר בשר ושחה חצי לוג יין האיטלקי
אביו ואמו מוציאין אותו לסקלו? אלא לא היה ולא עתיד להיות, ולמה נכתב -
דרוש וקבל שכר. אמר רבי יונתן: אני ראיתיו, וישבתי על קברו.

Who teaches the *baraita*: a rebellious son there never was and in the future there never will be, then why was it written? To explain and receive reward. Who is this? It is Rabbi Yehuda. Or, if you prefer, I will say: it is Rabbi Shimon, as it is taught in a *baraita*: Rabbi Shimon said: and because he ate this *tartemar* of meat and drank a half *log* of Italian wine his father and mother will take him out to stoning? Rather, there never was [a rebellious son] and in the future there never will be. And why was it written? To explain and receive reward. Rabbi Yonatan said: I saw him [a rebellious son], and I sat on his grave.

In the end, this would be the only way that the Rabbis could possibly understand the law of the Rebellious Son: it is a rhetorical case that could never be implemented. The very thought of every carrying out the sentence is unreasonable, so the law is here simply to give us the chance to study Torah. It is not, and was not meant to be, a practical law. The glaring exception to this view, that of Rabbi Yonatan, unfortunately goes without comment. We are left to wonder exactly who Rabbi Yonatan was thinking of, and what we could learn from him. But, for the rest of the Rabbis, living in a context so fundamentally different from the Ancient Near East where this law was first formulated,

they were forced to do everything they could to nullify the law, knowing that it could never work in their society. Rarely can such strong action against a Toraitic law be found without a serious objection being raised or attempt being made to slow the process down. In the end, the Rabbis reduce the law to exactly what they say it should be: a theoretical case, never to be applied, never even to be considered.

Chapter 3 – Kavod HaBriyot

כבוד הבריות, the dignity of people, is a *halachic* category used by the Rabbis. Simply stated, it means that treating other people with the respect that they deserve is an important principle in *halacha*. Although somewhat similar to כבוד הרב or כבוד המלך, כבוד הבריות is special in that it applies to all people, not just one special class. Still it is a powerful principle, *halachically* speaking. As we shall see, כבוד הבריות is important enough to override many *mitzvot*, including some laws of ritual purity as well as Shabbat observance. However, the nature and origin of this *halachic* principle will give some Rabbis pause, and make them question its applicability to Toraitic *mitzvot*. In their attempt to limit Rabbinic power to overturn or modify Toraitic law, the *Amoraim* will begin to say that כבוד הבריות can only override Rabbinic, not Toraitic laws, and that seems to be the final word on the subject, and the one accepted as the correct interpretation by successive generations. However, while it is clear that by the completion of the redaction of the Talmud that was indeed the prevailing opinion, by beginning with a look at some earlier texts we will see that the first generations of Rabbis saw no such distinction; to those earliest Rabbis, כבוד הבריות applied equally to Toraitic as well as Rabbinic *mitzvot*.

Sifrei D'varim, piska 192

Two very similar passages offer the closest thing that we have to proof-texts for כבוד הבריות, although both share a problem that make them questionable as true proof-texts for a *halachic* category. In *Sifrei D'varim* we read:

מי האיש הירא ורך הלבב. בוא וראה כמה חס המקום על כבוד הבריות מפני
הירא ורך הלבב כשהוא חוזר יאמרו שמא בנה בית שמא נטע כרם שמא ארס
אשה וכולם היו צריכים להביא עדותם חוץ מן הירא ורך הלבב

What man is there that is fearful and fainthearted (Deut 20:8)? ... Come and see how merciful the ever-present is on the dignity of people, so that one who is fearful and soft-hearted, when he returns [before a war] others will say "perhaps he built a house; perhaps he planted a vineyard; perhaps he married a woman." Others had to bring external proof, but not the fearful and fainthearted.

This passage is commenting on a section of Deuteronomy which gives various reasons that a man may excuse himself from a war. One of them is simple fear: a man who is too fearful to fight may leave, and he doesn't have to explain why he is leaving. The Rabbis believe that the reason for this is God's great concern for his dignity; rather than make him explicitly identify himself as fearful, he is allowed to leave the reasons for his abandoning the war force ambiguous, so that others might think that he has left for some other reason that the law allows him, such as a newly built house or a newly married wife.

What this passage does, as does a very similarly worded passage found in *Tosefta Bava Kamma* 7:10, is establish that there is a principle called *כבוד הבריות*, and that it is very important to God. It does not, however, give any reason to think that we have to add this principle into our *halachic* decision making. It could be argued that such concerns are already built into the system, as they are in this case.

The idea that *כבוד הבריות* exists as a separate *halachic* category, and one of great importance, is a Rabbinic, not Toraitic idea. The earliest generations of Rabbis seemed to

be comfortable with this – they apply the concept liberally, allowing concerns of human dignity to greatly affect their interpretation of the law. As the generations progressed, and the Rabbis became less and less comfortable with the idea of Rabbinic power winning out over revealed law, they began to limit the applicability of כבוד הבריות, explaining that such concerns can only change our rulings in cases where it would result in the violation of a Rabbinic, not Toraitic, decree.

Yerushalmi Nazir, Perek 7, Daf 56, Amud 1, Halacha 1

תני מיטמא הוא כהן ויוצא לחוץ לארץ לדיני ממונות ודיני נפשות ולקידוש החדש ולעיבור השנה ולהציל שדה מן הגוי וללמוד תורה ולשאת אשה רבי יודה אומר אם יש לו מאין ללמוד אל יטמא רבי יוסי אומר אפילו יש לו מאין ללמוד יטמא שלא מהכל אדם זוכה ללמוד אמרו עליו על רבי יוסף כהן שהיה יוצא אחר רבו ומיטמא אחר רבו לציידן אבל אמרו לא יצא כהן לחוץ לארץ אלא אם כן הבטיחו לו אשה מהו שיטמא כהן גדול לנישאות כפים גבילה אחוי דרבי בא בר כהן אמר קומי רבי יוסה בשם רבי אחא מטמא הוא כהן לנשיאות כפים שמע ר' אחא ואמר אנא לא אמרית ליה כלום חזר ומר או דילמא לא שמע מיני אלא כיי דמר רבי יודה בר פזי בשם ר' אליעזר כל כהן שעומד בכנסת ואינו נושא את כפיו עובר בעשה וסבר מימר שמצות עשה דוחה למצות לא תעשה אנא לא אמרי ליה איתוניה ואנא מלקי ליה

... מהו שיטמא אדם לכבוד הרבים תני היו שני דרכים מתאימות אחת רחוקה וטהורה ואחת קרובה וטמאה אם היו הרבים הולכין ברחוקה הולך עמהן ואם לאו הולך בקרובה מפני כבוד הרבים עד כדון בטומאה שהוא מדבריהן ואפילו בטומאה שהוא מדבר תורה מן מה דאמר רבי זעירא גדול כבוד הבריות שדוחה למצוה בלא תעשה שעה אחת הדא אמרה ואפילו בטומאה שהיה מדבר תורה

It has been taught that a priest may become *tamei* by going abroad to judge matters of money or capital crimes, or to sanctify the new month or to intercalate the year or to save land from a gentile and to study Torah and to marry a woman. Rabbi Yehuda says: if he has another way to study, he shouldn't become *tamei* to study. Rabbi Yosi says: even if he has another way to study he may become

tamei, for it is from everyone that a person merits to study. They said of Rabbi Yosef the Kohen that he would follow his master, in Tziddon, and become *tamei*, but they said that a priest should not go abroad unless he is guaranteed a wife.

What is the law about a High Priest becoming *tamei* in order to raise his hands¹⁸? Gebilah, the brother of Rabbi Ba bar Kohen said before Rabbi Yoseh in the name of Rabbi Aha: the priest may become *tamei* in order to raise his hands. Rabbi Aha heard this and said: I never said this! He then retracted and said: Perhaps he didn't hear it from me, but from what Rabbi Yudah bar Pazzi said in the name of Eliezer: any priest that stands in the synagogue and doesn't raise his hands transgressed a positive commandment, and he thought that I said that a positive commandment cancels a negative commandment. But, I never said that. Bring him and I shall beat him.

...

What is the law about a person who becomes *tamei* for the sake of the dignity of the community? It was taught [in a *baraita*] that there were two parallel paths – one far and *tahor* and one close and *tamei*. If the community went on the far path, go with them, and if not, go on the close [path] because of the dignity of the community.

Up until now, we have dealt with *tumah* that is Rabbinic, but what of *tumah* that is Toraitic? [We derive that] from what Rabbi Zera said: So great is the dignity of

¹⁸ i.e. bestow the Priestly Blessing.

people that it cancels a negative *mitzvah* for a single moment. That means: even *tumah* that is Toraitic.

In this passage, the *Yerushalmi* is dealing with a topic that we will see several other times in the *Bavli*: under what conditions may a person allow himself to contract *tumah* during the course of fulfilling another *mitzvah*. The fact that this passage is dealing with *kohanim* and the priestly blessing raises the stakes somewhat; a non-*kohen* who became *tamei*, especially once the sacrificial cult had stopped, wouldn't have the same practical repercussions of *tumah* to deal with as the *kohen*. Either way, though, the principle is the same: the avoidance of *tumah* placed against the fulfillment of some other *mitzvah*.

The text then moves on to what becomes a somewhat paradigmatic example: a person who has two paths available for taking while performing some *mitzvah*. One of these paths is difficult to take (usually because it is far away), but it is *tahor*. The other path is easier (closer), but it will expose the person in question to *tumah*. Which one should be taken? You might expect that we would be told that as long as we can still perform the *mitzvah*, we should go through the extra trouble of avoiding *tumah*, and that may indeed be the ruling in the simplest case. However, here we have added the extra complication of other people's dignity to think about, and we learn that if that dignity would be damaged by our taking the longer, *tahor* path, then we must let ourselves become *tamei*. Their dignity is more important than our ritual fitness.

The text then makes what is, for our purposes, a critical distinction: There are two types of *tumah*: Toraitic and Rabbinic. Certain things are declared by the Torah to be *tamei* and to impart *tumah* on one who comes into contact with them; a dead body would

be an example of this. In contrast, there are certain things which are considered *tahor* by the Torah, but were later declared to be *tamei* by the Rabbis; certain lands outside Israel fall into this category. The *tumah* that has been discussed up until now, according to our text, has been Rabbinic *tumah*, not Toraitic. What, then, is the law if the *tumah* is Toraitic? Almost the same. The text makes a slight shift and stops talking about **כבוד רבים**, dignity of the community, and instead teaches that **כבוד הבריות** overrides even Toraitic *tumah*. Whether or not **כבוד רבים** would also work here is not made clear, but it is explicit and unquestionable here: **כבוד הבריות** can override a negative, Toraitic *mitzvah*.

