



SHALOM HARTMAN INSTITUTE

Elu v'Elu: Two Schools of Halakha Face Off On Issues of Human Autonomy, Majority Rule And Divine Voice of Authority

By Noam Zion



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¹ Summarized based on Moshe Halbertal lectures to TICHON on Interpretation, Avi Sagi’s *Elu v’Elu*, and on Aviezer Ravitsky, “The Question of Toleration in Jewish Tradition: Between Pluralism and Paternalism” in *Bein Samchut l’Autonomia*, edited by Avi Sagi, Zeev Safrai p. 396. Thank you to Aylana Meisel for editing.

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Introduction

The Rabbinic Revolution – The Rule of the Interpreters

The Rabbinic revolution that spawned the Beit Midrash two thousand years ago encourages an ongoing debate among the legislative and judicial leadership of the Jewish people regarding the proper interpretation of the Divine word- the Jewish Constitution so to speak- in its written and oral traditions. That debate is concerned both with establishing theoretical truth and the will of God as well as creating a practical path that law-observing Jews who follow the rabbinic elite can adhere to. The Beit Midrash must find a balance between a **pluralist atmosphere** – an open, rational discussion of alternative interpretations and applications of Torah– and the need for an **authoritative decision** that unites as much of the community as possible. Though the Rabbinic system is not strictly democratic in the sense that people elect representatives to decide these issues, it does share much with modern Western democracy. For example, any democracy wants its choices based on the ideal of a rational debate but it also seeks to produce a decision determined by the will of the majority of authoritative participants in the legislative and /or judicial process. Majority vote does not guarantee that the most rational result will emerge victorious. Further, most democratic legal systems, like the Beit Midrash, make decisions not only on the basis of contemporary opinions and interests of those debating but also on the precedents and constitutional axioms, which they have inherited and upon which their authority rests. The American Constitutional system has more significant parallels to the Torah system. The US system prizes loyalty to the “founding fathers” of the republic (corresponding to the Divine Founding Father- God), to the founding constitution (corresponding to the Torah as a historic covenant ratified by the people at Mount Sinai) and to the history of precedents set by great jurists (corresponding to the Oral Tradition). Yet the contemporary judges and legislators (like the Rabbis) must also be true to their own reading of the text and of the situation, so that the law remains a living tradition, authentic to their understanding of the world as well as to the founding vision of their society (the holy people and the Torah).

Might we compare these issues of continuity and innovation, community and individual perspective, obligation and choice, to the challenges to Bnai Mitzvah? These young adults, called upon to take a place in society, must choose their paths through exercising their autonomous will, but schools as bastions of rationality and culture teach them to justify that act of individual will by rational argumentation. More broadly, schools are agents of acculturation and socialization that ask individuals nurtured by parents and community to give an account of how they respond to that inherited culture that brought them into the world and made the society from which they benefit possible. **Rationality** and **tradition** are double-edged swords that not only make claims on the individual but also serve as basis for a reformist critique of the given society for its failure to live up to reason or to society’s original project and axioms. Culture and reason can also be understood as mandating ongoing creativity, cultural re-appropriation and ongoing adjustment to changing realities – objective and subjective- so that the impetus to change and grow may be as primary as the one to preserve and to conserve what has been inherited.

We will examine a set of interlocking canonical texts of the rabbinic culture of the Beit Midrash, which recount the foundational debate between the schools of Hillel vs. Shammai,

and of Yehoshua and Rabban Gamliel versus Eliezer. Interpolated into these human debates is a miraculous expression of God's all-important input. Divine will is expressed through a variety of ways. It is expressed through authoritative verses quoted from the Torah, through voices from heaven, as well as through chance meetings with God's only "living" prophet at that time—Elijah (who never died but was taken up into Heaven). Last but not least, it is expressed through Divine providence punishing wrongdoers mentioned in these stories of conflict in the Beit Midrash. It is by contrasting these texts and multiple interpretations of each that we can learn about the Beit Midrash, the heart of rabbinic authority and culture, as well as its contribution to the formation of a quasi-democratic society of scholars.

The Rabbis - a Knowledge-based Interpretative Elite³

Knowledge has always been one of the central warrants for the claim to political rule, although not often a successful one. Plato's argument on behalf of philosophers is the classic example. The Republic he presents is an entirely imaginary polis. School learning and professional expertise more often position people as advisers or counselors than as actual rulers--thus the role of "wise men" in the biblical histories and the book of Proverbs. China's mandarin bureaucrats are perhaps the great exception here; they actually ruled the country, although they were formally subordinate to an emperor who, since he held the "mandate of heaven," did not have to pass the civil service examinations. [In theory King Solomon claimed to rule by virtue of wisdom, though he was far from infallible or universally acclaimed in his own era].

After 70 C.E., Israel no longer possessed a geographical center in Jerusalem or an institutional center in the royal court or the Temple. It became a **text-centered society**, focused on the Torah, bound by its covenant to a set of laws. After several centuries of confusion and conflict, it was effectively, but never monolithically, ruled by a fellowship of legal scholars (*hachamim*, sages), and trained in the rabbinic academies to investigate traditional text. They learned first its meaning, then its application under ideal conditions (as if the Temple still stood and the king ruled), and then its application in the world as it actually was and in the conditions of Israel's exile. So the sages ruled both in imagination and in fact, as philosophers and as judges.

But why were these particular people the authorized interpreters of the authoritative texts? There is no historical moment when the texts were delivered to them, as the law was to Moses; nor were the sages called by God, as the prophets were. Historical and biographical legitimization is replaced now by a special kind of genealogy. First described in Mishna Avot, this genealogy is constituted as a chain of succession extending back from the sages to Sinai, connecting them with Moses and the prophets, excluding kings and priests. Moses and the prophets however, had what the sages so clearly did not have: a direct, unmediated experience of divinity.

³ This subsection is quoted from **The Jewish Political Tradition** edited by Michael Walzer, Menahem Lorberbaum and Noam Zohar, Yale University Press, Volume One, page 246

The **genealogical argument** can be read as implying two rather different positions. The first of these suggests that interpretive authority is handed down from Moses to his successors, each generation recognizing, as it were, the succeeding generation and conferring legitimacy on its version of the Torah. The second position suggests that the Torah itself is handed down from one generation to another, but this is a Torah understood to include its own interpretations, the written and Oral Law together, revealed to Moses and passed on in its entirety. This latter view represents a very strong version of the standard defense of tradition--stressing continuity, denying the reality of revision and innovation. But in both these views, the original recipients of tradition validate its bearers today.

In fact, the sages support their authority through accumulation and application of knowledge: they know the texts and they know the hermeneutical rules through which the texts are interpreted. These two together give them access to the word of God, albeit indirect access and seemingly less than the prophets had. Because of this, the sages continually compare themselves to the prophets and worry about their relative standing. Sometimes they claim that prophecy has ceased in Israel and that they are its legitimate heirs--that their knowledge of God's word is the only possible knowledge available in the exilic world. Sometimes they claim to be prophet-like, responding to a "voice from heaven." And sometimes they claim that their readings of the texts are superior to prophetic disclosure--at least with regard to *halakha* and the work of the courts, and perhaps more generally. The argument about the relative merits of prophets and rabbis is an ongoing one, reflecting in some writers an entirely understandable insecurity and in others an extraordinary self-confidence.

The authority of the sages makes their own texts similarly authoritative. Henceforth, interpretation and commentary are the central genres of Jewish legal and political literature. These are at first the products of academic discussion, and are preserved through memory. But the written form they took much later was probably fixed early on in the mind's eye: the text surrounded by, and enclosed within, its commentaries. The commentaries never entirely supersede the original texts, though the originals seem sometimes to survive only in quotable bits and pieces--sentences and phrases used as "proofs" by commentators and judges. However the authority of Scripture, and then of the Talmud, can never be revoked. There is a pragmatic explanation for this **textual foundationalism**: the ongoing interpretive enterprise would cease to make sense; the judicial applications would lose their legitimacy, without the "proofs."

But pragmatism would never have sufficed to sustain the authority of the original texts without religious faith--in Scripture as the word of God and in the Talmud as the revealed or genealogically authorized interpretation and application of that word. For this reason, it is always possible to return to the originals, quoting God, so to speak, against the rabbis.

Hillel and Shammai – Forerunners of Yehoshua and Eliezer

The **Beit Midrash** was first invented by the Rabbis in the era of Hillel and Shammai in the era of Herod or immediately thereafter, between 40 BCE and 20 CE. Hillel is the first to take the lead in introducing *midrash* - rational and innovative analysis of traditional sources (*Masoret Avot*) to solve halakhic problems. For example, he earned his place as head of the Sanhedrin by introducing logical categories of text analysis like *gezera shava*, *kal vahomer*,

etc., in determining how to handle a concrete problem regarding the Pesach sacrifice when Pesach falls on Shabbat (Avot d Rabbi Natan A 37). Further he established a school of study, which followed his method, as did Beit Shammai. These schools resembled Hellenistic schools in some ways. Shammai's school, as opposed to Hillel's tended to be more conservative, sticking to older halakhic traditions, much more wary about using midrashic analysis to innovate though they might use it to establish an already accepted position. Their perennial debate on methodology seems to parallel two contemporaneous schools of jurisprudence in Augustinian Rome – Capito (who preserved the traditions handed down about Roman law) versus Labeo (who innovated in many things relying on his breadth of intelligence and his confidence in his learning).⁴ Many scholars distinguish Hillel and Shammai's schools by class – upper versus lower; by national politics – radical, xenophobic versus moderate, peace seeking; by strictness (like the Sadducees) versus leniency; by commitment to more ancient halakha versus more innovative. The differences in the schools' legal methodology and values of learning are some of the most distinguishing characteristics. These methodological and learning differences of the schools of Shammai and Hillel and their spiritual descendants Eliezer and Yehoshua in the generation of Yavneh include:

A. Two Great Debates of the Schools of Hillel/Shammai and the *Bat Kol*: Comparing *TB Eruvin 13b* and *TB Baba Metzia 59a-b*

These sources deal with the meta-legal questions about halakhic debate, a unique issue in rabbinic literature. In each a voice from heaven plays a role but in each it is radically different one. In each source the school of Hillel is ascendant, although the defeated school of Shammai, as the not-so loyal opposition, is delegitimated and excommunicated in one, and preserved and honored even in defeat in the other.

Oral versus Written Torah, Human Interpretation versus Prophetic Voice from Heaven

The Rabbis envision an Oral Torah that accompanies the Written Torah. Sometimes the Oral Torah is attributed word for word to God at Sinai, but at other times it is a general term for human additions to the Written Torah and its interpretation. Ongoing reinterpretation is necessary to apply Torah, God's word, to contemporary issues. But what is the source of this "new revelation"?

In the Dead Sea Scrolls written before and during the formative era of the rabbinic schools of Hillel and Shammai, prophecy continues through the interpreter and hence there is no legitimate controversy conceivable since interpretation is inspired by directly by God. Hence the Dead Sea Scrolls society has no concept of Oral Torah as the Rabbis did. For the Rabbinic mainstream, prophecy stopped at end of the Tanach in the beginning of the Second Temple. Only fools and children continue to resort to that form of thinking, say the Rabbis.⁵The denial of prophecy by the Rabbis is not an empirical claim that no more

⁴ Cited in Pomponius, Dig. I 2,2,47

⁵ However, in fact a few contemporary rabbis still resort to various forms of prophecy or Bat Kol to decide halakhic issues. Yosef Karo, author of the Shulchan Aruch, reports hearing Divine voices (*maggidim*) revealing law and, even in Jerusalem today, people still claim Divine revelation. Moshe Halbertal reports that his grandfather

prophets appear but a normative claim that prophecy should no longer be regarded as significant for the determination of law. This would include a *bat kol* in principle, yet paradoxically in the two foundational stories about the primacy of human interpretation which we will study, the Bat Kol plays a crucial role along with a prophetic report about God's response to the doings in the Beit Midrash. Let us observe how the Bat Kol is used in these two famous stories.