Eruvin 41b

משנה. מי שהוציאוהו נכרים או רוח רעה - אין לו אלא ארבע אמות. החזירוהו - כאילו לא יצא. הוליכוהו לעיר אחרת, נתנוהו בדיר או בסהר, רבן גמליאל ורבי אלעזר בן עזריה אומרים: מהלך את כולה, רבי יהושע ורבי עקיבא אומרים: אין לו אלא ארבע אמות. מעשה שבאו מפלנדרסין והפליגה ספינתם בים, רבן גמליאל ורבי אלעזר בן עזריה הלכו את כולה, רבי יהושע ורבי עקיבא לא זזו מארבע אמות, שרצו להחמיר על עצמן. פעם אחת לא נכנסו לנמל עד שחשיכה, אמרו לו לרבן גמליאל: מה אנו לירד? אמר להם: מותרים אתם, שכבר הייתי מסתכל והיינו בתוך התחום עד שלא חשיכה.

Mishna: One who is put out [of his Sabbath area] by gentiles or an evil spirit, he is allowed to move only four *amot* [from where he is at that point]. If they return him, it is as if he never left. If they lead him to another city, or they place him in a pen or corral, Rabban Gamliel and Rabbi Elazar ben Azarya say: he may walk within it all [i.e. all of the city], Rabbi Yehoshua and Rabbi Akiva say: he may only walk four *amot*.

Once, it happened that they came from Plandarsin and their ship moved out to sea. Rabban Gamliel and Rabbi Elazar ben Azarya walked within it all, Rabbi Yehoshua and Rabbi Akiva didn't move from four *amot*, because they wanted to be strict with regards to themselves. Once, they didn't enter the port until it was dark, and they said to Rabban Gamliel: can we disembark? He said to them: you are allowed, because I was watching, and we entered the Shabbat area before it was dark.

This *sugya* deals with an issue of Shabbat observance: travel on Shabbat. If a person should leave his **תחום שבת**, the *halacha* allows him to move up to four *amot* (cubits) from wherever he finds himself. What happens, the text asks, if someone is forcibly moved on Shabbat, and leaves his **תחום** not of his own will? One opinion states that he is, in essence, granted a new **תחום** and can move about within his current city, as if that was where he had started Shabbat. Another states that in fact it is as if he left of his own free will: he can only move four *amot*.

אמר רב נחמן אמר שמואל: יצא לדעת - אין לו אלא ארבע אמות. פשיטא! השתא מי שהוציאוהו נכרים אין לו אלא ארבע אמות, יצא לדעת מיבעיא? אלא אימא: חזר לדעת - אין לו אלא ארבע אמות. - הא נמי תנינא: החזירוהו נכרים - כאילו לא יצא. החזירוהו הוא דכאילו לא יצא, אבל הוציאוהו נכרים וחזר לדעת - אין לו אלא ארבע אמות! - אלא אימא: יצא לדעת והחזירוהו נכרים, אין לו אלא ארבע אמות. הא נמי תנינא: הוציאוהו והחזירוהו □ כאילו לא יצא. הוציאוהו והחזירוהו הוא דכאילו לא יצא, אבל יצא לדעת - לא. - מהו דתימא: לצדדין קתני; מי שהוציאוהו נכרים וחזר לדעת - אין לו אלא ארבע אמות, אבל יצא לדעת והחזירוהו נכרים כאילו לא יצא, קא משמע לן. בעו מיניה מרבה: הוצרך לנקביו מהו? אמר להם: גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

... Rav Nahman said that Shmuel said: one who goes out willingly, he may only move four *amot*. Obviously! We already know that one who is put out by gentiles

can only move four *amot*. Do we have to also say this for one who goes willingly? Rather, I might say: one who returns willingly – he can only move four *amot*. This, too, we already learned: one who is returned by gentiles, it is as if he never left, but one who is put out by gentiles and returns willingly, he may only move four *amot*. Rather, I might say: One who goes out willingly and is returned by gentiles, he may only move four *amot*. But this, too, we have already learned: one who is brought out and is returned – it is as if he never left. One who is brought out and is returned is as if he never left, but if he went out willingly, no.

What might you have said? That the Mishna is teaching independent rulings: one who is brought out by gentiles and returns willingly, may move only four *amot*, but one who goes out willingly and is returned by gentiles, it is as if he never left – that is what we learn here.

They asked of Rabba: if he needed to relieve himself, what is the law? He said to them: So great is human dignity that it overrides a negative commandment that is in the Torah.

The discussion that ensues is a fairly standard *halachic* discussion, centered around trying to find a unique but consistent meaning to a statement by Nahman in the name of Shmuel which seems too obvious to merit even being said. The details of the ensuing law are unimportant here, but what *is* relevant (but hardly surprising) is the exactness of the argument. Since Shabbat observance is an extremely important issue to the Rabbis, its specifics must be known and understood lest a transgression be accidentally committed.

However, the law seems to get much simpler when we are dealing with issues of כבוד הבריות. In that case, all of the “if’s” seem to disappear, and a single, simple rule emerges: you may move beyond your normal תחום on Shabbat if you must do so because of כבוד הבריות. The ability of כבוד הבריות to override Shabbat tells a lot about the Rabbinic view of this *halachic* category: Shabbat observance is far from a minor point in the Rabbinic world; some violations are still technically punishable by death, even if that would never be carried out in reality. This, and all following discussion where כבוד הבריות “wins out” over Shabbat shows how important human dignity really is. In addition, in this particular *sugya*, the juxtaposition of the full *halachic* discussion about the details of Shabbat observance and the simplicity of the laws of כבוד הבריות also serves to highlight the importance of this *halachic* concept.

In some examples which we will see later, the Rabbis will try to limit the use of כבוד הבריות so that it can only be used to override Rabbinic legislation, never Toraitic, for example allowing someone to carry on Shabbat in a כרמלית, but not in a true תחום שבת. Obviously, such an argument cannot be used here. The laws of תחום שבת are derived from Exodus 16:19, and even though the four *amot* that a person may move if he or she leaves the תחום is only derived later in the Talmud, the law as a whole is considered Toraitic, not Rabbinic. If כבוד הבריות can allow someone to move more than four *amot* once they have left their תחום שבת, then by definition, כבוד הבריות can override a Toraitic *mitzvah*. It is clear, then, that as late as Rabbah, a third generation Babylonian *Amora*, the prevalent view was that כבוד הבריות overrides Toraitic, and not merely Rabbinic, commandments.

Megillah 3b

אמר רבא: פשיטא לי: עבודה ומקרא מגילה - מקרא מגילה עדיף, מדרבי יוסי בר חנינא. תלמוד תורה ומקרא מגילה - מקרא מגילה עדיף, מדסמכו של בית רבי. תלמוד תורה ומת מצוה - מת מצוה עדיף, מדתניא: מבטלין תלמוד תורה להוצאת מת ולהכנסת כלה. עבודה ומת מצוה - מת מצוה עדיף, במדבר ו' + מולאחתו דתניא: ולאחותו מה תלמוד לומר? הרי שהיה הולך לשחוט את פסחו ולמול את בנו, ושמע שמת לו מת, יכול יטמא - אמרת: לא יטמא. יכול כשם שאינו מיטמא לאחותו כך אינו מיטמא למת מצוה - תלמוד לומר ולאחותו: לאחותו הוא דאינו מיטמא, אבל מיטמא למת מצוה. בעי רבא: מקרא מגילה ומת מצוה הי מינייהו עדיף? מקרא מגילה עדיף משום פרסומי ניסא, או דלמא מת מצוה עדיף - משום כבוד הבריות? בתר דבעיא הדר פשטה: מת מצוה עדיף. דאמר מר: גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

Rava said: That is obvious to me: between *avodah*¹⁹ and reading the *megillah*, reading the *megillah* is preferred [i.e. the reading of the *megillah* takes precedence over the *avodah*], according to Rabbi Yose bar Hanina. Between Torah study and reading the *megillah*, reading the *megillah* is preferred, according to the house of Rabbi. Between Torah study and a *met mitzvah*²⁰, the *met mitzvah* is preferred, as we learned in a *baraita*: we cancel Torah study to bring out the dead or welcome the bride. Between *avodah* and *met mitzvah*, the *met mitzvah* is preferred, according to *and to his brother* (Numbers 6:6-7). It is taught in a *baraita*: *And to his sister* (Numbers 6:7). What is scripture teaching [by this extraneous phrase]? That if one is going to slaughter his pascal lamb or to circumcise his son and he hears that a relative has died, you might have thought that he can let himself become *tamei* [i.e. attend to the dead rather than continue to perform the *mitzvah* that he was in the process of doing]. Therefore the Torah teaches: *He shouldn't let himself become tamei* (ibid). Perhaps just as

he shouldn't become *tamei* for his sister, so too he shouldn't become *tamei* for a *met mitzvah*. So, scripture says *and to his sister* – for his sister he doesn't become *tamei*, but he does become *tamei* for a *met mitzvah*. Rava asked: between reading the *megillah* and *met mitzvah*, which of them is preferred? The reading of the *megillah*, because of [the *mitzvah* of] advertising the miracle, or perhaps *met mitzvah* is preferred, because of the dignity of people? After he asked this, he answered his own question: *met mitzvah* is preferred, because the sages said: So great is the dignity of people that it cancels a negative commandment that is in the Torah.

Here, we have a discussion where the Rabbis seem to be trying to rank the importance, or at least the priority of performing, different *mitzvot*. After some other *mitzvot* are compared, they try to decide if the requirement to bury a *met mitzvah* is more important than reading of the *megillah*, noting that the importance of the *met mitzvah* comes from its being an issue of *כבוד הבריות*. Rava, who asked that question, answers it by teaching that *met mitzvah* and *כבוד הבריות* are more important than *megillah*.

At first, this would seem to do little to prove that the Rabbis ever thought that *כבוד הבריות* could override a Toraitic commandment; the reading of the *megillah* is an inherently Rabbinic, not Toraitic, commandment, so it teaches nothing about the importance of *כבוד הבריות* vis-à-vis Toraitic commandments. The discussion preceding that comparison, though, makes the issue not nearly so simple. It proves that not all Rabbinic *mitzvot* are subservient to all Toraitic *mitzvot*. Indeed, reading the *megillah* is

¹⁹ Sacrificial worship in the Temple.

more important even than performing sacrifices in the Temple, or studying Torah! If a transitive property can be applied here, we will see that since כבוד הבריות is preferred over *megillah*, then it must also be preferred over עבודה or תלמוד תורה. It is important to note as well that this teaching comes from no lesser a source than Rava. Often the decider in *halachic* debates, his endorsement here of the power of כבוד הבריות should raise serious questions about any statements (which we will soon see) of the purely Rabbinic nature of *mitzvot* that can be overridden by this principle. Rava was a fourth generation Babylonian *Amora*, so this passage offers strong evidence that at his time כבוד הבריות was still seen as a powerful principle, one strong enough to possibly override even some Toraitic *mitzvot*.

Shabbat 81a-b

אמר רב יהודה: אבל לא את הפאייס. מאי פאייס? אמר רבי זירא: כרשיני בבלייתא. אמר רבא: אסור למשמש בצרור בשבת כדרך שממשמש בחול. מתקיף לה מר זוטרא: ליסתכן? כלאחר יד, אמר רבי ינאי: אם יש מקום קבוע לבית הכסא - מלא חיד, אם לאו - כהכרע מדוכה קטנה של בשמים. אמר רב ששת: אם יש עליה עד - מותר. מיתיבי: עשרה דברים מביאין את האדם לידי תחתונות, ואלו הן: האוכל עלי קנים, ועלי גפנים, ולולבי גפנים, ומוריגי בהמה בלא מלח, ושדרו של דג, ודג מליח שלא בישל כל צורכו, והשותה שמרי יין, והמקנח בסיד ובחרסית. בצרור שקינח בו חברו, ויש אומרים אף התולה עצמו בבית הכסא! לא קשיא, הא בלח, הא ביבש. ואיבעית אימא: כאן - מצד אחד, וכאן - משני צדדין. ואיבעית אימא: הא - דידה, הא - דחבריה. אמר ליה אביי לרב יוסף: ירדו עליה גשמים ונשטשטשו, מהו? - אמר ליה: אם היה רישומן ניכר - מותר. בעא מיניה רבה בר רב שילא מרב חסדא: מהו להעלותם אחריו לגג? - אמר ליה: גדול כבוד הבריות שדוחה את לא תעשה שבתורה. יתיב מרימר וקאמר לה להא שמעתא, איתיביה רבינא למרימר: רבי אליעזר אומר: נוטל אדם קיסם משלפניו לחצות בו שיניו, וחכמים אומרים: לא יטול אלא מן האבוס של בהמה! - הכי השתא! התם - אדם קובע מקום לסעודה, הכא - אדם קובע מקום לבית הכסא?

²⁰ A corpse that is found and therefore must be buried by the finder.

Rav Yehuda said: But not a *payis*. What is a *payis*? Rabbi Zeira said: small rocks from Babylon. Rava said: it is forbidden to use a rock on Shabbat in the way that you would use it on a regular day. Mar Zutra challenged him: to the point of being dangerous? With the other hand. Rabbi Yannai said: if there is a set place for the latrine, one may fill one's hand; if not, you compromise. A small mortar for spices – Rav Sheshet said: if it has upon it a witness [of its past use], it is allowed. The sages responded: 10 things give a person hemorrhoids, and these are they: one who eats the leaves of reeds, or the leaves of grapevines, or the stalks of grapevines, or the tough portions of an animal but without salt, or the backbone of a fish, or a salted fish that has not been cooked as much as it needs to be, or one who drinks the guarded portion of wine, and one who wipes himself with a lime or a piece of pottery, or one who wipes himself with a rock with which his fellow had already wiped himself, and there are some who say that also one who suspends himself in a latrine. This is not a difficulty: one is talking about dry and one wet. Or if you prefer, I will say: here, with one side, and here, with the other side. Or if you prefer, I will say: this one is his and this one is his fellow's. Abaye said to Rav Yosef: if rain fell on it and washed it clean, then what? He said to him: if its mark is discernable, it is allowed. Rabba bar Rav Shila asked of Rav Hisda (AB,3): what about the bringing up [of those rocks] to the roof? He said to him: So great is the Dignity of People that it cancels a negative commandment. Marimar was sitting and he stated this teaching. Ravina (AB,6) responded to/challenged him with this teaching: Rabbi Eliezer says: a man may take a wood chip that lies before him to clean with it his teeth, and the sages say: he may not

take it unless it was part of bedding for an animal! How can you compare these cases? There, a man has a fixed place for his eating. Here, does a man have a fixed place for his latrine?

This passage again deals with questions of Shabbat observance, but not related to travel, as we saw before, in the *Eruvin* passage. Here, we are instead talking about Rabbinically prohibited carrying on Shabbat, specifically when and how stones may be used and carried on Shabbat for the purpose of cleaning oneself after using the latrine. The prohibition against this exists to prevent people from exerting themselves unnecessarily on Shabbat. This discussion is structured similarly to the case from *Megillah*: after discussing some details about the way in which stones may be used, and then a tangent concerning personal hygiene and safety, the text then asks a related question: can the stones be carried up to a roof (if the latrine is up there), or would that constitute unnecessary effort, and therefore violate Shabbat according to the Rabbis? The answer is, as we have seen before, simple: since cleaning oneself after going to the bathroom is a question of human dignity, and the stones are presumably needed for such cleaning, then the carrying is allowed, because human dignity overrides a negative commandment, in this case, the Rabbinic commandment against unnecessary exertion on Shabbat.

Much like the *Megillah* passage, at first, this discussion seems to have little relevance to *כבוד הבריות* and Toraitic *mitzvot*, since the carrying that is being discussed is only prohibited Rabbinically. However, Rav Hisda, upon invoking *כבוד הבריות* never says that it only applies to cases such as this, i.e. Rabbinic prohibitions, as later generations will tend to do. It's possible that he sees that distinction as relevant, but it is

at least as possible, if not more so, that he is using a *kal v'homer* here: since כבוד הבריות can override a Toraitic prohibition, how much more so should it override a Rabbinic one.

The participation of Rabba bar Rav Shila and Rav Hisda place this discussion at around the third generation of Amoraim, and once again we see in a middle Amoraic discussion no hint of there being any clear distinction between the ability of כבוד הבריות to override Toraitic and Rabbinic mitzvot. Any claim to the contrary would have to be read into the text. It is also interesting that Rav Hisda seemed to have another argument open to him: it has already been established that not cleaning after using the latrine is a health issue. Concern for health is a powerful *halachic* tool, and could have been used as the argument for being allowed to carry rocks on Shabbat. The fact that כבוד הבריות was used instead would seem to imply that it was seen as a line of argument that could be used with confidence; it was well accepted by the Rabbis of Hisda's day.

Berachot 19b

אמר רב יהודה אמר רב: המוצא כלאים בבגדו פושטן אפילו בשוק, מאי טעמא +משלי כ"א+ - אין חכמה ואין תבונה ואין עצה לנגד ה' - כל מקום שיש חלול השם אין חולקין כבוד לרב. מתיבי: קברו את המת וחזרו, ולפניהם שתי דרכים, אחת טהורה ואחת טמאה, בא בטהורה - בא בטמאה - באין עמו בטמאה, משום כבודו. אמאי? לימא: אין חכמה ואין תבונה לנגד ה'. תרגמה רבי אבא בבית הפרס דרבנן. דאמר רב יהודה אמר שמואל: מנפת אדם בית הפרס וחולך; ואמר רב יהודה בר אשי משמיה דרב: בית הפרס שנדש טהור.

Rav Yehuda said: One who finds *shatnez* in his clothes must take them off, even if he is in the marketplace. Why? *There is no wisdom and there is no understanding and there is no help against God* (Proverbs 21:30). Every place where there is desecration of God's name we do not grant honor even to a Rabbi. He responded: a group is returning from burying the dead, and before

them are two paths, one is *tahor* and one is *tamei*. If he [the mourner] goes by the *tahor* path, go with him on the *tahor* path. If he goes by the *tamei* path, go with him on the *tamei* path, because of his honor. Why? I could say *There is no wisdom and there is no understanding ... against God*. Rabbi Aba interpreted it in relation to a *beit haPras*²¹. As Rabbi Yehuda said that Rabbi Shmuel said: a person may blow on a *beit haPras* [to clear away any *tamei* bits] and continue [walking on it]. And Rav Yehuda bar Ashi said in the name of Rav: a *beit haPras* which is well trodden is *tahor*.

This *sugya* opens with the problem of one who is walking in public and suddenly realizes that he is wearing *shatnez*. According to Rav Yehuda, he must take off those clothes immediately. This is justified by use of the Proverbs passage, which in its own context seems to simply state that you can't win if you try to oppose God. Taken slightly out of context, however, Yehuda uses it to say that as long as you are doing something against God's will, in this case, wearing *shatnez*, you can receive no reward, even for other things that you might do. You must, therefore, immediately fix the problem.

But, what if a *mitzvah* must be transgressed in order to fulfill some other *mitzvah*? The example is given of someone who must become *tamei* by walking along a path which is *tamei* in order to comfort a mourner. The answer is that you should let yourself become *tamei*, even though this is a violation of a Toraitic injunction. Given what we had just learned from Proverbs, you might think that the *mitzvah* of comforting mourners might not be able to be properly fulfilled as long as we were violating some other *mitzvah*, and therefore we should avoid becoming *tamei*. The first attempt that the Rabbis

²¹ An area that is suspected (but not known) to have a corpse buried there, and therefore may be *tamei*.

make to resolve that conundrum is via a technicality: perhaps this situation is like that of a *beit haPras*, which is easy enough to make *tahor*, at least for these purposes. This answer doesn't seem to satisfy the Rabbis, though, because they go on to discuss other options that more directly relate to the nature of the contradictory obligations placed on this person attempting to comfort a mourner.