Torah Is "Not in Heaven" - the Tanur shel Aknai Debate between Eliezer and Yehoshua (TB Baba Metzia 59a-b)

The dispute begins on the substantive level as a detail of the laws of purity regarding ovens. However when the great expert Rabbi Eli'ezer, heir to the school of Shammai, finds himself in the minority, there arises a meta-halakhic confrontation over the criteria for deciding the law. Rabbi Eliezer calls for support from heaven and receives it. However, Rabbi Yehoshua, heir to the school of Hillel, boldly affirms the independence of rabbinic interpretation from divine intervention. In support he adduces the biblical statement that the Torah is "*not in heaven*" (Deut. 30:12).

Let us contrast the Traditionalist Eliezer with the Creative Interpreter Yehoshua, while drawing other sources that enhance understanding each school of thought.

used to ask for halakhic judgment via a dream. Once when he was in the army fellow Israeli soldiers tried to do a séance. They asked Moshe Halbertal, himself a rationalist, why he refrained from participating and whether law forbade the séance. Moshe told them to conjure up Rambam to decide the issue. Of course Moshe knew that Rambam was the strictest opponent of such magic.

The Traditionalists: What is the Position and Image of Eliezer ben Horcanus?

Eliezer ben Horcanus, a student of Rabban Yochanan ben Zakai, along with Rabbi Yehoshua, is a representative of Beit Shammai. Eliezer represents the “*halakha rishona*” – the **traditional oral laws** passed down from teacher to teacher from Sinai (Pirkei Avot 1:1) without forgetting, extrapolating or innovating. Like his teacher Rabban Yochanan ben Zakai, Eliezer says: “I never taught anything that I did not learn from Master” (See Tosefta Yevamot 3:4; TB Sukkah 28a; Avot d Rabbi Natan 14). The literary foil for Eliezer is another fellow student probably related to the Hillel tradition, Elazar ben Arach. According to Pirkei Avot 2:8: “Eliezer is like a plastered cistern that never loses a drop,” while “Elazar ben Arach is like an overflowing spring”. Ironically in one story describing Eliezer’s emergence as a great teacher, he considers himself unworthy of teaching Torah, yet when he begins to expound he becomes an overflowing spring like his alter ego- Elazar ben Arach (Midrash Leviticus Rabbah 22:1). Eliezer is best described as the type of scholar called “*Sinai is one who memorized the Mishna and Baraitot as they were given at Mount Sinai*”. He is not an *Oker Harim*, “*one who uproots mountains and who is sharp and mefulpal in analyzing the Torah, even though his memorized oral traditions, Mishna and Baraitot, are not ordered in his head as they were given at Mount Sinai*” (Rashi on TB Horayot 14a).

Moshe Halbertal points out that Rabbi Eliezer’s theory of tradition is close to that of the Babylonian **Geonim** for he emphasizes loyal preservation of oral tradition passed to him by his teachers. He never sleeps lest he miss a precious word or idea being taught, and he never adds to the tradition passed down to him. He never even tries to reconstruct or restore lost laws but consistently refuses to interpret. In fact, Eliezer reflects a continuation of Rabban Yochanan ben Zakai’s views and ideal virtues. This may reflect a conservative response to the loss of tradition resulting from the destruction of the Second Temple and the whole Jerusalem society of scholars.

Tragically, even though Eliezer is like a sealed, plastered cistern, he still feels that he has touched on a rich tradition that filtered down weakly to him. The degeneration of oral tradition continues apace, as human apathy and weakness with regard to tradition increases. In fact, most of Eliezer’s students never asked him about much of what he knew. Only Akiva, for example, asked about magic of gathering cucumbers. (See Tosefta Yevamot 3:4; TB Sukkah 28a).⁶ Even more tragically, Rabbi Eliezer, who had so much to teach, was excommunicated by the scholars rallying around Rabbi Yehoshua, whose view of tradition is creative radical reinterpretation. An enormous amount of Torah was lost as a result of the excommunication of the “Sinai” scholar of conservative transmission.⁷

⁶ Moshe Halbertal suggests there is an optimistic ending of the sugya in TB Sanhedrin 68a even though Rabbi Akiva did not learn about magic cucumber gathering from Eliezer since he did not understand him. Transmission of content without understanding cannot help. However Akiva then relearned these traditions - presumably with logical explanations - from Rabbi Joshua. He then understood it and the tradition came alive.

⁷ Yet perhaps the lost Torah can be recovered or reinvented using Rabbi Yehoshua’s approach (see TB Temurot 16 a⁷)

Eliezer is also capable of **rational argumentation** as he shows at the beginning of the debate about the stove of Achnai whose name is interpreted to mean, “a stove surrounded by words and arguments like coiled snake.”

However when Eliezer is outvoted he resorts to **Divine authority** in the form of miraculous signs of authority as Moshe used on Pharaoh, then in the form of a voice from heaven, and finally in a kind of *coup d’etat* threatening to bring down the walls of the Beit Midrash (on top of its scholars?). Eliezer crosses the line demarcating the rabbinic position (at least of Hillel) that *hacham adif minavi* – **the power of the wise takes priority over the authority of the prophet** in the realm of legislation.

What are the Positions of Eliezer and the Traditionalists Toward Disagreement and Debate?

We can identify Eliezer with a whole tradition that denigrates debate itself and abhors multiple interpretations of the Oral Torah handed down in the chain of tradition. The sources collected here represent that position which rooted in Mishnah Avot 1:1:

Moses received Torah from Sinai and passed it on to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets passed it on to the men of the Great Assembly [anshe kneset ha-gedolah].

This is the opening statement of tractate Avot, "The Fathers," which consists of ethical aphorisms by many of the key figures of the Rabbinic tradition. The first mishna depicts these teachers of the Oral Law--and by extension the Mishna itself--as the authentic carriers of the Torah. The omission of priests from this account of the chain of tradition lends it a polemical edge, presumably directed against other Second Commonwealth parties such as the Sadducees or Essenes. The subsequent aphorisms (continuing with the formula "A and B received from them") proceed in chronological order through the traditions of Hillel's descendants and the students of Yochanan ben Zakai. This school of thought may be described as the Chain of Tradition School.⁸

Rambam writes on **Pirkei Avot 1:1**:

“Moshe received the Torah from Joshua and handed it over to the Elders...”(Literally “tradition” means to hand over) - “Know that every mitzvah given by God to Moshe Rabbenu was given with its interpretation.” (Rambam, Introduction to the Mishna, Seder Zeraim).

Rambam explains Oral Torah as follows: All the commandments given to Moses at Sinai were given along with their explanations, as it is said, "*and I will give you the tablets of stone, the Torah and the Mitzvah*"¹ (Exod. 24:12): torah refers to the Written Torah-while mitzvah refers to its explanation. [Moses] commanded us to carry out the torah in accordance with the mitzvah. This mitzvah is what goes by the name "Oral Torah."

⁸ *The Jewish Political Tradition* edited by Michael Walzer, Menahem Lorberbaum and Noam Zohar, Yale University Press, Volume One, page 250ff

Moses, our master, wrote down the entire Torah before he died in his own hand and gave a scroll to each tribe. One additional scroll, he deposited in the Ark to serve as a witness [to the true text], as it is said: "*Take this scroll of the Torah, and place it along the [inner] side of the ark of the covenant of the Lord your God that it may be there for a witness . . .*" (Deut 31:26).

But the mitzvah, which is the explanation of the Torah, he did not write down; he rather commanded it [orally] to the elders, Joshua and all the rest of Israel, as it is said: "*Everything which I commanded you, that you shall observe to do; do not add to it or diminish from it*" (Deut. 13:1)--which is why it is called the Oral Torah.⁹

Maimonides himself denies that there are legitimate disputes about the core of Oral Torah, *halakha l'Moshe miSinai*, however the bulk of law allows for human interpretation and disagreement. However the Talmudic position closer to Rabbi Eliezer denies the value of any dispute. In **TB Sanhedrin 88b Rabbi Yossi** says:

“Originally there were no disputes in Israel but rather the Sanhedrin sitting in Temple decided.” When an issue arose then the local courts decided issues based on tradition, otherwise they appealed to a higher court that might have a tradition. If there was no tradition then majority rule decided the issue once and for all. (Shmua).¹⁰

TB Sotah 47b says:

“When the arrogant in their intelligence increased, then disputes in Israel increased. When the number of students of Hillel and Shammai who did not study with their teachers sufficiently increased, then disputes in Israel increased and the Torah was made into two Torahs.”

Rashi explains, “The arrogant did not listen carefully enough to their teachers’ traditions because they relied on their intelligence to make explicit the traditions.”

The disputes are, then, a purely negative phenomenon in halakha that makes it look “like there are two Torahs” or that threatens the unity of the society. They arise because of loss of central institutional court of appeals with along reliable tradition and because of human negligence in preserving the tradition learned from their teachers. In this understanding, Torah is not dynamic nor essentially a rational hermeneutic procedure.

⁹ Maimonides, Introduction to the Mishneh Torah, translated by Bernard Septimus, (Yale University Press

¹⁰ See also Rambam, Hilchot Mamerim 1:4 and the ruling on *Zaken Mamrei* as culpable only if he claims that his *sevarah* contradicts the court's *shmua* -TB Sanhedrin 88a Rav Kahanna.

The Creative Interpreters: What is Rabbi Yehoshua's Position?

In the school of Hillel, Torah is God's word but it was always meant for human beings to interpret by use of rational argumentation. This is the substance and form of Yehoshua's radical reinterpretation of the verse *lo bashamayim hi*. The story of Achnai's oven begins with such rational debate and only when the dispute cannot be resolved by argumentation, do they resort to the second verse quoted – *acharei rabim l'hatot*, - majority rule to reach a binding legal ruling. **Reason** is first and then comes the **rule of the democratic majority of scholars**. Yet these two human modes of decision-making still claim to reflect the divine will, for they presuppose the theological view that the Divine itself willed these modes of human autonomy. Later this view is called Lurianic *Tzimzum* meaning God withdrew from the world to allow for human action and in this case for human intellectual development. The Rabbis made this a permanent withdrawal, binding even if God were to express the Divine author's original intention of the Torah (the *bat kol* siding with Eliezer) and even if a later historical interpretation were to be unrecognizable to Moshe the original human recipient of the revelation (TB Menachot 29b), This "rupture," the radical Divine contraction of presence, which in Kabbalist circles is often seen as tragic is celebrated without a sense of nostalgia by the Hillel school. In fact, it not at all experienced by Rabbi Yehoshua as a rupture in continuity of tradition, but as God's original intention in the verses quoted.

Rabbi Yehoshua rejects the interpretative move of Eliezer who "consults the author" regarding the authoritative reading of the Torah. Yehoshua claims **authorial intention is irrelevant to interpretation** even if the words of God are called mitzvot, that is, - expressions of God's will. This is counter-intuitive and paradoxical, for usually we say about mitzvot that not the text but the mitzvah (the *Divine will*) is the source of authority.¹¹ Similarly, a last will and testament is authoritative because it reflects the *will* of the deceased. Thus Rabbi Yehoshua's viewpoint is a radical one. He uses it to challenge a God who in the story is unsure that giving up control of the interpretation of Torah is good. The later Rabbis continue to have their doubts about God's response to Yehoshua's coup. That anxiety is reflected in Rabbi Natan wanting to know, several generations later, what God felt and feels about the human palace revolt led by Yehoshua. The answer he receives assuages the anxiety by revealing a God who though initially taken back is ultimately resigned – with a smile – to the assertion of his children's autonomy in God's own name.

"It is not in Heaven" is then a **radical** defense of human interpretation by rejecting the prophetic voice from heaven that would have stopped controversy by authenticating one view.