תא שמע, דאמר רבי אלעזר בר צדוק: מדלגין חיינו על גבי ארונות של מתים לקראת מלכי ישראל, ולא לקראת מלכי ישראל בלבד אמרו אלא אפילו לקראת מלכי אומות העולם, שאם יזכה - יבחין בין מלכי ישראל למלכי אומות העולם. אמאי? לימא: אין חכמה ואין תבונה ואין עצה לנגד ה'! כדרבא, דאמר רבא: דבר תורה, אהל, כל שיש בו חלל טפח - חוצץ בפני הטומאה, ושאין בו חלל טפח - אינו חוצץ בפני הטומאה, ורוב ארונות יש בהן חלל טפח, וגזרו על שיש בהן משום שאין בהן, ומשום כבוד מלכים לא גזרו בהו רבנן.

Come and learn, as Rabbi Elazar bar Tzadok said: we climb over a coffin of a dead person to greet a King of Israel. And they said not only to greet a King of Israel, but even to greet a King of other nations, so that if he merits [to see the messiah], he will see the difference between Kings of Israel and Kings of other nations. Why? I could say *There is no wisdom and there is no understanding ... against God*. [The solution to this problem is] as Rava said: Rava said: It is Torah law that if a tent has an overhang of sufficient size, it blocks the acquiring of *tumah*, and if it doesn't have an overhang of sufficient size, it doesn't block the acquiring of *tumah*, and most coffins have an overhang of sufficient size, and so it was decreed on those that have [the proper overhang] for the sake of those which don't have [that proper overhang], and for the sake of Honor of Kings, the Rabbis didn't decree for them.

The case of the mourner is now compared to the case of dishonoring the dead in order to grant proper respect to a king. We have learned elsewhere that we are even allowed to climb over a coffin in order to show such respect. How is this justified? Again, based on the Proverbs verse, it might seem that becoming *tamei* would cancel out any merit for honoring the king. To resolve that, Rava's teaching about the nature of coffins and *tumah* is quoted. The main part of it merely explains how it came to be that all coffins, even those that seem to qualify as non-*tumah* passing ones, do pass on *tumah*. As an addendum, though, Rava mentions that the Rabbis made a special exception for kings – their honor is explicitly set apart as more important than issues of *tumah*. In effect, the Talmud implies that honoring the king is a *mitzvah*, just as refraining from becoming *tamei* is, and then it picks a side, as it must when two *mitzvot* conflict. In this case, honoring the king is a more important precept to fulfill than refraining from becoming *tamei*. But note that according to the Talmud, the *tumah* in this case is most likely only Rabbinic, since most coffins do not transmit *tumah* according to Toraitic law. The Rabbis decreed against most coffins because of the minority which do transmit *tumah*. For the king's sake, the Rabbinic decree is waived, but at the same time, the *tumah* transmitted according to Toraitic law, through that of a minority of coffins, is also seen as less important than honoring the king.

תא שמע: גדול כבוד חבריות שדוחה את לא תעשה שבתורה. ואמאי? לימא: אין חכמה ואין תבונה ואין עצה לנגד ה'! - תרגמה רב בר שבאקמיה דרב כהנא בלאו + דברים י"ז + דלא תסור. אחיכו עליה: לאו דלא תסור דאורייתא היא! אמר רב כהנא: גברא רבה אמר מילתא לא תחיכו עליה, כל מילי דרבנן אסמיכנהו על לאו דלא תסור, ומשום כבודו שרו רבנן.

Come and learn: so great is Dignity of People that it cancels a negative *mitzvah* in the Torah. Why? I could say: *There is no wisdom and there is no understanding and there is no help against God*. Rav Bar Shaba explained it before Rav Cahana as the negative *mitzvah* of *Do not turn away* (Deut 17:11). They laughed at him: the negative *mitzvah* of *Do not turn away* is Toraitic! Rav Cahana said: a great man has said something; do not laugh at him. All Rabbinic laws rely on the negative *mitzvah* of *Do not turn away*, and because of a person's honor the Rabbis allowed [its violation].

Having discussed the honor of the dead and the honor of kings, the text now cites a related teaching regarding כבוד הבריות – the honor of people in general. Just as honoring a king is a great enough precept that we can ignore Rabbinic *tumah* to fulfill it, so too honoring with a person. But, in this case, the principle of כבוד הבריות is severely limited. According to Rav Bar Shaba, the only negative precept that כבוד הבריות can override is the precept of לא תסור, found in Deuteronomy 17:11. That commandment is considered to be the basis for all Rabbinic power – it commands obedience to the sages, thus allowing them to rule with the authority of the Torah behind them. So, in effect, Bar Shaba is saying that כבוד הבריות can override any *mitzvot* that are derived from לא תסור – any Rabbinic *mitzvot* – but not any Toraitic *mitzvot*.

Although this line of arguing, limiting כבוד הבריות to laws derived from לא תסור, is found several times in Rabbinic literature, this seems to be the “origin text” for this argument – Rav Bar Shaba explains it (as opposed to most other texts which just state it as a given) to a group which is obviously unfamiliar with this line of reasoning, and indeed finds it laughable at first. If we are indeed witnessing the introduction of this

concept, or at least it's introduction into the mainstream, then we can see that it isn't much before the 6th or 7th generation of Amoraim that כבוד הבריות becomes limited to לא תסור. The earlier Rabbis seemed to have no problem applying כבוד הבריות to a wide range of situations, without differentiating between Toraitic and Rabbinic law. Later on, apparently, some Rabbis became uncomfortable with this. They were reluctant to take this essentially Rabbinic concept and to put it, and therefore their own power, above that of the Torah. Rather, they will do what they can to limit their power, making sure that the Torah remains unchangeable.

Menachot 37b-38a

רבינא הוה קא אזיל אבתריה דמר בר רב אשי בשבתא דריגלא, איפסיק קרנא דחוטיה ולא אמר ליה ולא מיד; כד מטא לביתיה, אמר ליה: מהתם איפסיק, א"ל: אי אמרת לי, מהתם שדיתיה. והא אמר מר: גדול כבוד הבריות שדוחה את לא תעשה שבתורה! תרגומה רב בר שבא קמיה דרב כהנא: בלאו + דברים י"ז + דלא תסור.

Rabina was walking behind Mar bar Rav Ashi on the first Shabbat of the study season, and the corner of his garment tore away, and he [Rabina] said nothing. When they got to his house, he said to him: it tore away there. He said to him: if you had told me, there I would have removed it. But isn't it taught: So great is the dignity of people that it cancels a negative commandment in the Torah! Rav bar Shava explained it before Rav Cahana as the negative [commandment] *Do not turn away* (Deut 17).

And there are those who say: he said it to him there [in the street], and he said to him: what do you think? Should I cast it off here? Hasn't it been taught: So great is the dignity of people that it cancels a negative commandment in the Torah!

Has not Rav bar Shava explained it before Rav Cahana as the negative commandment *do not turn away*. Also, it is a *carmelit*; it is [only] Rabbinic.

Once again the Talmud places כבוד הבריות against Shabbat observance, and once again, כבוד הבריות wins out as more important. However, as in the last passage, we see the Rabbis trying to limit the scope of כבוד הבריות to the purely Rabbinic realm. It seems, though, that in the first version of the story, Mar bar Rav Ashi is unaware of that distinction. Rabina notices that Mar's garment is defective; the corner, and therefore the *tzitzit* has been torn away. Since this is no longer a *kosher* piece of clothing, it is no longer technically being worn, but is now being carried, which is forbidden on Shabbat. When Mar learns that he had been walking around in this state, he says that if he had known, he would have had to take it off in public, an embarrassing act, to say the least. The *stam* then questions him on this. Might he have been able to keep it on, despite the apparent Shabbat violation, since stripping down would have been a violation of כבוד הבריות, which should override Shabbat? No, the text goes on to say, כבוד הבריות could only override a Rabbinically imposed Shabbat restriction, not the Toraitic one seen here. But, neither Rabbi in the story mentions or seems aware of that distinction.

The second version of the story shows that *one* of the Rabbis was aware of such a distinction, although the text is ambiguous, so that it could have been either one. Since it is Mar who is asking the initial question, it probably makes the most sense to assume that Rabina was the more knowledgeable here, although the issues remain essentially the same either way. Reading it that way, Mar asks Rabina whether or not he should take off the garment, thinking that maybe he shouldn't because of כבוד הבריות. Rabina tells him of the interpretation of Rav bar Shava, which limits the ability of כבוד הבריות to override

mitzvot to those that are Rabbinic, not Toraitic. That distinction doesn't matter to Mar, who now reveals that he is in a *כרמלית*, not a true *רשות הרבים*.

The details are, indeed, somewhat ambiguous, but the stories taken together seem to show that while later *Amoraim* such as Rabina and Mar bar Rav Ashi were somewhat aware of the more limited reading of *כבוד הבריות*, it was not fully accepted yet. That means that as late as the 7th *Amoraic* generation, limiting *כבוד הבריות* to overriding Toraitic *mitzvot* was at most in the process of becoming the norm; it wasn't yet there. It would seem that *כבוד הבריות* was limited slowly, perhaps over 2-3 generations. This is not at all hard to believe; such a change in *Halacha* wouldn't be accepted instantly. It would only be after several Rabbis had a chance to pass it on to their disciples that it would come to be accepted as the only correct reading.

Shabbat 94a-b

את המת במטה - חייב, וכן כזית מן המת וכו'. אמר רבה בר בר חנה אמר רבי יוחנן, ואמר רב יוסף אמר רבי שמעון בן לקיש: פוטר היה רבי שמעון אף במוציא את המת לקבורו. אמר רבא: ומודה רבי שמעון במר לחפור בו, וספר תורה לקרות בו, דחייב. פשיטא! דאי הא נמי מלאכה שאינה צריכה לגופה היא - אלא מלאכה שצריכה לגופה לרבי שמעון היכי משכחת לה? - מהו דתימא: עד דאיכא לגופו ולגופה, כגון מר לעשות לו טס ולחפור, ספר תורה להגיה ולקרות בו - קא משמע לן.

"And [one who is carrying] a corpse on a bed – he is still liable²², and so too one who is carrying a piece of a corpse, etc." Rabba son of Bar Hana said that Rabbi Yohanan said that Rav Yosef said that Rabbi Shimon ben Lakish said: he is exempt, according to Rabbi Shimon, even if he is carrying the corpse to it's

²² The Mishna is discussing a person's liability for carrying various objects on Shabbat.

grave. Rava said: And Rabbi Shimon agrees that a spade used for digging [the grave], and a Torah scroll to read from, [one who carries these is] liable. Obviously! For if here, too, we have "work that is not needed for its defined purpose," how will we ever find "work that is needed for its defined purpose" according to Rabbi Shimon? What is it that you are saying? Until there is benefit for his sake and for its sake, such as a spade with which to make a plate and to dig, or a Torah scroll to repair and to read from. That is what the text is teaching us.

Our last *sugya* is again dealing with laws of Shabbat, this time discussing certain types of carrying which may or may not be done on Shabbat. The first part of the discussion, then, is again about balancing the honor due to a corpse with Shabbat observance. The text is trying to discern how the nature of the work being done, whether it is directly or only indirectly useful, or both, affects its permissibility.

ההוא שכבא דהוה בדדוקרא, שרא רב נחמן בר יצחק לאפוקיה לכרמלית. אמר
 ליה רבי יוחנן אחיה דמר בריה דרבנא לרב נחמן בר יצחק: כמאן - כרבי
 שמעון, אימר דפטר רבי שמעון מחיוב חטאת - איסורא דרבנן מיהא איכא! -
 אמר ליה: האלהים! דעיילת ביה את, ואפילו לרבי יהודה (שרי). דמי קאמינא
 לרשות הרבים? לכרמלית קאמינא! גדול כבוד הבריות שדוחה את לא תעשה
 שבתורה.

There was a case of a corpse that was in Darokra and Rav Nahman bar Yitzhak allowed it to be carried to a *carmelit*. Rav Yohanan brother of Mar son of Rabana said to him: Who are you following in your permitting this? Rabbi Shimon? Perhaps Rabbi Shimon frees people from the [Toraitic] obligation of the sin offering, but it is still forbidden by Rabbinic decree? He said to him: By God!

Even you may bring it [the corpse] in! For this would be permitted even by Rabbi Yehuda: for was I talking about a public domain? I was talking about a *carmelit* – So great is the dignity of people that it cancels a negative commandment that is in the Torah.

The discussion now turns to a specific case, which returns us to the issue that we started with – what are the laws in regards to carrying a corpse on Shabbat? What the text seems clear about, in the end, is that carrying a corpse on Shabbat is permissible, if it is happening in a *כרמלית*, but not a in a true public domain, a *רשות הרבים*.

What is interesting is that our standard rhetorical phrase, “So great is the dignity...” is not used here until it is clear that we are only dealing with carrying in a *כרמלית*, not a true *רשות הרבים*. The phrase is brought as a proof that carrying in such a *כרמלית* is permissible. If the Rabbis in this discussion ever thought that *כבוד הבריות* could be used when talking about *רשות הרבים*, then this passage wouldn't make any sense. It seems to prove that these Rabbis, from the 4th generation of *Amoraim*, understood the negative *mitzvot* that *כבוד הבריות* overrides as being only those derived from Rabbinic, not Toraitic, legislation. This seems much earlier than we would expect to see this view, based on the texts that we have seen up until this point.

The explanation comes from a study of the language of this last *sugya*. The main body of the text includes the discussion between two Rabbis which is written using the construct *אמר ליה* to identify direct speech. The language used to record such conversations is Aramaic. However, the last line of the discussion, *גדול כבוד הבריות*, is in perfect Hebrew, not Aramaic, and also seems detached from the rest of the

conversation. Therefore, the last line appears to be a later addition by the *stam*, not an integral part of the original text. It serves as a perfect example of the development which we have been seeing: discussions of Tannaim and earlier Amoraim show no knowledge of any distinction between Toraitic and Rabbinic law in the context of the ability of *כבוד הבריות* to override *mitzvot*. However, later generations most assuredly do make such a distinction, and believe it to be so fundamental that they are willing (or, more correctly, they feel compelled) to force that distinction upon earlier texts. It remains, however, their distinction, not one known or held by their predecessors.

There can be no doubt that by the time the *Bavli* was redacted into its final form, the Rabbinic understanding of *כבוד הבריות* was that it could override a Rabbinic *mitzvah*, but never a Toraitic one. It goes without saying that those same Rabbis believed their understanding not to be a new interpretation, but rather the view held by all Rabbis before them. Clearly, though, a historical analysis of our texts leads us to different conclusions. In the Mishna, *Yerushalmi* and earlier layers of the *Bavli*, that distinction is simply not found. Early on, and potentially much later in Palestine, Rabbis believed that *כבוד הבריות* could override all *mitzvot*, even those found in the Torah. Only later in Babylonia did our predecessors feel the need to limit their own power, limiting the ability of *כבוד הבריות* to override *mitzvot* to Rabbinic laws.

Chapter 4 – Cancellation of a *get*

The case of the revocation of a husband's right to nullify a *get* provides a fascinating example of Rabbinic power's ability to overturn Toraitic law, and one which will show, quite clearly, how far the *Bavli* must occasionally stretch logic in order to keep that right out of the hands of the Rabbis.

Mishna Gittin 4:2

בראשונה היה עושה ב"ד ממקום אחר ומבטלו, התקין רבן גמליאל הזקן שלא יהו עושין כן, מפני תיקון העולם. בראשונה היה משנה שמו ושמה, שם עירו ושם עירה; התקין ר"ג הזקן, שיחא כותב איש פלוני וכל שום שיש לו, אשה פלונית וכל שום שיש לה, מפני תיקון העולם.

At first, [one] would create a court in some other place and cancel [his get]. Rabban Gamliel the Elder decreed that they couldn't do this, because of *Tikkun Olam*²³. At first, [one] would change his name and her name and the name of his city and the name of her city. Rabban Gamliel the elder decreed the he must write "Mr. So-and-so, and any [other] name which he has, and Mrs. So-and-so, and any [other] name which she has...", because of *Tikkun Olam*.

According to the Torah (Deuteronomy 24:1-2), total control over the *get* is in the husband's hands. He is the only one empowered to give one, and the only one with the power to retract it. Hence, a man who has issued a *get* and sent it by *sheliach* to his wife, presumably in another city, can go to a *beit din* and cancel the *get*, before it reaches his wife. In this case, the *get* is null and void, and the marriage is still valid. Presumably, this

was to be done when the husband had a last-minute change of heart, and immediately after canceling the *get*, he would send a message to his wife, or he would find her, and they would continue to be married. However, it seems that something went wrong, something which upset *Tikun HaOlam*. The most likely explanation seems to be that some men were using this power maliciously, canceling the *get* but never sending word to their wives. These women would receive the *get*, and having no idea that it had been cancelled, would go about acting as if they were fully unmarried women. Accidental adultery and illegitimate children were bound to result.

In reaction to this abuse of a legal right, Rabban Gamliel the Elder decided to make a *Takkanah* to put an end to it. He decreed that men no longer had this right, so a *get* could not be cancelled long-distance in this way. That enactment is extraordinary, because it directly overturns a Toraitic law; the right to cancel the *get* is implicit in the Torah, and explicitly assumed by the Rabbis to be the Torah's meaning. Presumably, it is thus not subject to mitigation by Rabbinic decree. Not surprisingly, the *Mishna* does not comment on nor attempt to explain what Gamliel did, it merely reports on it and seems to accept it. It can be inferred from this that the *Mishna* saw no problem with what Gamliel did; in its view, legislating out Toraitic rights in this way was within the purview of the Rabbis, assuming that a good social purpose was served. Just as Hillel, Gamliel's father, had created the *Prozbul*, so his son limited a man's right to cancel his *get* if this led to communal disruption or injustice. The truth of this statement, and the limits of Rabbinic power, are again taken up by the *Yerushalmi* and the *Bavli*, with very different results.

²³ *Tikkun Olam* in the Talmud means something like "good social order," and has no connection to the social activism with which we associate it today.

Talmud Yerushalmi Gittin Perek 4, Daf 45, Amud 3, Halacha 2

אם ביטלו חרי זה מבוטל דברי ר' רבן שמעון בן גמליאל או אינו יכול לבטלו
ולא להוסיף על תנאו יאות אמר רבן שמעון בן גמליאל מאי טעמא דרבי דבר
תורה הוא שיבטל והן אמרו שלא ביטל ודבריהן עוקרין דברי תורה וכי שמן על
זיתים וענבים על היין לא תורה הוא שיתרום מפני גזל השבט והן אמרו שלא
יתרום ולא עוד אלא שאמרו עבר ותרם אין תרומתו תרומה

If he cancels it, then it is cancelled – these are the words of Rebbe. Rabban Shimon ben Gamliel says that he can't cancel it and he can't add to its conditions. Rabban Shimon ben Gamliel ruled correctly. What is Rebbe's reasoning? It is a Toraitic law that it is cancelled [if the husband cancels it], and they say that it is not cancelled? Their words uproot words of Torah! So with olives in place of oil and grapes in place of wine, isn't it Torah that one may switch [them for purposes of the priestly offering], and didn't they [the sages] say that you may not switch them, because of theft from the tribe [of the Levites]? And that is not all, but they also said that if one violates [this decree] and switches them, then their offering is not an offering.

The *Yerushalmi* begins this passage with the question of exactly how binding Rabban Gamliel's decree is. What if a man were to try to violate the decree by assembling a *beit din* and going through the procedure of canceling a *get* which he had sent to his wife? Does the cancellation stand? Rebbe says that it does stand, and the *get* is cancelled. In other words, according to this view, Rabban Gamliel has made long-distance cancellation of a *get* illegal *l'chatchila*, but not *b'diavad*. In this way, the *takkanah* is somewhat limited; since the power granted by the Torah still exists, the fundamental facts have not changed, and the Torah has not been overridden. Rabban

Shimon ben Gamliel, in contrast, believes that the decree is absolute, and that the power to cancel from afar has actually been removed from the husband. The text concurs with this latter view.

The text then tries to explain its view. It starts by stating the obvious reasoning behind Rebbe's rejected view: Torah law is Torah law, and Rabban Gamliel shouldn't have the power to, in its words, uproot that law. To defeat this view, the text brings forward another ruling that it sees as an analogy. According to Toraitic law, for the *terumah* offering, olives may be used in place of the more expensive olive oil, and similarly, grapes may be used in place of the more expensive wine. However, people were apparently taking advantage of this loophole to such a great extent that the text equates it with stealing from the tribe of Levi, the beneficiaries of *terumah* offerings. So, to prevent this, the sages declared that the substitution may no longer be made. Just as in our case of the *get*, a Torah law is overturned for the purpose of good social order.