However Yehoshua's move is also **conservative** in that it rejects what Max Weber calls the charisma of individual, for it keeps all authority inside the Beit Midrash institution. It rejects the prophet and the voice from heaven that speak in the name of the ultimate authority – God's revelation. The Beit Midrash now relies on its exclusive monopoly over God's word. God's prophecy is only valid at a founding moment with Moshe but afterwards the prophet

¹¹ In American law one might say we are bound by the intentions of the founding fathers, but alternatively, the constitution may be seen as having authority from being ratified whatever the authors who wrote it meant.???

cannot speak of halakha with authority. Thus ever after radical charismatic movements (like for example Rav Kook's calls for renewed prophecy) are blocked by a Hillelite position on revelation as a phenomenon of the past only.¹²

Open Canon and Closed Canon

Revelation is excluded from then on. For the Rabbis the Torah is a **closed canon** the exclusive authority, such that every question must be answered through the text alone as interpreted unaided by human reason. Foreclosed is the precedent in which Moshe faced with problem of *bnot tzelofchad* (the daughters of Tzelophad) and appealed to God for a new revelation. Yet paradoxically what for the Rabbis is closed in form is open in content. Since the Torah is the only authority for the Rabbis and it must lead guidance in all ways of life, its fluid reinterpretation is permitted by human means even if it undermines the stability of its semantic meaning. Yehoshua's two interpretations of the Torah verses are obviously far from their *pshat*. **Torah must be more open-ended in interpretation because it is a closed canon in its extent for there will be no new authoritative revelations.**

Wisdom Precedes Prophecy

Yehoshua's rejection of the Bat Kol, the voice of prophecy, becomes a central position of the halakha, in preferring human interpretation, although fallible, to prophetic knowledge. The following sources show the development of that position from the Talmud to the medieval commentators.

¹² Scholem claims that the repressed anarchic charismatic prophetic element returns through Kabbalah. In fact Ramban would argue that Kabbalah is very conservative tradition not allowing for any creative moment, while other Kabbalists would, like Abulafia, renew prophecy initiated by human effort. However the prophetic spirit of Kabbalah is NOT chiefly used in changing law but in reframing law within a mystical drama. But, as we said above, some kabbalist halakhists like Yosek Karo use revelation to determine law and Shabatai Tzvi does change the law radically.

B. Can Later Rabbinic Creativity Transcend its Origins? Moshe versus Akiva in TB Menachot 29b

In **TB Menachot 29b** Moshe is at Mount Sinai traveling into the future to see Akiva, the student of Yehoshua, explaining the Torah of Moshe in such creative ways that it is unrecognizable to Moshe. Moshe is unable to sit in the first seven rows of the recognized students of Torah (who sit in order like the first and second violin in an orchestra). He is unable to understand the Torah but he knows God intended that it be interpreted creatively in that way. Perhaps the gap is created by history – a different Torah in a different generation. Perhaps it is caused by Akiva's creativity, which could never be predicted by Moshe or by Akiva's acumen in uncovering hidden meanings in the crowns on the letters.

This is a self-conscious moment of extreme discontinuity when Torah might seem to have lost its mooring in the historic Torah of Moshe or the Divine Torah of God. Yet Moshe is reassured of continuity when Akiva credits the "new" Torah to Moshe. God assures us that every comment that a student of Torah will in the future make is already somehow encompassed in the original revelation at Sinai. The story presented in TB Menachot portrays God adding crowns to the Torah, which Moshe cannot understand but Akiva will. Its message promises us that interpretation is creatively rooted in Torah but that its trajectory is unchartable and that it will go far beyond what Moshe himself in the original revelation could have ever understood. Thus meaningless textual decorations are a resource for creating many new laws. But at least Moshe gets credit for "*Halakha l' Moshe miSinai*." This interpretive boldness may be related somehow to Akiva's tragic end. Perhaps it is the same boldness in trying to force God's hand in the Bar Kochba Revolt. Still the Hillelite conclusion is that his method is unimpeachable, his interpretative chutzpa is identified with the crown of Torah that makes him higher than Moshe, as Moshe himself admits in awe.

Moses in Akiva's Academy -TB Menachot 29b

The story of the mysterious crowns on the letters in the Torah explores the relation between the Written and Oral Law in terms of an imaginary "back to the future" encounter between Moses and Akiva, their respective representatives. Among the Rabbis, Akiva's hermeneutics were distinguished by his bold departure from the semantics of the biblical text. His midrashic expositions, which often rely on a single letter, are represented here--somewhat hyperbolically--as focusing on the decorative coronets of the letters in the handwritten Torah scroll, and even on these coronets' individual horns.

Rav Judah said, citing Rav:

When Moshe ascended to heaven [to receive the Torah] he found the Holy One sitting and fashioning coronets for the letters.

[Moshe] said to Him: "Master of the world, who requires you [to do this]?"

[God] replied: "There is a person who will come to be after many generations, called Akiva ben Yosef; he will one day expound heaps upon heaps of laws from each and every horn."

[Moshe] said before God: "Master of the world, show him to me."

[God] replied: "Turn around." He turned around and [found himself] behind the eighth row [in the Talmudic academy--behind the regular students arranged in order of excellence in the first seven rows]. Moses did not understand the discussion and was dazed. When [Akiva] came to a certain point, his students asked him "Whence do you know this?" Akiva replied, "[This is] a law [given] to Moses from Sinai." (*Halakha l'Moshe miSinai*).
Then Moses was calmed.

But Moshe turned back and stepped before the Holy One and said: "Master of the world, You have such a person, yet You give the Torah through me?"
God replied: "Be still, that is how it entered my mind."

Then Moshe said: "Master of the world, you have shown me his Torah; show me his reward."

God said: "Turn around." He turned around and saw Akiva's flesh being weighed in a butcher shop.⁸

Moshe exclaimed: "Master of the world, such Torah and such a reward?"

God replied: "Be still, that is how it entered my mind." (TB Menachot 29b)

TB Menachot 29b teaches a view of Torah radically different than that of Eliezer's fixed traditions preserved but never added to, through a fantastic but literal memory. Akiva's Torah is broader than its literal meaning. Here human beings are active in creating new Torah through midrash mandated by God; here human beings are liberated from the fear of violating God's word or from the fear of hubris lest they challenge the Moshe the founding father's great wisdom or Moshe's historical closeness to the original revelation. The principle of Torah study is ***Hidush* through human midrash rather than *masoret* through repetition and memory of the given**. Humans are co-creators of the Torah, not merely interpreters in the usual sense of those subject to the dictates of the text explicated.

The **Netziv Naftali Tzvi Berlin** explains the transition from the traditionalist to the innovative midrashic approach to the Torah as parallel to the transition from the first tablets at Sinai written by God to the second ones written by Moshe:

In the first tablets there was no gift of *Hidush* at all but Torah was whatever Moshe heard with its basis in the Written Torah. Moshe did not know how to make his own *Hidush* except to think analogically but without creative **pilpul**. But in the second tablets **the power of *hidush*** was granted to innovate new halakhot in every generation. That is the meaning of the Rabbinic phrase that 'everything that a veteran student of Torah will in the future innovate is already given at Sinai.' The power to innovate, not the content, is given. (*HaEmek Davar* Dt 4:14).

"The reason God ordered Moshe to carve the second tablets was not because they were not worthy of a Divine act but to teach that the ever-renewing power of halakha given in the second tablets involves the active participation of the labor of human beings who with Divine aid, just as the second tablets were carved by Moshe and the writing was by God." (*HaEmek Davar* Exodus 34:1).

The fact that Akiva could come up with an alternative understanding of Torah that even Moshe could not understand, let alone critique, shows that even the greatest scholars must be **skeptical** of their own interpretations. Therefore the Netziv maintains that, halakhic research is like scientific research.

“Scientific scholars can not claim in their hearts that they have understood all the secrets of nature...In fact, they cannot be sure that their own research is true since they have no clear test. A later individual or generation can through research contradict the previous scientific construction. So too researchers into the nature of Torah cannot claim to have considered all the changes and all that requires thought. There is no certainty that what they have explained is the true intention of the Torah. So all we can do is do our best with what we have.” (*HaEmek Davar*, Introduction, section 5).

Therefore even codes of law like the Shulchan Aruch are not the final word. Rav Haim Volozhin quotes the **Gaon of Vilna** saying:

“In Torah do not respect persons [that is a judge is forbidden to give preferential treatment to someone being judged in the court even if they are rich or important. Justice must be blind to persons]. That applies even in respect to the authors of the Shulchan Aruch, when it comes to teaching or even deciding the law.”

The Hazon Ish, Avaraham Yeshaya Karletz, maintains, “that even though we follow the Shulchan Aruch, we still deviate from it in light of later scholars of our generation when they bring solid proofs.... For the halakha always follows wisdom.” **Rav Yaacov Emden**: “I heard from my teacher that one is not authorized to make halakhic decisions until they have the power to uproot and erase a section of the Shulchan Aruch.”

This self-conscious power of the Rabbis to transcend and even uproot the original meaning of the Torah goes back for the great Lithuanian tradition back to the Babylonia.

TB Makkot 22a-b

Mishnah: How many lashes are administered? Forty less one [i.e., thirty-nine], as written: “. . . *by number. Forty [stripes he may give him]*”¹³ (Deut. 25:2-3)--a number leading up to forty. Rabbi Yehudah says: He is given full forty lashes . . . Gemara: What is the reason [for this reading]? If it had been written "forty by number," then I would say: a count of forty. Now that it is written, "by number forty"-[this means] a count that leads up to forty. Said Rava: How foolish are all those people, who rise before a Torah scroll but fail to rise before a great man [i.e., a scholar]! For in the Torah scroll it is written "forty," and the rabbis came along and subtracted one.

Exclusive Loyalty to What They Have Learned Versus Commitment to Constant Innovation

As aforementioned, Rabbi Eliezer identifies himself with a plastered cistern that never loses a drop and he prides himself on neither forgetting nor adding anything to the chain of tradition. On his deathbed he says:

“Much Torah have I learned and much Torah I taught. I have not taken [or lost?] anything from me more than a dog who licks from the sea. Much Torah I taught and yet my students have not taken [or lost?] from me more than a brush from an eye paint container.” (TB Sanhedrin 68a, Avot dRabbi Natan A 25)

Rabbi Yehoshua says: It is impossible to hold a session of a Beit Midrash without an innovation (*Hiddush*) (Tosefta Sotah 7:9)

Rabban Yochanan ben Zakai said: Eliezer, teach us one thing from the words of the wise.

Eliezer demurred saying: Let me give you a parable. To what may I be compared? To a cistern (*bor*) that cannot produce more water than was put in it.

Rabban Yochanan ben Zakai replied: Let me give you a parable. To what may you be compared?

To a spring (*be'er*). Just as when it begins to flow it produces water from its own sources, so you can teach words of Torah more than were conveyed to Moshe at Sinai. (Avot d Rabbi Natan, Version B, 13).

Rabbi Akiva prefers the model of a spring (like Elazar ben Arach) to a plastered cistern (like Rabbi Eliezer):

Rabbi Akiva says: “*Drink water from your cistern (bor)*” (Proverbs 5:15) means that your cistern is initially incapable of producing from itself even a drop of water more than what it already contains. Thus initially a student has nothing more inside than what has been learned.

“*Flowing from your spring (be'er)*” (Proverbs 5:15) means [you become] similar to a *be'er*. Just as a spring overflows with living water on all sides, so your students will come and learn from you. This is a realization of the verse “*spread forth your wellsprings*”(Proverbs 5:16). (Sifrei Dvarim 48)

C. The Power to Exclude from the Debate: Why do the Rabbis Excommunicate Eliezer?

While the first half of the Aknai story ends in a clear victory for human autonomy and Hillelite interpretative leeway led by Rabbi Yehoshua's rhetorical masterpiece in hoisting God on the petard of the Torah's own verses, the second half is quite disturbing both to the characters themselves and to the liberal-minded reader.

It is related that on that day the rabbis collected everything that Rabbi Eli'ezer had pronounced pure and burned it in a fire. Then they voted on him and placed him under the ban. (TB Baba Metzia 59b)

Doesn't the school of Hillel and Yehoshua represent a pluralism of debate rather than sectarianism and an authority delegitimizing dissenters? How can we gag Eliezer for challenging human majority rule and simultaneously defend the individual's courage to stand up to Divine authority?

Two Responses

(1) Perhaps Rabbi Yehoshua does not agree with the Rabbis, probably led by Rabban Gamliel in excommunicating Eliezer and denying him the right to follow and to teach his view of the halakha. Yehoshua disagrees with the substance of Eliezer's type of argumentation using miracles but not with his right to hold that position and even act upon it. In fact Yehoshua himself will suffer from Rabban Gamliel's attempt to repress disagreements in practical halakha and to force dissenters to acknowledge publicly the official position (TB Berachot 27b-28a on Maariv and TB Rosh Hashanah 25a on Yom Kippur).

Moreover Hillel's school is given priority in TB Eruvin 13a for being easy-going, not provoked even when insulted, pursuing peace like Aaron. Hillelites (including Rabban Gamliel who is a direct descendant of Hillel) ought to be sensitive to the pain of *onaat devarim* to Eliezer, even if they felt he was wrong.

(2) Even Yehoshua would agree with Rabban Gamliel for Eliezer's position undermines the axiom of all Hillel's notion of *Torah she Bal Peh* by introducing Divine intervention. Further, Eliezer threatens violence literally (or by an implicit call to revolt) against the Beit Midrash when calling for the walls to crash down. Then he publicly teaches his position as authoritative for action even after the majority has ruled (*Zaken Maamrei*).

Note that the exclusion of Rabbi Eliezer is the last one mentioned in Rabbinic sources. Several generations later after the Bar Kochba Revolt, the scholars of Usha in the Galilee ruled: *shelo l'nadot zaken* / One is not allowed to excommunicate a scholar." (TJ Moed Katan Chapter 3, 81d)

D. What is the Divine Perspective on the Eliezer / Yehoshua Debate? (Multiple Revelations of the Divine will)

In some sense it is surprising that God plays such an important role in the Aknai story. After all the point of Yehoshua's "it is not in heaven" is to exclude God's will and God's power from legal decision-making. The destruction of the Second Temple which these scholars had witnessed is often seen as a withdrawal of God's active will and power from history and God's miracles are discounted by the Rabbis in daily calculations that should not rely on miracles." Yet the God of law and of nature is very much character in our story and through God's manifestations we might be able to learn about the narrator's evaluative lens in this complex story. Recall the ending, for example, which is so different in tone from Elijah's picture of a good-natured grandfatherly God smiling in satisfied resignation at his children's rhetorical flourishes.

It is related that on that day the rabbis collected everything that Rabbi Eli'ezer had pronounced pure and burned it in a fire. Then they voted on him and placed him under the ban.

...[Rabbi Eli'ezer] tore his clothes and took off his shoes and sat down on the ground. Tears fell from his eyes. Then the world was afflicted: one third of the olives, one third of the wheat, and one third of the barley... It is said: "There was great woe that day, for every spot toward which Rabbi Eli'ezer directed his eyes was burned."

Multiple readings of God's role and its implications might be suggested:

(A) God does do miracles to establish Eliezer's authoritative position as if Eliezer were like a prophet, like Moshe before Pharaoh or Elijah on Mount Carmel. In fact God almost brings the walls of the Beit Midrash crashing down on the rabbis head for they have in Eliezer's mind made a travesty of the house designed to "divine" the Divine will. In the story of Rivka in Genesis 25, she goes *l'drosh et Adonai* which is to divine God's will. The Beit Midrash might be seen as a latter-day divinatory method that derives its authority from the author of the divine will who is also the creator and who can do miracles at will.

(B) God speaks through a *Bat Kol* literally renewing prophecy at least to establish that Eliezer is the recognized human authority in this area of law.

(C) Yehoshua by rising to speak to the voice acknowledges that this is no sleight of hand but a real revelation. Yehoshua quotes the Torah – God's word back to God to hold God's new revelation in check by citing God's own foundational revelation of the human authority of legal interpretation. God not only assents in silence to Yehoshua's rather *chutzpadik* challenge, refraining from further miraculous intervention but God stops the walls from crashing on the rabbis when Yehoshua rebukes him for interfering in a human debate among great scholars.

(D) God intervenes as one punishing a sin when Eliezer prays that Rabban Gamliel be punished for causing him such emotional pain and humiliation (*onaat dvarim*) by excommunicating him.

How can that Divine acquiescence to Eliezer's prayer be understood? Here are three options:

First, David Weiss Halivni argues that God agrees with Yehoshua about the theoretical nature of rabbinic debate but disagrees with Rabban Gamliel and with the Rabbis who excluded the dissenter from the community. Even Eliezer might agree that he should follow the majority view point but not that all his former decisions about purity should be burned and himself excluded. In Jerusalem Talmud Moed Katan 3:1 it says:

“Didn't Rabbi Eliezer know that 'one must follow the rule of the majority'? Yes he did but he was angry only about the burning of his objects declared pure in front of his eyes.”

Rabban Gamliel provokes Eliezer to call out for Divine retribution not merely because Eliezer's view was rejected but because his whole life was expunged with his old verdicts destroyed as if he had never existed and his most important purpose in life – handing over the tradition to students - was forbidden.

Second, David Hartman argues that God as a revealer of Torah clearly agrees with Yehoshua and may even agree with Rabban Gamliel that social order requires suppressing Eliezer's refusal to accept the majority rule. The fact that God punishes Rabban Gamliel is not a statement about the correctness of his position. A simple sin-punishment model can never decipher God's providential actions as we learn in TB Menachot 29b, where Akiva's interpretive method of Torah is vindicated but he still suffers a martyr's death that cannot be rationalized into a punishment for human sin.

Third, I think that Rabban Gamliel is not punished for excluding Eliezer but for causing him the pain of humiliation, denying the whole meaning of his life as teacher since no one is allowed to study with him. This is like the punishment of Jacob for causing pain to Esav in taking the birthright even if Jacob deserved it. So Jacob is punished measure for measure. Perhaps the pain of *onaat devarim* may be unavoidable but it is not forgivable, it has consequences, even if it was the right thing to do. That is why this story is placed in sugya of *Oannat Devarim* and it ends with Rabban Gamliel's wife (sister of Eliezer) saying that the gates of *onaah* – of Divine justice intervening in human history to redress cries of human insult and exploitation. This is parallel to Yochanan and Resh Lakish story where a common sister/sister-in-law cannot keep the two men from destroying one another with *onaat devarim*. Recall that in TB Baba Metzia 84a, Rabban Yochanan reminds Resh Lakish of his former years as a brigand before he did Teshuvah. This is the classic case of *onaat devarim*.

Fourth, Moshe Halbertal adds a feminist critique of the competitive male ego, which fits what we learned from the role of Ima Shalom (mother of peace, Gamliel and Eliezer's sister/sister-in-law). He suggests that Gamliel failed to uphold his ancestor, Hillel's position that would have promoted female collaboration over confrontation. Even God is implicated in acting to violently defend Divine honor as Eliezer does. It is therefore natural that God empowers Eliezer to bring about natural catastrophes aimed at Rabban Gamliel, just as Eliezer almost brought down the Beit Midrash walls on the majority of Rabbis when trying to

prove his point). So contra Yehoshua and Rabbi Natan, God is not willing to withdraw from the argument between scholars. Rabban Gamliel ultimately needs to argue with God that he too is representing God's own honor and the good of Israel in excluding God's preferred scholar, Eliezer.

The point of Eliezer's vengeance is to show us the price of revolution and the danger that ego will get involved in what should be a rational decision process. There is a tragic consequence to an interpretative revolution. In fact the rhetorical logic of the sugya is that *onaat dvarim* opens up all the gates of Heaven, so God listens and acts in history in response to hurt feelings. The specific violation not only shames Rabbi Eliezer but also marginalizes him.

Is this a necessary act to safeguard the community or a crass power play dressed up as a principled debate? In defense of the exclusion, Rabban Gamliel's speaks to God about his motivation – to defend God's honor, not Gamliel's. The ending is in the hands of Eliezer's wife/ Gamliel's sister. As a woman she is outside the male power struggle and yet she is its victim and she is also the one who cares about them both and tries to calm the injured egos. The male competition of the Beit Midrash is about the defeat not only of God the father - *nitzchuni banai* – but also of Ima Shalom the mother of peace. The Beit Midrash is proven to be a dangerous place.

E. Bat Kol: What is the Relationship Between God's Revelation and Halakhic Decision Making?

TB Baba Metzia 59 and Eruvin 13b

How are the Bat Kol events of Eliezer and the school of Hillel related? Are they similar? Or are they contradictory?

In **Baba Metzia 59**– *Tanur shel Aknai* – Eliezer calls upon the Bat Kol to reinforce his position and to cut off all debate and Yehoshua rejects it in principle. While in **Eruvin 13b** – the Bat Kol is not invited into the debate by either side but this time it reinforces Hillel's position and is not refuted. It too serves to cut off further debate after a three-year stalemate. However Hillel's Bat Kol does seem to contradict Yehoshua position, for it offers an authoritative, extra- natural proof where rational argument is supposed to have exclusive sway. (Later in Jewish history great figures like Josef Karo will continue to call upon voices from heaven to reinforce their views).

Yet unlike Eliezer's Bat Kol, Hillel's Bat Kol even while deciding one way in a human debate, legitimates both sides as reflective of the Divine and commends the theoretical truth of both sides, even while pragmatically deciding for one. The need for order does not require then a monolithic understanding of truth. The theoretical pluralism and practical unity of the halakha can coexist. A rejected legal position is not valueless as Torah study.

The truth value of the opposite views as equally valid reflections of God's will is described also in Mishna Hagiga 3:2: "Torah scholars forbid and permit yet both must be honored as the will of God." Hillel's Bat Kol offers a reason for preferring Hillel, it joins the rational debate, while Eliezer's closes off debate and merely establishes Eliezer's authority without argument.

Some interpreters see a direct contradiction in the content of the two manifestations of a Bat Kol. The Bat Kol in the case of Eliezer maintains that the minority, one great scholar who is the expert in the field, is preferable to the majority of Rabbis. The Bat Kol in the case of the debate of Hillel and Shammai may be understood as supporting majority rule (even though it does not say so explicitly). TB Yevamot 14a understands the debate between the schools that lasted three years not as a debate over specific concrete issues, but over a procedural principle: **how disputes shall be settled – by a majority of voices of scholars (Hillel's view being the majority overall) or by greater wisdom (Shammai's view since Shammai is considered sharper intellectually like Eliezer)**. The Bat Kol reassures us that both Hillel (even if less brilliant) and Shammai (even though their opinion is rejected by the Bat Kol) are still true to God's Torah yet the principle for resolving disputes will now be according to the majority of the scholars.

TB Eruvin 13a assumes that both Hillel's and Eliezer's human arguments correspond to God's thoughts. However a more radical position not based on a correspondence theory of truth appears in TB Gittin 6a where a debate between Yonatan and Evyatar is quoted by God in the Divine Beit Midrash. Thus human interpretations constitute the Divine. In fact in TB Baba Metzia 86a God imports Rabbah bar Nahmani into the heavenly court to serve as an

expert *posek* for the Divine court.¹³ Thus rather than the Bat Kol determining human law, human expertise determines Divine law.

¹³ EXERCISE: The Divine Father and the Founding Fathers

If a prophet like Moshe showed up in a legal discussion, should that, in your judgment stop the debate by revealing God's answer? What about Thomas Jefferson showing up to reveal the founding fathers' intentions in the US Supreme Court in a debate on constitutionality and the bill of rights? What would you answer Moshe or Jefferson if they insisted that you follow their view of the author/authority of the Torah/ Constitution?

F. What is the Significance of Hillel's Moral Virtues in the Granting Priority to Hillel's School over Shammai's? (TB Eruvin 13a)

Why does the Bat Kol justify the preference for Hillel's ruling based on moral virtues of humility rather than on intellectual as one would expect from the camp of Yehoshua?

Beit Shammai is understood as *mchadidei tfei*, "sharper intellectually," than Hillel's school (TB Yevamot 14a), but intellectual brilliance is not the only criterion for decision making.