Of course, the same objection could, in theory, be made about this analogous case: it should be disallowed because it is uprooting Torah. But that isn't the *Yerushalmi's* point. It never even thinks about challenging the analogous ruling. This case is brought as an already accepted ruling to show that, in fact, the Rabbis simply have the power to overturn Toraitic *mitzvot* in cases like this. That power isn't explained away nor, even more interestingly, is it justified. It is presented as a simple, accepted part of the legal system, one which has been employed before, and one which can be again in our current case. Just as in previous cases which we have looked at, the *Yerushalmi* concurs with the *Mishna*; neither one sees any particular problem with the Rabbis having this power, as extreme as it may seem to us. While occasionally questioned, it is never

fundamentally challenged. The only limit on this Rabbinic power, from the cases which we have seen, is that it should apply where there is unfairness or danger to the community's stability. And, again as we have seen, the *Bavli* will have quite a different view from this.

Bavli Gittin 33a

ת"ר: בטלו - מבוטל, דברי רבי; רשב"ג אומר: אינו יכול לא לבטלו ולא להוסיף על תנאו, שא"כ, מה כח ב"ד יפה. ומי איכא מירי דמדאורייתא בטל גיטא, ומשום מה כח ב"ד יפה שרינן אשת איש לעלמא? אין, כל דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושין מיניה. אמר ליה רבינא לרב אשי: תינח דקדיש בכספא, קדיש בביאה מאי איכא למימר? שויה רבנן לבעילתו בעילת זנות.

Our Rabbis taught: If he cancels it, it is cancelled – these are the words of Rebbe. Rabban Shimon ben Gamliel says: he can't cancel it and he can't add to its conditions, for if he could, then what good is the power of the *beit din*? And is there such a thing that from a *Toraitic* standpoint the *get* is cancelled, but because of "what good is the power of the *beit din*?" we allow a married woman to the world [i.e. to remarry as she sees fit]? Yes. All marriages are made by Rabbinic power, and the Rabbis annulled his marriage. Ravina and Rav Ashi said to them: this is fine for marriages [made through acquisition of] money, but what would you say about marriages [made through] sex? The Rabbis equated [that sexual act] with promiscuity.

The *Bavli* starts with the same discussion which we saw in the *Yerushalmi*: whether or not one may go against Rabban Gamliel's decree. The reason that the *Bavli* gives, at first, for upholding Gamliel's ruling is different: if we were to allow someone to

violate the decree, then what good is that decree, or any other to come from a *beit din*.

The argument is thus answered indirectly: it is possible to say that, in theory, the decree should be non-binding, but that would have horrific effects on the power of all courts, so the decree is upheld for the greater good.

The *Bavli* is unsatisfied with that answer; the sanctity of the Torah seems more important than the power of the *beit din*. That brings us to the real, core issue, according to the *Bavli*. In the case of marriages, we now learn, this kind of power has been ceded to the Rabbis. The *Tosafotist's* explanation of this is that when the man makes the standard declaration "Behold, you are betrothed to me, by this ring, according to the law of Moses and Israel," "the law of Moses" refers to the Torah, but "the law of ... Israel" refers to the Rabbis.²⁴ The declaration of the groom in every wedding essentially states that the marriage is being created under the auspices of Rabbinic law, and so it is binding only so long as the Rabbis support it. They have, at their discretion, the ability to dissolve it at any time. So, it turns out that when the husband tries to cancel the *get*, it is, in fact, effective. The *get* is cancelled. At the same moment, though, the Rabbis nullify the marriage, generating the exact same practical effect as not nullifying the *get*: the marriage is ended. They aren't overturning any Toraitic law, merely circumventing it through perfectly legal channels.

This fits perfectly with a pattern which we have seen emerging from previous examples: the Rabbis take a case where it seems that their power can supercede that of the Torah, and then explain that in this particular case, the only law that is being superceded is other Rabbinic law. They quite naturally have the power to do this. The

²⁴ See *Tosafot*, Gittin 33a, q.v. כל דמקדש כו.

discussion is limited to the Rabbinic realm, and the Torah is left inviolate. However, as in all previous cases at which we have looked, it is only the later Rabbis who take this point of view. When the earlier texts are read independently, there is no evidence whatsoever that the earlier Rabbis shared this perspective with those who followed them. The reticence to modify Toraitic law is a trait not of those first Rabbis, but of those who followed them.

Chapter 5 – Uprooting the Torah – עת לעשות לאדוני

Up until now, we have looked at several cases of the Rabbis overturning Toraitic *mitzvot*, and in all of them, those sages have tried to explain away or justify their changes, always doing everything they can to minimize the changes that are actually attributed to them. There are, however, cases where the Rabbis are more than willing to explicitly overturn *mitzvot*. They begin by relying on a verse from Psalms, Psalm 119:126: “It is a time to act for God, they have uprooted your Torah.” While the simplest reading of this verse would seem to say that we must fight heretics who are acting to uproot the Torah, we will see that some Rabbis reverse the clauses, saying that *we* must uproot the Torah in order to act for God. This hermeneutic is invoked as an emergency measure: when the situation is most dire, even blatant reversal of a *mitzvah* is allowed, since it is acting, in the long run, in the name of God.

Mishna Berachot 9:5

חייב אדם לברך על הרעה כשם שהוא מברך על הטובה שנא' (דברים ו) ואהבת את ה' אלהיך בכל לבבך ובכל נפשך ובכל מאדך בכל לבבך בשני יצריך ביצר טוב וביצר רע ובכל נפשך אפילו הוא נוטל את נפשך ובכל מאדך בכל ממוןך דבר אחר בכל מאדך בכל מדה ומדה שהוא מודר לך הוי מודה לו במאד מאד לא יקל אדם את ראשו כנגד שער המזרח שהוא מכוון כנגד בית קדשי הקדשים לא יכנס להר הבית במקלו ובמנעלו ובפונדתו ובאבק שעל רגליו ולא יעשנו קפנדריא ורקיקה מקל וחומר כל חותמי ברכות שהיו במקדש היו אומרים מן העולם משקלקלו המינין ואמרו אין עולם אלא אחד התקינו שיהיו אומרים מן העולם ועד העולם והתקינו שיהא אדם שואל את שלום חברו בשם שנאמר (רות ב) והנה בעז בא מבית לחם ויאמר לקוצרים ה' עמכם ויאמרו לו יברכה ה' ואומר (שופטים ו) ה' עמך גבור החיל ואומר (משלי כג) אל תבוז כי זקנה אמן ואומר (תהלים קיט) עת לעשות לה' הפרו תורתך ר' נתן אומר הפרו תורתך עת לעשות לה'.

A person is required to bless evil just as he is required to bless good, as it is said: *And you shall love Adonai your god with all of your heart and with all of your soul and with all of your might.* With all of your heart – with your two impulses. With the impulse for good and with the impulse for evil. And with all of your soul – even if He were to take your soul. And with all of your might – with all of your wealth. Another interpretation: with all of your might – with every measure which He gives to you, you shall thank him. A man must not act lightly opposite the East Gate because it is oriented opposite the house of the Holy of Holies. One shouldn't enter the Temple Mount with his staff or with his shoes or with his purse or with dust on his feed, and one shouldn't use it as a passageway, and [the prohibition against] spitting there is a *kal v'homer*.

All who concluded blessings in the Temple would say 'from eternity;' When the heretics came and disrupted it, and said that there is only one world, they established that they should say 'from eternity until eternity.' And, they established that a person should ask after the welfare of his friend with God's name, as it said: *And Boaz came from Bethlehem and said to the farmers, "May God be with you," and they said to him "May God bless you."* And, it says: *May God be with you, mighty warrior.* And, it says: *And don't disrespect your mother because she is old,* and it says: *It is time to act for God, they have uprooted your Torah.* Rabbi Nathan says: They have uprooted your Torah because it is time to act for God.

This Mishna lays down the basis for all of the subsequent Rabbinic usages of the passage from Psalms, "It is time to act for God, they have uprooted your Torah." The first

half of this Mishna seems at first to have little connection with the second half. At best, the two seem to be related in that they both deal with the need for proper reverence and respect with regards to how we relate to certain sacred items. The first half lays down a series of laws which give some examples of how and when such reverence must be displayed. The second half deals more with examples and situations when such rules may be broken. It is that half which interests us.

Although it is not explicitly listed in the first half, the use of God's name in a greeting seems to be something which was forbidden at one point, and which fits in well with the other rules listed above. However, at some point, that rule was changed in reaction to some unnamed heretics. The Mishna tries to find some justification (seemingly *ex post facto*) that would explain why the new God-including greetings are allowable. The first attempt is to quote Boaz who used precisely such a greeting. The second quote, "And don't disrespect..." is probably there to further bolster the Boaz example – the idea that we shouldn't disrespect our elders could lead one to say that we shouldn't disallow a greeting which someone who came long before us, Boaz, was in the habit of using. The fact that his legitimacy is predicated on his being an elder probably implies that he himself was not intrinsically worthy of being such a model, and his other credentials were therefore needed. Either because of that questionability of using Boaz as a model, or for some other, unspecified reason, the Mishna feels that it needs to bring another, different proof-text for the new greetings, and so it brings "It is time..." Its applicability is tersely explained by Rabbi Nathan who reverses the text: the reason that they uprooted your Torah (i.e. they allowed something which had been forbidden) is that

it is time to act for God (i.e. the heretics have made this into an emergency situation, and we have to do everything we can to stop them).

This hermeneutic move has, at least potentially, placed a fantastic amount of power in the hands of the Rabbis (or, more correctly, in the leaders and authorities of the day). Torah laws may be overturned if it is deemed to be necessary to act against some extreme situation, but there are no boundaries given to how this concept may be applied, at least not here. Interestingly, the Rabbis in Tannaitic and Talmudic materials show considerable restraint in using this rubric, rarely invoking it and thus never feeling the need to explicitly place limits or definitions on this power.

Berachot 63a

התקינו שיהא אדם שואל בשלום חברו וכו'. מאי ואומר? - וכי תימא: בעז
 מדעתיה דנפשיה קאמר - תא שמע +שופטים ו' + ה' עמך גבור החיל. וכי תימא:
 מלאך הוא דקאמר ליה לגדעון - תא שמע +משלי כ"ג+ אל תבוז כי זקנה אמך.
 ואומר +תהלים קי"ט+ עת לעשות לה' הפרו תורתך

"They established that a person should ask after the welfare of his friend..." Why "and they also said" [why does the Mishna continue on with other proofs]? For, if you will say that Boaz was speaking based on his own opinion – come and learn *God be with you, mighty warrior*. And if you will say that it was merely a messenger who said this to Gideon – come and learn *And don't disrespect your mother because she is old*, and it says: *It is a time to act for God, they have uprooted your Torah*.