1. Law involves **analogical thinking**, not deductive thinking, so one's subjective judgment may shape the inferential process. (If legal reasoning were purely technical, deductive logic, then moral character would have no influence on the results.) Humility is necessary to open them to hear the opponent's views thus to reach a better rational clarification of the truth which is achieved through discussion i.e. discursive truth, rather than prophecy. Further since the humble ones suspect that they might err, they will double check themselves. Thus humility becomes a cognitively fruitful trait associated with skeptical self-criticism. Further, even if Shammai is considered the wiser scholar as was Eliezer, Hillel's school studies Shammai until they have learned his truth and then they add their own perspective. (Thus later rabbis in halakha often feel that they are ignoramuses or even subhuman monkeys compared to the wisdom of earlier generations, however they may still prefer to follow the halakha according to later opinions – *halakha kdbatrei* – for they are like midgets sitting on the shoulders of giants who can see farther than the giants (Rabbi Yeshayahu de Trani).
2. Ethics are more important for **social peace**. Hillel is a pursuer of peace like their hero Aaron, so he feels deciding in their favor is less likely to lead to exclusion of the dissenters and the creation of sectarianism. True, Eliezer was excluded but he would not accept majority view. In fact the story of his exclusion with the story of divine punishment is included in the Hillel tradition of editing which is more open to self-criticism and therefore self-correction than Shammai. As opposed to Eliezer's view of law as concerned with blind strict justice (*hadin yikov et hahar*), Yehoshua and Hillel prefer **mediation to judgment**. Here they follow in the footsteps of Aaron rather than Moshe (see TB Sanhedrin 6–7),
3. Hillel's willingness to be *ne'elavi* and not *meulav*, being insulted without being provoked, is essential for the functioning of the Beit Midrash which otherwise will become a **sectarian battlefield of male egos** ala Rabbi Yochanan and Resh Lakish. Eliezer's extreme sensitivity to "being insulted" makes him unfit to lead, but Rabban Gamliel's concern for order is insensitive to the repercussions, the backfire of insulted genius.

4. Hillel's humility leads the people to accept his leadership more readily since they are not acting for self-interest or arrogantly promoting their own greater wisdom. Humility and teaching the opponent's view means in the future that the decision can be reconsidered while preferring Shammai is the end of debate. Shammai will suppress the dissenting view. Decisions made by Hillel, even if mistaken, are subject therefore to reconsideration. So there is less risk in choosing Hillel's view since it is open to a **self-corrective process** unlike that of Shammai.
5. Humility opens one to reality, not only to the ideal, so law can be modified and society can survive and change more easily. Unlike Shammai who chased away the potential convert, Hillel is considerate of human needs that halakha must address, not only of the ideal it demands.
6. Humility towards God means that the decisions will be less influenced by one's desire to be right and more by the desire to please God, which is, after all, the purpose of determining the law.
7. Humility is a religious value that may even be more important than the fidelity to the logic of the text. After all it is service of God and realizing a religious way of life – not merely obeying the rules – that is the goal of Judaism. Laws are designed, says Maimonides, to shape character. Hazal say *mitzvot nitnu ltzoref bahem et habriyot* – “mitzvot were given to purge and purify human traits.”
8. Hillel is praised for teaching opponent's views while the sin of Rabban Gamliel's excommunication of Eliezer involved **suppressing all his previous verdicts, wiping out the dissenter from history** and denying him the students he needs to keep his memory and his Torah tradition's memory alive. Rabban Gamliel remind us of the Church and the Soviets who rewrote history to expunge those former colleagues they declared heretical like Trotsky. Rabban Gamliel provokes Eliezer to call out for Divine retribution not merely because Eliezer's view was rejected but because his whole life was expunged with his old verdicts destroyed as if he had never existed and his most important purpose in life – handing over the tradition to students was forbidden.
9. **Willingness to Change their Mind in Light of Argument from their Opponents and Students-** Mishna Eduyot opens: “One should not be so rigid as to stick with his own words whatever (*lo y'hei adam omed al dvarav*) (Mishna Eduyot 1:4)... These are the things that Beit Hillel retracted and began to decide halakhically according to Beit Shammai” (Mishna Eduyot 1:12)

Rabbi Eliezer was wary of midrashic analysis until his student Ben Beteira reassured him that the midrash was in service of reinforcing traditional views (*l'kayeim divrei chachamim*) (Mishna Negaim 9:3)

Rabbi Akiva invited his students to challenge his views with logic and midrash (*kol misheshama taam al chavero, yavo vyomar*). Then after hearing the argument of his student he changed his own halakhic ruling. (Tosefta Zavim 1:5-6)

Rabbi Yehoshua changed his ruling when one of his students quoted and explicated a view of Beit Shammai (Tosefta Ohalot 5:11).

See **David Hartman, “Pluralism and Revelation”** in *Conflicting Visions*, pp.263-265)

G. Pluralism Versus Monism in the Search for Truth and the Relationship to Others' Views:

What sense can we make of *Elu vElu divrei Elohim hayim* (TB Eruvin 13a)? How can there be multiple points of view within God's one true Torah? Can we have pluralism *and* truth?

Avi Sagi suggests that there are two major schools of thought about truth reflected in the halakhic thinkers who ponder the debates of Hillel and Shammai – one monist and one pluralist.

MONISM holds that there is in the end one truth, one Author's intention, even if there is a process of raising multiple points of view *until* we get to the true answer. The search for truth involves "discovering" the original intention of the Torah either by finding a **correspondence** of the law with the order of nature created by God or finding the **coherence** of any one case with the ideal system that Torah teaches (Rav JB Soloveitchik). When there is a dilemma between two values, there is always one that takes precedence, so dilemmas are always temporary. (Kant, Ronald Dworkin).

PLURALISM holds that there are multiple truths that are all legitimate and that no one truth captures all the aspects of an issue. We do not "discover" the truth but we "prefer" a particular truth over others. The decision is one based on argumentation, not arbitrary preference, but the arguments are not deductively decisive rendering the alternative option illogical or mistaken or just plain wrong. Dilemmas are real and there is a price for any choice made. (This pluralism is typical in different forms of Isaiah Berlin, Yosef Raz, Aharon Barak, head of Israeli Supreme Court). While in many cases the law will be clear and objective in hard cases, in dilemmas between two valid conclusions based on the existing law, the judge must rely ultimately on subjective judgment in the analogical thinking typical of law. That judgment is not arbitrary but rather it is reasoned inferentially. The authority of the judges then rests on their holding that office, not merely on their being experts at what the law requires.

MONISM believes that there is only one true view, only one legitimate halakhic position. However unlike Eliezer that truth is not merely received by tradition and preserved without rational argument. We need rational discussion – not a Bat Kol – to identify the truth. **But after reaching the truth, how can we call even the rejected view "the words of the living God"** as does the Bat Kol in TB Eruvin 13a? How are **tolerance** and encouragement of debate essential in defining the Divine truth given at Sinai?

MONISM

1. **Mishna Eduyot 1:5** explains according to Rabbi Yehuda that **the minority opinion** is taught along with the majority position, so that if someone claims they heard the minority view as tradition then we know that it was **the rejected tradition**. We know the point of the majority position when we know what they rejected so it cannot be raised again.
2. The rejected view serves instrumentally to help us understand the accepted view better. Many scholars have upheld this form of monism which value the study of dissenting views:

3. **Rashi** (TB Ketubot 57a) explains “when one amora argues one way and another the opposite, neither view is false for they are making legal analogies [in which more than one conclusion can be inferred]. About this we should use the phrase *Elu vElu dirvrei Elohim Hayim* for sometimes one argument is relevant and sometimes another for the reasoning can be reversed in accordance with a slight change of the case.” The rejected opinion may turn out to be very relevant in a similar but slightly different legal case. **Both sides of the argument are essential not because God’s ideal Torah is filled with contradictions but because the application of law to the reality in its changing conditions requires complex distinctions. The rejected opinion may be incorrect for one concrete case but true for another.**
4. The rejected opinions of the minority serve not only to clarify the truth but they may become the majority opinion in later generation. That we learn:

Mishna Eduyot 1:5

“Why do we report the legal view of a single scholar [the overruled minority] along with the majority view, even though the minority view is not the halakha but rather the majority? For if a Beit Din sees the minority opinion as valid, then they may use it as a precedent [for deciding the law differently].”

Rav Menashe from Ilia, 1767-1831

“For the law can change according to the generation. Even laws between God and human beings or mitzvot without reasons depend on the times and on the court in that era.”

5. In fact, according to a **Kabbalist tradition**, “in the future the halakha as a whole will follow the school of Shammai and Rabbi Eliezer ben Horcanus in halakhic decision-making always changes according to the state of deterioration of the generation. But we may hope that the generation will fix itself (*Tikkun Hadot*) and ‘*the earth will be filled with wisdom.*’ Truth and reason are twin brothers never to be separated. In the future when the majority of the world is good, then the halakha will change to follow the previous minority position of Shammai who are called *mchadidei tfei* – wiser, sharper, and of Rabbi Eliezer ben Horcanus whose great prominence is well-known. Their opinion was rejected in their generation because of the state of the generation but the halakha will return to its full strength in the future.” (Menashe from Ilia ,1767-1831). Thus halakha has an ideal state (Beit Shammai) and a pragmatic state for world of unredeemed humanity (Beit Hillel). Both are the words of the living God.

PLURALISM

PLURALISM explains the multiplicity of views, not as contradiction to God's one truth, but as God's original intention.

1. **Pluralism can be understood as characteristic of the nature of the Torah as an intentionally open text that cannot be applicable to differing situations and times without human interpretation.**

The Torah from Sinai is not contradicted by these multiple applications in diverse ways because the Torah was only given as general principles (*klalot*). The following sources explicate this Jewish pluralism:

Shemot Rabbah 41,6: What did God do when the forty days on Mount Sinai were finished? God gave the Torah as a gift to Moshe...But how could Moshe learn the whole Torah in 40 days when the Torah is described as 'longer than the earth and wider than the ocean'? The answer is that God only taught Moshe the general principles."

The Spanish philosopher **Yosef Albo** wrote that, "It is logically impossible for God's Torah to be complete in the sense that it offers detailed rules for all cases, for the individual situations are constantly changing and are too numerous to be included in any book. Therefore God gave Moshe the general principles hinted at in the Torah, so that the wise of every generation could derive the ever-new particulars...Those are the principles mentioned as the 13 categories by which the Torah is interpreted." (*Sefer Halkarim*, Section 3 Chapter 23).

Similarly **Rabbi Yannai**, a disciple of Rabbi Yehuda HaNasi, says, "If the Torah had been given *hatucha*, cut and dried [i.e. rigid and inflexible] then there would be no leg to stand on [i.e. there would be no way to apply it to varied situations.] So "when God spoke to Moshe" (Exodus 23:2), means that Moshe asked: Master of the Universe, reveal to me what the halakha is. God responded: 'Follow the majority rule' – if there are more who argue to acquit, acquit. If there are more to convict, convict. Thus the Torah is interpreted with 49 facets for impurity and 49 facets for purity." (**TY Sanhedrin 4:2**).

Thus God refrains from deciding one way or the other in the revelation, so that the judges may tip the balance according to the situation as the majority sees fit.

The principle of a Torah that must be capable of fitting the ever-new particulars of changing times is also why **TB Sanhedrin 17a** says: "No one may be seated as member of the Sanhedrin until they show that they know how to prove the purity of an impure dead animal (*sheretz*) in 150 ways." "For no issue is completely evil and there is always a time or situation in which it will be good. Generally they are bad for the world, but there are places that the *sheretz* can be pure and beneficial"

(Menashe from Ilia, 1767-1831). The rejected opinion has its place as true and useful in ad hoc situations as times change.

2. Pluralism should be understood, not as contradictions between laws given at Sinai, but as the full spectrum of potential legal arguments or facets laid out in at Sinai.

Rabbi Yannai, a disciple of Rabbi Yehuda HaNasi, says, If the Torah had been given *hatucha*, cut and dried [i.e. rigid and inflexible], then there would be no leg to stand on [i.e. there would be no way to apply it to varied situations.] So “when God spoke to Moshe” (Exodus 23:2), means that Moshe asked: Master of the Universe, reveal to me what the halakha is. God responded: ‘Follow the majority rule’ – if there are more who argue to acquit, acquit. If there are more to convict, convict. Thus the Torah is interpreted with 49 facets for impurity and 49 facets for purity.”
(**TJ Sanhedrin 4:2**).

Thus the **Ritba, Rav Yom Tov son of Avraham Ibn Asbili** explains that Moshe was shown all the arguments, 49 pro and 49 con, but not the decisions which were to be worked out by majority rule in every generation. The pluralism is inherent to the arguments and the unity is the result of the authority of the majority in each generation. The new generation is not subject to the previous generation’s decision for the new generation is itself actualizing a Divine possibility already given. Thus in the heavenly tribunal above they have the same arguments as below, because all the logical possibilities are given at Sinai, not their determination.

3. Pluralism of Torah can be understood as result of the anthropological diversity of its readers who cannot help but hear it differently. That can be a skeptical argument that human beings can never agree on any one reading of the Torah because they are so different and because Torah is always heard and filtered through our particular angle. In fact, God took that into consideration and spoke in many voices to fit each person’s needs, so the Torah is itself already inclusive of the multiple ways it will be heard.

4. Pluralism of the Torah can be the result of God’s intentional *Tzimtzum* and refusal to determine the law which has been handed over to human beings who must decide on their own without regard to what God’s original intent may have been. (Rav Moshe Feinstein)

Rabbi **Moshe Feinstein** says God chose the way of *Tzimtzum* by producing a Torah with crowns that could be understood by various readings by analogical thinking. “When there is a dispute, then it is decided by the majority rule even if they do not fit the truth of what God intended, for God gave the Torah to Israel to act according to what they understand the Written Torah and the Oral Torah. No longer will God interpret or decide the laws of the Torah for ‘it is not in Heaven.’ ... So *elu v’elu* – ‘these and these are the words of the living God’ [cannot mean that God said the

words of Hillel and Shammai but rather] that the rabbis can determine the law according to either Hillel or Shammai.” (*Igerot Moshe*, Orach Hayim, part one of introduction).

“It is not in the heaven,” means that one is obligated to be a judge even if one’s judgment is opposed to God’s interpretation, for God’s will is that human judges make the decisions. One receives a reward for making legal decisions even if one’s interpretation turns out not to be true to God’s opinion. Both views are considered the living words of God even if one of them is clearly contradicted by Heaven.

How can deciding against God’s truth be an embodiment of God’s will? For in Deuteronomy 17 one is instructed to do whatever one is told by the officials of the court. That means that **God’s will** is that humans make the decisions, therefore even if we contradict God’s content we are loyal to God’s will – “*lo tasur*.”- for God appointed judges to replace the direct Divine role in legislation and judgment. And God instructed them to rely on *sevarah*, not just traditional *masoret*. In that sense whatever human judges say are the “words of the Living God” – even if they change their mind as times change. Here is Ramban’s notion of human interpretation “constituting” the Torah and winning God’s acknowledgement whatever they may say the law is.

We may not take the conservative traditionalist view of Rabbi Eliezer never to teach anything not received in tradition, never to decide a law not already written in some book. Rav Moshe Feinstein asks rhetorically, “Is there an end and boundary to Torah, God forbid? If we rule only according to what is written in books, what shall we do when questions arise whose answers are not found in the books? ...Certainly even now in our time Torah can grow. Even if we rule according to what is written we cannot rule just because it says so but because of its rational appeal.”

Rabbi Arye Leib Heller, Baal *Ketzot HaHoshen* explains that, “Truth follows the consensus of scholars, based on human reason, for God gave the Oral Torah as a complete gift ... to be whatever the wise determine it to be...[Why is it the Oral Torah which was given to Israel?] For if all of the Torah was written in God’s own hand, then we would have no say based on human reason over a book belonging to God, however regarding Oral Torah – it belongs to us.”

5. Pluralism can be a celebration of ongoing Divine revelation through the medium of human individualism and intellectual creativity (the Maharshal). The result is that the revelation to Moshe is not unique and not greater and not exhaustive relative to those to later scholars.

Therefore the Maharshal opposes written legal texts like the Shulchan Aruch that limit creativity as an expression of the infinite continuing revelation of scholars. Relying on text

discourages independent thinking. People assume what the pragmatic law is determines the limits of what has value in halakhic thinking. Therefore the Maharshah refuses to give greater deference to earlier scholars for they are not closer to the original and their judgments do not exhaust the infinite richness of ongoing Torah revelation as mediated from God to human beings through their intelligence.

(6) Pluralism must be the process of infinite search for truth; an endless learning process rather than the true result for truth cannot be achieved by any human being.

Rav Yitzchak Reines (1839-1915), leader of Mizrachi, in his book *Ora vSimcha*, holds that pluralism is the endless process of applying the general principles of written Torah to reality, which is synonymous with the function of Oral Torah. By definition that process is endless. What God wants from us is not to reach the truth but to pursue the truth as process rather than a product. “The Torah gave room for doubts and disputes because God wants everyone to search for truth without necessarily finding it for God loves the pursuit of truth more than truth itself. In fact no human being can grasp the truth in hand, so the purpose of human life is only the pursuit of truth,” he says.

Reb Haim of Volozhin holds the same view of the ultimate value of the endless search for truth. Then he uses it as a fulcrum to demand that each individual be true to one’s own view of truth even against higher authorities.

Pirkei Avot 1:4: “Yosi ben Yoezer says: May your home be a place for scholars to meet and one should be *mitaveik* in the dust at their feet and drink thirstily their words.”

Reb Haim explains this excerpt in a surprisingly paradoxical manner. The term *mitaveik* gains a double meaning in his *Ruach HaHaim* – it is both to sit in the dust at their feet in humility and to wrestle with them in the dust like Jacob with the angel.

“It is forbidden for student to accept the words of his master if he has critical questions about them (*kushiot*). For sometimes the student has the truth and the student can be like a twig that ignites a log.[the student can, by challenging the teacher, push him to great enlightenment]... In ‘May your home be a place for scholars to meet and one should be *mitaveik* in the dust at their feet,’ *Mitaveik* should be understood in the context of Jacob wrestling with the angel for wrestling is a form of making war and there is a war of mitzvah [in the metaphoric sense of *milchamta shel Torah*, the war of Torah study].

Thus we to wrestle the great holy rabbis who live on earth as well as those whose souls are in Heaven, the great authors whose books we have. For we have permission to wrestle with them and make war with their words and to resolve the difficulties in their views. We shall not give deference to personages but we shall only love truth.

However we as students must be careful not to speak in arrogance when one finds something to dispute. Do not imagine yourself as great as your master/teacher or as the author of the book against which you are raising objections. Know that sometimes you have not understood the teacher or author's intent so maintain great humility. Say to yourself that even though I am unworthy, this is a matter of Torah and I 'must wrestle' but only under condition that remain 'in the dust of their feet' i.e. with an attitude of humility and deference arguing before them from my position on the ground."

In Conclusion

The message of the pluralist creative interpreters is that Torah is not merely preserved as the traditionalists argue but that it must continue to develop creatively.

Seder Eliyahu Zuta (Chapter 2) describes an argument against Karaite presented as the loyal slave who when asked to care for wheat and flax, kept it intact in a locked treasure box. "When God gave the Torah to Israel, the Torah was granted as a raw material – grain to be made into flour and flax to be made into a garment." (See the full story of two slaves).

**H. Eliezer's Crisis of Conscience:
How Can We Be Obligated to Follow a "Wrong" Decision
Made by the Rabbis Just Because They are the Majority?**

Rabbi Eliezer can be stigmatized as traditionalist lacking creativity or as self-dismissive believer lacking the chutzpah and the faith in human autonomy to challenge God's word. However he can also be lionized as a **courageous person of conscience** who refuses to do what is wrong in the sight of God because of the majority's social and legal pressure, even when he is threatened with social isolation. The Rabbis call this the case of the *Zaken Mamrei*, the judicial leader who refuses to bow to the authority of the Supreme Court that has overruled his verdict. The case is first described in **Deuteronomy 17:8ff.**

**Judicial Authority
Deuteronomy 17:8-13**

These verses establish a central institution for interpreting the law, whose officials are priests and some kind of magistrate (*shofet*). The Rabbis viewed themselves as the heirs of this institution; hence this selection is pivotal for subsequent discussions of the authority of the Oral Law and its rabbinic proponents.

If a case is too baffling for you to decide, be it a controversy over homicide, civil law, or assault--matters of dispute in your courts--you shall promptly repair to the place that the Lord your God will have chosen, and appear before the Levitical priests, or the magistrate in charge at the time, and present your problem. When they have announced to you the verdict in the cases, you shall carry out the verdict that is announced to you from that place that the Lord chose, observing scrupulously all their instructions to you. You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left. Should a man act presumptuously and disregard the priest charged with serving there the Lord your God, or the magistrate, that man shall die. Thus you will sweep out evil from Israel: all the people will hear and be afraid and will not act presumptuously again.

In the case of Rabbi Eliezer the problem is not just one single judge versus the majority, but between the greatest scholars of his era, the expert in the impurity laws under discussion. He represents ancient traditions of Shammai, which claim with some justification to go back to Sinai (after all, God agrees with Eliezer).

However the problem also relates to every new generation that seeks to interpret the law in a way different than its own teachers or previous venerated generations. How then do we educate Jews to hold tradition in awe and honor that greatness of previous, often incomparable, scholars and yet give them the power to think for themselves in ways appropriate to their own era and viewpoint? On the other hand how do we maintain order and unity when conscience-driven individuals in the name of their religious vision oppose the majority rule of the leadership? In contemporary terms, what are the limits of civil dissent and even civil disobedience?

Two sources help us to clarify these issues and each tips the balance of these conflicting values. In **Zaken Mamrei of Deuteronomy 17** the emphasis is on the power of the majority of judges living today to suppress the single judge however great, while the Talmudic discussion in **TB Horayot** deals with the obligation of any learned person to follow their own reading of the Torah when they think the court has erred. Many a thinker have tried to put forth a way in which to finding the middle road between the two poles.

How does the halakhic worldview relate to the individual dissenter?

On one hand, the dissenting individual position is preserved and it may even be cited for later reversal of the decision. **Mishna Eduyot 1:4-5 and Tosefta Eduyot 1:4**

On the other hand, the individual may be excommunicated for refusing to retract dissenting legal views, at least in the story of Akavia ben Mehallemel (Mishna Eduyot 5:6-7, JPT p.319). The dissenting judge may even be executed but not for teaching a dissenting view but only for rendering dissenting verdicts as if authoritative after the supreme court has overruled the dissenting justice (JPT p.323-328, **Mishna Sanhedrin 11:2-4; TB Sanhedrin 87a-88b; Rambam Mishne Torah Laws of Rebels 3:4**).

Similarly, on one hand, dissenting scholars and even their students must reject in action as well as in words a majority decision, if they know it to be in error. (JPT p.320-323; Mishna Horayot 1:1; TB Horayot 2b: Asher ben Yehiel, Tosafor HaRosh Horayot 2a).

Yet on the other hand, one is obligated to obey the court even if says what is left is right and what is right is left. (Deuteronomy 17:11; Sifrei 154¹⁴: Nachmanides on Deuteronomy 17:11).

Yet again the next generation's majority may reverse the previous generation's majority without being considered rebellious. Rabbenu Asher ben Yehiel, explains:

“If one disagrees with earlier legal judgments and brings proof for one's position acceptable to the contemporaries, then we follow the Talmudic principle that ‘the judge Yeftach has as much authority in his generation as the later judge Samuel.’ At any given time there is only the authority of the ‘judge who will be in that time’ (Deuteronomy 17:11) and that judge may decide not to follow the precedents of the predecessors. For in all questions that were not definitively decided in the Talmud...one may ‘demolish and create’ even to the point of disagreeing with the views of the Babylonian Geonim.”