The Talmud passage building off of our Mishna starts with some small changes in the explication of the new, God-centered greetings: the problem with Boaz wasn't with

his fitness to be a model for us, but rather with his motivations for doing what he did. It's possible, we learn, that Boaz wasn't relying on any authority when he invoked God's name, and just thought that it was a good idea. If so, it wouldn't be the type of behavior that we would want to imitate. Either way, though, the pattern remains the same as in the Mishna: Boaz is brought as an exemplar, and then (at least potentially) rejected, leaving the Rabbis to fall back on "It is time..." to justify the new greeting.

אמר רבא: האי קרא מרישיה לסיפיה מדריש, מסיפיה לרישיה מדריש. מרישיה לסיפיה מדריש: עת לעשות לה' מאי טעם - משום הפרו תורתך. מסיפיה לרישיה מדריש: הפרו תורתך מאי טעמא - משום עת לעשות לה'.

Rava said: This verse may be explained from front to back: *It is a time to act for God. Why is that? Because they have uprooted your Torah.* It can be understood from back to front: *They have uprooted your Torah. Why is that? Because it is a time to act for God.*

Rava then gives a fuller explanation of the Psalm verse than Rabbi Nathan did in the Mishna. The verse can actually be validly understood in either of two ways: the simpler meaning, following the verse as it is, is that we must do something in the name of God because some group has acted to uproot His Torah. In other words, there is some heretical person or group out there, and this is our call to action. But, there is no reason to think that we have any right to act outside of the law to combat those heretics. The other reading, which requires reversing the clauses of the verse, says that they, now meaning the authorities, have uprooted the Torah. They have made an enactment which goes

against the true law, but that enactment is justified by a sense of emergency – a time to act for God.

What is interesting is that in many cases, including the current example of the heretics, either reading could be perfectly applicable. The front to back reading works: we must join together and act, because the heretics are uprooting Torah. That could be a call for more education, speaking out against heresy or any number of proactive defenses of that sort. But, the back-to-front reading also works: because there is a sense of emergency, due to the heretics, they, the sages, uprooted the Torah, and allowed a God-based greeting. It seems that the only way to tell which reading is being used is to look at what is being done in reaction to the emergency. In our case, the Rabbis are doing something which they understand to be counter to the existing law – allowing the use of God's name in a greeting. Therefore, they must see themselves as uprooting the Torah, meaning that the back-to-front reading is the one that applies here.

תניא, הלל הזקן אומר: בשעת המכניסין - פזר, בשעת המפזרים - כנס. ואם ראית דור שהתורה חביבה עליו - פזר, שנאמר +משלי י"א+ יש מפזר ונוסף עוד, ואם ראית דור שאין התורה חביבה עליו - כנס, שנאמר עת לעשות לה' הפרו תורתך.

It is taught [in a *Baraita*]: Hillel the elder would say: in a time of gathering – disperse, in a time of dispersal – gather in. And if you saw a generation to whom the Torah is dear, disperse, as it is said: *There is one who disperses, and gathers in more*. And if you saw a generation to whom the Torah is not dear, gather in, as it is said: *It is a time to act for God, they have uprooted your Torah*.

This section then continues with another example of application of our principle, again with ambiguity as to whether it should be the “front-to-back” or “back-to-front”

reading that is being invoked. A quick statement by Hillel is explained by an anonymous *Tanna* as relating to "It is a time to act..." The dispersing that Hillel is talking about, the *Baraita* seems to imply, is the dispersal of our Torah knowledge. If there is a time when people care about Torah, we should be teaching as much as we can, but in a generation when the Torah is not cared for, we should hold our teaching close – either not teach them or, more plausibly, only teach them to those closest to us, those whom we know will listen. The front-to-back reading is certainly plausible: we must do something (or, in this case, not do something – teaching), because the world is filled with uprooters: those who don't love Torah. However, if we recognize that *Talmud Torah* is a *mitzvah*, then the instruction to not teach can be seen as uprooting Torah, allowing the back-to-front reading: we must uproot the Torah (the law of *Talmud Torah*) because it is a time of emergency. Again, the act that is being done in response to the heretics is what enables us to see that the back-to-front reading must be the favored one here.

Gittin 60a

שלחו ליה בני גליל לר' חלב: מהו לקרות בחומשים בבהכ"נ בציבור? לא הוה בידיה. אתא שייליה לר' יצחק נפחא, לא הוה בידיה. אתא שאיל בי מדרשא, ופשטוה מהא דא"ר שמואל בר נחמני א"ר יוחנן: ס"ת שחסר יריעה אחת - אין קורין בו. ולא היא, התם מחסר במילתיה, הכא לא מחסר במילתיה. רבה ורב יוסף דאמרי תרוייהו: אין קוראין בחומשין בבית הכנסת משום כבוד הצבור. ורבה ורב יוסף דאמרי תרוייהו: האי ספר אפטריתא - אסור למקרי ביה בשבת; מאי טעמא? דלא ניתן ליכתב. מר בר רב אשי אמר: לטלטולי נמי אסור; מ"ט? דהא לא חזי למיקרי ביה. ולא היא, שרי לטלטולי ושרי למיקרי ביה, דר' יוחנן ור"ש בן לקיש מעייני בספרא דאגדתא בשבתא, והא לא ניתן ליכתב! אלא כיון דלא אפשר - תהלים קי"ט+ עת לעשות לה' הפרו תורתך,

The people of Galil sent [a question] to Rabbi Helbo: what is the law regarding reading publicly from a *chumash*²⁵ in the synagogue? He didn't have an answer for them. He came and stood before Rabbi Yitzhak Nappacha, he didn't have an answer. He came and asked in the house of study, and they [those studying there] resolved it from what Rabbi Shmuel bar Nahmani said that Rabbi Yohanan said: a Torah scroll which is missing one sheet – one cannot read from it. But that is not applicable: there it is lacking in its [intended] content, here it is not lacking in its [intended] content. Rabba and Rav Yosef both said: one may not read from a *chumash* in a synagogue because of the honor of the public. And Rabba and Rav Yosef said together: this book of *Haftorot* – it is forbidden to read from it on Shabbat. What is the reason? Because it wasn't meant to be written. Mar son of Rav Ashi said: even to carry it is forbidden. What is the reason? Because it is not fit to be read from. But this is not so! It is allowed to carry it and it is allowed to read from it. For Rabbi Yohanan and Rabbi Shimon ben Lakish studied from a book of *Aggadah* on Shabbat, and that isn't allowed to be written! Rather, since it was not possible, *It is time to act for God, they have uprooted your Torah.*

Later in the Talmud, back-to-front seems to emerge as the preferred reading of “It is time to act...,” as we see in this passage. The debate begins trying to figure out whether or not we may read Torah from a *chumash*. A short discussion ensues, with an attempt to bring a parallel situation which is then shown not to be applicable to our

²⁵ Not a *chumash* as we know it, but probably a scroll containing one of the books of Torah instead of all five.

problem. The second attempt is another analogy, this time to the reading of a book of *Aggadah*. Since neither book was ever supposed to be written down, it would seem that just as one, the book of *Aggadah*, may not be used on Shabbat, so to the other, the *chumash*, should not be used on Shabbat. The problem arises when someone raises an objection based on the actions of two *Amoraim*, Rabbis Yohanan and Shimon ben Lakish, who did indeed read from a book of *Aggadah* on Shabbat. That implies that, in fact, reading from a book of *Aggadah* on Shabbat is actually allowable. So, it would seem that there would be no problem with reading from a *chumash* on Shabbat either, at least according to this analogy.

The analogy is broken, though, by limiting the actions of those two *Amoraim* to a non-typical situation. Under normal conditions, they would never have read from a book of *Aggadah*, but, they did so in this case because it was an emergency, and the Talmud invokes "it is a time..." to justify their actions. Clearly, this is a back-to-front reading – allowing their seemingly illegal actions based on some emergency. Unfortunately, the type of emergency that they were facing is not revealed to us in this text, so we can't learn very much from this example about how and when this principle can be applied. It is worth noticing, however, that the Rabbis who are applying this principle (or, more properly, the Rabbis who the Talmud claims are applying this principle) are second generation *Amoraim*. So, we do learn at least that overturning the Torah for the greater good of God is not limited to the earliest generations of Rabbis; that right extends at least well into the third century B.C.E.

Yoma 69a

ובמדינה לא? והתניא: בעשרים וחמשה בטבת יום הר גרזים הוא, דלא למספד.

יום שבקשו כותיים את בית אלהינו מלאכסנדרוס מוקדון להחריבו ונתנו להם. באו והודיעו את שמעון הצדיק. מה עשה? לבש בגדי כהונה, ונתעטף בבגדי כהונה, ומיקירי ישראל עמו, ואבוקות של אור בידיהן, וכל הלילה הללו הולכים מצד זה והללו הולכים מצד זה עד שעלה עמוד השחר. כיון שעלה עמוד השחר אמר להם: מי הללו? אמרו לו: יהודים שמרדו בך. כיון שהגיע לאנטיפטרס זרחה חמה, ופגעו זה בזה. כיון שראה לשמעון הצדיק, ירד ממרכבתו והשתחוה לפניו. אמרו לו: מלך גדול כמותך ישתחוה ליהודי זה? אמר להם: דמות דיוקנו של זה מנצחת לפני בבית מלחמתי. - אמר להם: למה באתם? - אמרו: אפשר בית שמתפללים בו עליך ועל מלכותך שלא תחרב יתעור גויים להחריבו? - אמר להם: מי הללו? - אמרו לו: כותיים הללו שעומדים לפניך. - אמר להם: הרי הם מסורים בידיכם. מיד נקבום בעקביהם ותלאום בזנבי סוסייהם, והיו מגררין אותן על הקוצים ועל הברקנים עד שהגיעו להר גריזים. כיון שהגיעו להר גריזים חרשוהו, וזרעוהו כרשינין. כדרך שבקשו לעשות לבית אלהינו. ואותו היום עשאוהו יום טוב. - אי בעית אימא - ראויין לבגדי כהונה, ואי בעית אימא - +תהלים קיט+ עת לעשות להי הפרו תורתך.