That is the root of the halakhic principle that *halakha kbatrei*, that we always follow the later scholar's verdict both because we follow the most prominent leader of the contemporary generation and because we assume that the later ones know the views of the earlier judges

¹⁴ Diametrically opposed to the Sifrei is the midrash in TJ Horayot 1:1 that says: "One might have thought that if they says that right is left and left is right, you still obey them. [However to forestall that incorrect hypothesis] the Torah says you shall nor deviate either to the right or to the left, that is, you must obey them *only when they declare the right to be right and the left to be left.*"

whom they have overruled, while the earlier ones never benefited from the comments of their successors.¹⁵

¹⁵ Excerpted from **The Jewish Political Tradition**, Vol I, pp. 307-314

**I. Tolerance and Living with Disagreement:
The Culture of Controversy –
What are the Limits of Unity and Diversity
Within a Common Community?**

In the two foundational stories examined above, TB Eruvin 13a maintains a broad tolerance and even a pluralistic respect for the dissenting school of Shammai, while TB Baba Metzia 59a describes a harsh suppression of Rabbi Eliezer's "obstinate" opposition to majority rule. In the section below we will offer a typology for various views of the dissenting views drawn from Avi Ravitsky's article.¹⁶

"Rabbi Chiya bar Abba said: A parent and child, a rabbi and disciple, when involved in studying the same topic in Torah may become like enemies battling one another. However they persist on this point and do not disengage until they again become loving friends to one another. That is how we might understand the connection between the obscure verses in Psalms?? "*They will not be ashamed to speak as enemies in the gate of the city*" and in Numbers 21:14 "*In the end they will love.*" (TB Kiddushin 30a)

Avi Ravitsky lays out the various positions on toleration and its limits within Jewish rabbinic thinking:

TOLERANCE Defended

The most extreme modern definition of tolerance is the **paradox of toleration** where only the persons or society who believe in truth and morality and finds that another view is immoral and wrong can really achieve the virtue of toleration by renouncing coercion of a deviant whom they would wish would disappear before they cause harm. This tolerant person is not indifferent to the issue, nor is he agnostic about knowledge of the truth.

Arguments for extreme **tolerance even of false and dangerous viewpoints** are only found in a limited way in rabbinic sources. Each is explicated below:

The defense of truth and the faith leads to bloodshed and persecution. Rav Naftali Tzvi Berlin, HaNetziv (Lithuania 19th c. under the Czar) in *HaEmek Davar* on the Tower of Babel (Genesis 11) describes the crime of the tower builders to be their **totalitarian pursuit of unity**:

"*The whole land spoke one language and dvarim achadim, unanimous things*" (Genesis 11:1)

"It was not the content of the things that aroused God to oppose their plan," postulates the Netziv, "but the fact that they were unanimous, whatever they were, ...and that they decided to kill anyone who thought differently than their *deah*..."

Since people's *deot* are not identical, the builders of the tower feared that people would abandon their one view and consider alternative thoughts.... Hence they decided to kill

¹⁶ See Aviezer Ravitsky, "The Question of Toleration in Jewish Tradition: Between Pluralism and Paternalism" in *Bein Samchut l'Autonomia*, edited by Avi Sagi, Zeev Safrai p. 396 Hebrew); David Dishon, *Tarbut HaMachloket* and *The Jewish Political Tradition*, Vol I p. 334 - 344

anyone who had a *deah* different than theirs... So too they prohibited travel from one city to another... and they used the tower as a **watchtower** to observe and keep control all their residents... From there they sent out emissaries to maintain surveillance over all their domain [secret police] and under them served military officers to punish all violators and throw them into the furnace.”¹⁷

In the same spirit the Netziv characterized the sins of “the righteous in the Second Temple who suspected anyone else’s piety if they behaved differently than their notion of piety. They suspected them of being sectarians, Sadducees or Epikoruses, and that lead to bloodshed.” (*HaEmek Davar*, Introduction). This view underlay the Netziv’s opposition to the creation of separatist ultra-Orthodox communities.

The censorship of false opinions harms the necessarily open investigation of truth:

Maharal of Prague (1598) argues against censorship:

“The love of knowledge and the investigation of truth makes it unworthy to distance oneself from a view that disagrees with your own even if these views are opposed to your religion and your faith. Do not shut people’s mouths for then there will be no forum to clarify the truth of religion. Tell everyone to speak freely for the lack of opposition voices produces a weakness of faith.. Reason requires it... Anyone desiring to show heroism wants a worthy opponent so that a victory will prove how great the heroism.”(*Beer HaGolah*, section 7)

Respect for human autonomy as prior to truth.

Following the Protestant model of individual faith as a private realm of choice, modern liberals like John Locke have argued that we must be tolerant even of error because individual autonomy is preferred over truth, the search for truth over the result, choice over choosing what is good. Process takes precedence over content.

That view is difficult in Jewish sources that speak of duties rather than rights, of the autonomy of the people who chose Torah, not of the individual to reject Torah, of divinely revealed truth, of choosing the good, the way of life. We stand before God not as a solitary individual without a past or a community but as an “I” deeply marked by history and community.

That respect for free choice even to choose in error is defended most often in rabbinic sources for the Talmid Hacham only:

Maharal, (*Netivot Olam*, part one, 69):

“Even if the judges fear that they will deviate from the truth and their verdict will deviate from the truth, still the wise have nothing but what their personal reason (*sechel*) allows them to understand from the Talmud. Even if their reason and wisdom mislead them, God loves them when the verdict is based on what reason requires. ‘A

¹⁷ Compare to George Orwell's *1984* which is based on Soviet Communist totalitarian mind control

judge has nothing but what one's eyes see' - *ein ladayn elea rak ma she-einav ro-ot*. Deciding from one's reason is better than relying on some composition [Shulchan Aruch, for example] where the judge does not understand its rationale, for that is like a blind person [pointing out the way] on the road."

Nevertheless this tolerance might extend to all human beings through the ideal of **Teshuvah**, says David Hartman. In Teshuvah an individual is challenged to choose the good freely, just as accepting the yoke of the God and the mitzvot is to be performed by each individual twice daily when reciting the Shema. A slave is exempt from Shema for the slave lacks liberty so free choice is prerequisite for true worship and that requires lifting censorship and coercion that make a lie of all free choice. Similarly, on the communal level the ideal acceptance of the Torah is by choice not as one over whom a mountain has been held. So in Kabbalist language, God must withdraw to create space for a free choice to return to God. So must a parent and society offer the same space for individual choice and hope that reason and education lead one to choose the good and to reaffirm the communal aspect of the individual identity.

Moderate Forms of Tolerance

The arguments advanced for moderate forms of tolerance include:

- (1) **Agnosticism** – We could be wrong so let us not shut the mouths of those who disagree –
- (2) **Indifference** – We can live with others personal deviances as long as they do not harm us. We do not need to coerce them in paternalistic way and we believe that each individual can pursue their own views even if wholly mistaken and injurious to him.
- (3) **Patience with unintentional error**- we understand their error is not really their fault so we can tolerate their error. They are not acting freely out of choice so they are not rebels in the fullest sense. If they were to choose freely we would reject them out of hand, but they have not had that chance.

Tolerance based on PLURALISM:

Avi Ravitsky explains that this seminal passage was reinterpreted over the last millennium to make it the basis of a Jewish democratic political philosophy quoted by among others the Israeli court system. That development required an expansion of two linguistic terms beyond their original context and a debate over the evaluation of that plurality of human traits.

- (1) *Deot* or *Daat* means in Rabbinic Hebrew **personality traits** like the tendency to anger, to jealousy, to patience. (That is Rambam's use of the term in his ethical laws Mishneh Torah, Book of Knowledge, Hilchot Deot 1:1). Later rabbis interpreted *deot* as **reasoned views** about the halakhic process or the Torah text. *Deot* become rational opinions which may be based simply on reason or perhaps rooted in personality. Kabbalists often identified *deot* with **ontological aspects**

unique to each human being. They argued that God at Sinai revealed different aspects of the complex nature of truth via the 600,000 children of Israel at Sinai who each was equipped to hear those different aspects. Contemporary Jewish thinkers in the modern era have understood *deot* as simply the **opinions** of the human beings whatever their origin.

- (2) *Sovel* originally means the admirable human and Divine trait of bearing with the personality and often the sins of others. When Moshe is called *anav mikol adam* – “more humble than any human being” (Numbers 12:3), Rashi explains that he is “*sovlan* (patient), easy going and not easily provoked by insults” (as Hillel is also described). Only in modern Hebrew does *sovlan* (patient) and *savlanut* (patience) give birth the term *sovlanut* (toleration) as translation of the liberal value of a democracy. In Western parlance that is a political principle that calls for the toleration, the non-interference by legal coercion, of those who hold what you or even the overwhelming majority think to be mistaken and even immoral views. The Hebrew still has overtones of an ethical trait where those outraged by the immorality of the deviant still overcomes their feelings and bear with that deviance for the sake of maintaining peace and democratic liberty.

Now a plurality of personalities and opinions may be acknowledged as human nature without that leading to **toleration of the diversity by the central political authorities:**

While today toleration of diversity is often understood as the key to social peace, some rabbis like the author of *Sefer HaHinuch* (14 century Spain) hold that, “since human *deot* are divided from one from the other and no general agreement can be expected, therefore controversies over the earning of mitzvot will increase and the Torah will lose its unity.”

Therefore we should rely on the central authority of the rabbis make majority decisions even if they sometimes err. “It is good to be *sovlan*, patient with the possibility of one error” by the rabbis rather than to suffer from anarchism and endless controversy when “everyone follows their own *daat*”. (Sefer HaHinuch, Shoftim 508).

Others oppose a central authority censoring a variety of *deot* because of their positive evaluation of the blessing of *Baruch Chacham Razim*.

Rav Haim ben Bezalel, (the brother of the Maharal of Prague, 16th c.) opposed the exclusive authority of the Shulchan Aruch on the grounds that, “just as nature of creation continues today, as it did once, to distinguish between differing faces of each human beings, so one should believe that wisdom is divided up in the hearts of these varying persons.” (*Vikuach Mayim Haim*, Introduction 5b).

Pluralism within the halakhic community assumes that there are aspects of truth in every position *lshem shamayim* – for the sake of heaven. Those breaking with the whole system would be beyond pluralist based tolerance. Those within the system, accepting its premises, seeking truth, are welcome and valued.

Positive forms of **tolerance based on pluralism** recognize the positive value of the aspects of truth contained in differing worldviews. This is not mere tolerance. It recognizes the truth has special quality:

- a) **Dialectical nature of truth** – even its paradoxical nature. So the controversy below reflects the one above in the heavenly court because the difference of human opinions is rooted in the divine diversity of the Torah, of ontology. (Meir ibn Gabai)
- b) **Dynamic nature of truth** – “God gave the court below the power to generate *sevarot*, rational conjectures on both sides of an issue” (Rav Ephraim Lunschitz, *Kli Yakar* Shoftim 102a)
- c) **Infinite nature of truth** – the Torah is so beyond any particular human formulation that we must beware to identify it with any one view. Hence we must act with suitable humility.

Rav Kook states: “*Emunah*, faith is full of broad-mindedness and crowned with *hesed* and great patience, tolerance *savlanut* for she knows ...that Divine perfection, completeness, is so rich in its hues that she can dress herself in many different forms even contradictory ones.” (Avi Ravitsky p 412)

- d) **Moral power of religion even if theologically in error.** The Meiri takes Christianity out of Avodah Zara because it civilizes its adherents morally and thus they become our brothers in ethical mutuality in many areas.
- e) **Spiritual power of a universal natural speculative philosophic faith** which according to the Rambam makes *hasidei umot halom* candidates for the *olam haba*.
- f) **Universal nature of the image of God in human beings.**
Rav Kook: “We promote the Divine banner in the name of God who created the whole world in the image of God. All the branches, whether to the right or to the left, all return to one place of origin and destination, so that the world will be perfected under the kingdom of God (Tikkun Olam) and all human beings will worship in the name of God.” (Avi Ravitsky, p. 412)

THE AUTHORITY OF THE RABBIS VERSUS THE AUTHORITY OF THE KARAITES¹⁸

The authority of the sages makes their own texts similarly authoritative. Henceforth, interpretation and commentary are the central genres of Jewish legal and political literature. These are at first the products of academic discussion, preserved through memory. But the written form they took much later was probably fixed early on in the mind's eye: the text surrounded by, enclosed within, its commentaries. The commentaries never entirely supersede the original texts, though the originals seem sometimes to survive only in quotable bits and pieces, sentences and phrases used as "proofs" by commentators and judges. But the authority of Scripture, and then of the Talmud, can never be replaced. There is a pragmatic explanation for this **textual foundationalism**: the ongoing interpretive enterprise would cease to make sense; the judicial applications would lose their legitimacy, without the "proofs." But pragmatism would never have sufficed to sustain the authority of the original texts without religious faith--in Scripture as the word of God and in the Talmud as the revealed or genealogically authorized interpretation and application of that word. For this reason, it is always possible to return to the originals, quoting God, so to speak, against the rabbis.