[preceding this passage is a discussion on the laws regarding when Priestly garments may be worn]

And in the land [e.g. outside of the city] it is not allowed? Isn't it taught in a *baraita*: On the 25th of Tevet, which is the Day of Mount Gerizim, one may not eulogize. That day the Cutheans requested the House of our God from Alexander so that they might destroy it, and he gave it to them. The came and notified Shimon the Righteous. What did he do? He dressed in the priestly clothes, and wrapped himself in the priestly clothes, and with the wealthy people of Israel with him, and with lit torches in their hands, and all of the night, these walked from this side and those walked from that side until the first ray of dawn. At the first ray of dawn, he said to them: who are these? They said to him: They are the Jews who are rebelling against you. When they reached Antipastres, the sun shone and they reached each other. When he say Shimon the Righteous, he got down from his chariot and bowed before him. They said to him: A great king

such as yourself will bow to this Jew?!? He said to them: an image in the likeness of this man wins before me in the house of my wars. He said to them: why have you come? They said: is it possible that the house in which we pray for you and for your kingdom will not be destroyed by these people? He said to them: which people? They said to him: These Cutheans who stand before you. He said to them: Behold, I deliver them into your hands. Immediately, they pierced their ankles and hung them from the tails of their horses, and they were dragging them over thorns and over thistles until they arrived at Mount Gerizim. When they arrived at Mount Gerizim they plowed and planted it, in the same way that they had sought to do to the House of our God. And that day was made a festival.

If you prefer, say that they [the garments used] were only *fit* to be used as priestly garments, or, if you prefer, say *It is time to act for God, they have uprooted your Torah*.

This passage is most interesting in that it, better than any that we have seen so far, shows what qualifies as “a time to act” in the back-to-front reading of that Psalms verse. The *halachic* details here are fairly simple: it is, according to some, prohibited for a priest to wear his priestly vestments outside of the Temple District, but there is a story, contained in a *baraita*, which shows Shimon the Righteous doing exactly that. But, it was not done lightly. It seems that the donning of the priestly clothes was part of an attempt to impress and thereby persuade Alexander to spare the Temple in Jerusalem.

Clearly, there are few if any things which would be more important than saving the Temple from destruction, so if a law could ever be uprooted, then this would be a time for it. So, on the one hand, one could infer that we now know the severity of the

situation which qualifies as “a time to act.” Unfortunately, that is not really so. Nowhere is it stated, implicitly or explicitly, that times must be this dire before that verse applies; it could be that this is the upper end of a wide range of dangerous situations which qualify, or it could be that this is essentially at or near the lower end. We just can’t learn from this what other lesser emergencies would also give us the right to invoke the verse from Psalms and overturn the Torah.

Amazingly, this remains the situation throughout the *Bavli*. Never are we given any criteria by which to judge whether or not we may uproot part of our Torah. Given the extreme power that this principle gives to people, you would expect the Rabbis to be incredibly zealous in their restrictions, but that is not so. It is possible that this principle was rarely invoked, either because it wasn’t widely accepted or perhaps because it’s power, and therefore the care that must be taken with it, was understood without the Rabbis legislation. Any such arguments are obviously arguments from silence; we may never know exactly how the earliest Rabbis really viewed this verse from Psalms, and the authority which it granted us.

Talmud Yerushalmi Berachot Perek 9, Daf 14, Amud 4, Halacha 5

עַתָּה לַעֲשׂוֹת לַיהוָה הִפְּרוּ תוֹרַתְךָ רַבִּי נָתַן מִסֵּרס קִרְאִי הִפְּרוּ תוֹרַתְךָ עַתָּה לַעֲשׂוֹת לַיהוָה
 רַבִּי חֶלְקִיָּה בִּשְׁם רַבִּי סִימֹן הָעוֹשֶׂה תוֹרָתוֹ עֲתִים הָרִי זֶה מִיִּפְרָ בְּרִית מַה טַּעֲמָא
 הִפְּרוּ תוֹרַתְךָ עַתָּה לַעֲשׂוֹת לַיהוָה תִּנִּי רַבִּי שְׁמַעוֹן בֶּן יוֹחִי אוֹמֵר אִם רָאִיתָ אֶת הַבְּרִיּוֹת
 שֶׁנִּתְּיָאוּ יְדִיהֶן מִן הַתּוֹרָה מֵאֵד עֲמוּד וְהִתְחַזַּק בָּהּ וְאַתָּה מִקְבֵּל שְׂכָר כּוֹלֵם מַה
 טַעֲמָא הִפְּרוּ תוֹרַתְךָ עַתָּה לַעֲשׂוֹת לַיהוָה.

It is a time to act for God, they have uprooted your Torah. Rabbi Natan switched the verse: They have uprooted your Torah [because] it is a time to act for God. Rabbi Helkia in the name of Rabbi Simon: one who does Torah from time to time,

behold it is like one who breaches the covenant. What is the basis for this? They overturned your Torah, those who from time to time do Torah [there is a play off of the Hebrew עת and עתים that doesn't get picked up in the translation]. Rabbi Shimon ben Yochai says: if you see people who greatly remove their hands from Torah [i.e. give up Torah], stand and grasp it, and you will receive all the reward. What is the basis for this? *They have uprooted your Torah, it is time to act for God.*

In the *Yerushalmi*, we never see a case of actual application of “It is time to act...,” but this passage shows that the Palestinian *Amoraim* were more than aware of the back to front reading of the verse which we have seen invoked several times now in the Mishna and *Bavli*. This passage also shows that they definitely didn't see it as the definitive reading of the verse; two alternate readings are presented after Rabbi Nathan's. Rabbi Helkia reads it *aggadically* – making a play on the word עת, he condemns those who only sporadically involves himself with Torah. Rabbi Shimon ben Yochai also have a more *aggadic* reading, teaching that we can receive extra credit as it were, for doing where others have failed to do. In this case, the *Yerushalmi* seems to be very similar to the *Bavli* in how it handles this verse. It allows for the possibility of overturning *mitzvot*, but at the same time knows of other, less drastic interpretations of the Psalm.

Also like the *Bavli*, the *Yerushalmi* sees no reason to explicitly limit or control the power granted by the back-to-front reading. This still remains surprising, and somewhat frustrating. It would be most interesting to learn exactly what the Rabbis considered to be an emergency serious enough to qualify as “a time to act for God.” Later generations have had to rely on their own guidance, not that of the *Tannaim* or *Amoraim*, to teach

them when and how to apply this great power. It would be most interesting to know something about the original intent of these first Rabbis.

Conclusion

An objective reading of the major sources of Rabbinic literature can lead to only one conclusion. The Rabbis who began the Judaism that we know today, the Judaism which began after the destruction of the Second Temple, did not see the Torah as an unchanging monolith. That is not to say that they didn't see it as the most important document in existence, indeed, as a piece of divinely revealed legislation. They did. But that did not lead them to believe that every single statute contained therein was perfect and therefore applicable in every situation, from the moment of revelation until the end of history.

The first example in this thesis, פרוזבול, shows this quite clearly. The way in which the community was working within the שמיטה law, avoiding it by refraining from giving any loans near the שמיטה year, was resulting in societal problems, which is the exact opposite of the intent of these laws – the good, orderly running of society. As a result, Hillel felt compelled to make a decree which nullified the שמיטה year in practice, even if he still left it functioning on a theoretical level. He did so openly and directly, by creating a hierarchy among conflicting *mitzvah* obligations, and only later did Rabbis feel the need to explain his actions in any way other than this.

The case of the Rebellious Son is different mainly in its timing; the law seems to have been reversed by the time of the first Rabbinic writings. However, despite ongoing attempts to explain why the law was *never* intended to be invoked literally, the evidence proves that the original intent must have been exactly that: the actual execution of a son who was incorrigibly rebellious. That idea, acceptable to those who lived in the Ancient

Near East, was antithetical to the morals of Rabbis of all generations, so the law had to be nullified; it was the only way that it could fit into the system which the Rabbis subscribed to. But, that doesn't mean that the understanding which the Rabbis had of this law was what it meant originally.

The case of *כבוד הבריות* offers what is probably the most subtle of the uses of Rabbinic power which this thesis has examined. It is never clearly identified as being an expression of Rabbinic will, but it is. That must have been apparent to later generations of Rabbis, the *Amoraim* in particular, because it was they who felt compelled to limit the scope of this halachic category. They were uncomfortable with a Rabbinic construct overriding laws laid down in the Torah. But, as we always see, this reticence was theirs; it finds no expression in the legislation or other writings of the *Tannaim*.

The last two examples are the most bold and most direct of all of the Rabbinic legislation to overturn Toraitic law. Clearly, there are times when the Torah must be overtly overturned, and the Rabbis are able to do so by invoking *עז לעשות לה'*, but they obviously knew this extreme measure was only to be used in the most dire of circumstances – when the whole body of Torah was being threatened in some way. But, even in less extreme situations, they were still willing to rule directly against Toraitic law. The revoking of a man's right to cancel a *get* sent to his wife from afar is, to the Rabbis way of thinking, such an overturning; it is a Toraitic law which is overturned, but clearly not due to an emergency of epic proportions. Yet, little if any apology or rationalization beyond *משום תקון עולם* can be found in *Tannaitic* or *Palestinian Amoraic* writings. Because this enactment was necessary for the good of the community, it was simply enacted. Those Rabbis were unwilling to let the principles which they saw

underlying the Torah die in order to maintain the individual laws which were supposed to work towards those principles. The Rabbis of the *Bavli* apparently didn't see it that way

It is not surprising that those Rabbis, as well as all later generations of Rabbis were not comfortable with this open view of the nature of Torah. A more static view certainly seems more logical. How could a person, even one as pious and learned as one from the first generations of Rabbis, ever think that his insights were valid in the face of contradiction from the Torah? How could divine legislation be found to be outdated, or imperfect in any way? How could our system of ethics be superior to the one which God gave us directly.

Even if that view seems more theologically cogent to us, it didn't seem compelling to those early Rabbis. They clearly had some other way of understanding their relation to Holy Writ. Perhaps it was an ethical certainty that they learned from the majority of the Torah which acted as their guide. They certainly could have believed that they were doing "what is right and good in the sight of the Lord (Deuteronomy 6:18)," as they had been commanded to. Perhaps they had a different relationship with our God, which led them to different ways of relating to God's law than we have. Whatever the reason, the fact remained the same. Certain times and certain situations called for them to transcend the laws written in the Torah, and out of their bravery grew the religion that we all call our own today.