The Karaites oppose the whole interpretive tradition in the name of biblical literalism. Their relation to the rabbis is like that of Protestant reformers to the Catholic doctors of medieval and early modern times.

The **Karaites** survived for centuries as an alternative Jewish community, challenging the *halakha* of the rabbis, who expended much energy in both literary and political responses. Judah Halevi's *Kuzari* provides the greatest and most enduring literary response. The arguments are familiar because they arise within every interpretive tradition. The Karaites ask why God's word is not sufficient unto itself, available to any conscientious reader (this is the Jewish equivalent of Luther's "priesthood of all believers": every man his own rabbi). The **Rabbanites** respond that the word is not self-evident; the Karaites are themselves interpreters, but what they produce is a chaos of interpretations--in contrast to the coherent and stable rabbinic tradition, continuous with Moses and the prophets.

Karaite writers were certainly correct to argue that rabbinic Judaism is as much innovation as continuation. That, indeed, is the strength of an interpretive tradition: it adapts, more or less readily, to changing political and social realities. But this adaptive process raises hard questions. How strong are the constraints of the original texts? How far can an interpreter move from their plain meaning (*pshat*)? How much can an interpreter do, right now, and how openly? When and how do interpreters of the law become legislators in their own right? The answer to the last of these questions is probably: Never in their own right, for the original text says *lo tosif* (do not add [to the law]), and the rabbis must claim to be bound by the text. Insofar as the interpreters revise by elaboration and addition, the interpretation is always open to challenge. When the rabbis act against the law in an emergency, responding to "the

¹⁸ **The Jewish Political Tradition** edited by Michael Walzer, Menahem Lorberbaum and Noam Zohar, Yale University Press, Volume One, page 248ff

needs of the hour," aren't they replacing it with something new? When they "build a fence around the law," aren't they adding to it? Halevi claims that so long as the needs are met and the sages build the fences, that is, by scholars committed to the tradition and always acting in fidelity to its principles, these questions don't apply.

Maimonides argues that change poses no bar to rabbinic legislation so long as this legislation doesn't claim to be "from Sinai." The rabbis can do what they think necessary so long as they leave the public face of divine law intact. A standard distinction between God's law and the rulings of the rabbis underlies the Maimonidean argument: the latter can always be changed, though there are significant restraints on the process; the former is in principle unchangeable, though always subject to interpretation.

The closest analogy to these kinds of arguments is the role of lawyers and judges in a country like the United States, with a written and much revered constitution. Americans are constantly engaged in debates that closely resemble those that have characterized Jewish legal and political history--about texts, intentions, meanings, interpretations. And these debates lead to comparable worries about legal maneuvers and manipulations . . . and usurpations.

[**Ramban** is close to] **Justice Holmes's famous claim that the law is what the judges say it is.** A rabbinic maxim provides a rough equivalent: *Ha-kol le-fi re'ut ha-bet din* (Everything depends upon the judgment of the court). But like most American judges, the rabbis are eager to deny that they ever change the law. Perhaps it makes a difference that for them the law is divine. Still, the rabbis in their courts are hardly less authoritative than Holmes's judges in theirs. How else can a foundational text serve the needs of an ongoing community except through judicial interpretations that are also de facto revisions? And who can provide these interpretations except the learned?

**Appendix: Rabbinic Innovation that uproots God's Law –
Paradigm: The Prosbul¹⁹
By: Noam J. Zohar**

When the learned disagree, disputes among them are settled by majority vote. The story of Achnai's oven in Bava Metzia suggests that the crucial alternative to this political procedure is to invite divine intervention--and the Rabbis are as uneasy about that as they are about prophecy. Rabbi Eli'ezer's claim to be seconded by God carries no weight once the law is in the hands of its human interpreters. In much the same way, the intentions of the American founders are routinely overridden in constitutional law--and would be overridden even if the founders themselves miraculously appeared before the Supreme Court. Collective wisdom effectively replaces both revelation and legislative intention. But this is the collective wisdom of specialists, not of ordinary people.

We offer Hillel's prosbul as the classic example of Rabbinic innovation--for a biblical law is here effectively canceled. This was done, Hillel would certainly have said, with due respect for the spirit and purpose of the law, in order to meet changing circumstances. The Talmudic discussion of Hillel's ruling reveals the sages' ambiguous mix of uneasiness and confidence with regard to this sort of legislative or near-legislative activity. Their arguments cover the whole range of possibilities, characteristically without any attempt by the editor at resolution. Hillel has repealed a Torah law; no, only a ruling of the rabbis. He has acted for all times and places; no, only for his own time. What he has done should be repealed; no, it should be confirmed. There are not many cases where such an open innovation is so openly debated. Few of the Rabbis were prepared to claim for themselves the authority of Hillel. Most often, they preferred the mode of innovation through interpretation, exemplified here by Akiva. There is a great deal of quiet or concealed boldness in the history of halakhic decision making even in post-Talmudic times, particularly in the early years of the kahal. The rabbis of the autonomous communities of pre-modern times could not imitate Moses or speak like the prophets, but a good many of them walked in Hillel's or Akiva's footsteps. Their successors were often more cautious.

Hillel Enacted the Prosbul- TB Gittin 36a-b

The background for this selection is the law of debt remission every seventh year, connected to the (partly utopian) biblical system of social justice described in Leviticus and Deuteronomy (see 20). In the face of the practical pressures of economic life, Hillel devised the prosbul (a Greek word of uncertain meaning) to circumvent the biblical injunction. Legally, the prosbul works by consigning the debt to the court, for debts already in the process of collection by a court were not subject to remission. Despite this technical justification, the Talmud voices dissatisfaction over the Rabbinic uprooting of biblical laws. The discussion here introduces the maxim that the court has the power to expropriate, to which we return in subsequent chapters.

¹⁹ **The Jewish Political Tradition** edited by Michael Walzer, Menahem Lorberbaum and Noam Zohar, Yale University Press, Volume One, page 248ff

Hillel enacted [*tikken*] the prosbul for the sake of tikkun olam (Mishnah Gittin 4:3); the Mishnah (Shvi'it 10:3a-4) reads: [A debt secured by] a probul is not remitted. This is one of the things enacted by Hillel the Elder. He saw that the people refused to make loans to each other, thus transgressing against that which is written in the Torah: <"Beware lest you harbor the base thought 'The seventh year, the year of remission, is approaching,' so that you are mean to your needy brother and give him nothing" (Deut. 15:9). So he arose and enacted the probul.

The text of a probul runs thus: "I, X, hereby consign to you, the judges at location Y, that any debt owed me by Z may be collected at any time I see fit." And the judges or witnesses sign below.

According to the Torah [de'orayta] the seventh year effects remission, yet Hillel enacted that there be no remission. Is such a thing possible?

Said Abaye: [Prosbul applies] only to the seventh year in these times, following the view of Rabbi [Judah the Prince, who holds that according to basic Torah law, debt remission does not apply under conditions of incomplete sovereignty] . . . It was the rabbis who enacted that there should nevertheless be remission, to preserve the seventh year; then when Hillel saw that the people refused to make loans to each other, he arose and enacted the probul.

But is such a thing possible, that according to the Torah [de'orayta] the seventh year [in "these times"] brings no remission, yet the rabbis enacted that there be remission [Rashi: and thus the borrower becomes a robber]? Said Abaye: This is [merely an instance of] "hold back and do not act" ¹⁴ [i.e., there is no active breach of a prohibition].

Rava said: The court has the power to expropriate.

Rashi: This relates [even to] the position which holds that [even] in these days, the seventh year effects remission of debts de'orayta--yet Hillel enacted that it should not; . . . yet there is no difficulty, since [intervention] in monetary matters [mamona] does not constitute "uprooting something from the Torah," as long as it is a case of [building] a fence; for in monetary matters, the court has the power to expropriate.]

For Rabbi Isaac said: Whence [do we know] that the court has the power to expropriate? As written, "[a proclamation was issued in Judah and Jerusalem that all who had returned from the exile should assemble in Jerusalem] 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 10:7a-8). Rabbi Elazar said, [This derives] from "These are the portions bequeathed by lot to the tribes of Israel by the priest Elazar, Joshua son of Nun, and the leaders of ancestral houses [literally, "fathers"]" (Josh. 19:51). What is this connection between "leaders" and "fathers"? It tells us [that] just as fathers [can] bequeath to their sons whatever they wish, so too [can] leaders bequeath to the people whatever they wish.

The question was raised: When Hillel enacted the prosbul, was it for his generation that he enacted it--or perhaps for future generations as well? The implications concern [the

possibility] of annulling it. Should you say that he enacted it for his generation, we can annul it, whereas if you say that he enacted it for future generations as well, then "a court cannot annul the ruling of a fellow court unless it excels it in wisdom and in number" (Mishnah Eduyot 1:5).

What [is the answer]? Come and hear this saying of Shmu'el: <"A prosbul can be written only by the court of Sura or by the court of Neharde'a." ¹⁵ Now if you suppose that he enacted [it] for future generations as well, let it be written by any court!--Perhaps, when Hillel enacted it for future generations, [this extended] not to any court, [but only] to a court like his own, such as [that of] Rav Ami and Rav Assi, who have the power of expropriation.

Come and hear this saying of Shmu'el: "This prosbul is a judicial insult; if I have the power, I will annul it."--Annul it? But "a court cannot annul the ruling of a fellow court unless it excels it in wisdom and in number!"--He means to say: If I had more power than Hillel, I would annul it.

Rav Nahman, however, said: "I would confirm it."--Confirm it? But it is firmly in place! He means to say: I would make a pronouncement regarding it, so that even without being written, it will be as though it had been written.

Commentary. The Oral Law: Celebrating Radical Reinterpretation

Respect for the Torah is traditionally shown by rising before the scroll--the only concrete object of reverence in synagogues to this day. Rava wryly complains that the same measure of respect is not shown toward Torah scholars: "How foolish are all those people, who rise before a Torah scroll but fail to rise before a great man [i.e., a scholar]!" But why, precisely, does Rava believe that scholars should be revered just like the book they have mastered?

The scroll itself is revered as an embodiment of the sublime Torah, God's word. Does Rava perceive the scholar in a similar light? Surely he cannot mean simply that Torah's holiness (or its wisdom, or whatever other qualities make it worthy of reverence) resides also in the scholar. For surely no scholar can possess the Torah's qualities to the full degree that they are present in the Torah itself. If people refuse to equate the partial with the full presence, that hardly justifies calling them <"foolish."

What Rava seems to believe, then, is that the scholar is in some sense superior to the Torah, a superiority reflected in the feat of midrashic reinterpretation: "For in the Torah scroll it is written 'forty,' and the rabbis came along and subtracted one." Clearly, this midrash is not cited as a unique occurrence, but rather as a fine example of halakhic midrash as it operates throughout the law. The implied superiority of scholar over scroll--of midrash over the text's plain meaning--can be understood in two very different ways: one in terms of value, the other in terms of authority.

Superiority of value would mean that the midrashic rendition of the law is better than the original--better, that is, for the people subject to the law, because their punishment is reduced, or perhaps better for the law itself, because the harshness of its justice is tempered

by a touch of mercy. To be sure, the improvement here is rather minimal. The significance of reducing the number of stripes from forty to thirty-nine lies not in the (minuscule) difference in physical suffering, but in the symbolic message of underlying compassion. Corporal punishment is delivered not with a vengeance but with restraint.

If this understanding has some plausibility, it derives less from Rava's specific example here--the symbolic sparing of one stripe--than from other Rabbinic sources. Alongside the clause upon which Rava is commenting, the same chapter of the Mishnah includes several other clauses that appear to promote compassion toward the sinner and reduce the severity of corporal punishment. Similarly, and even more significantly, the Rabbis virtually abolished capital punishment. Rava can be taken, then, as pointing to the numerical reduction as representing a broad midrashic remaking of biblical law.

If Rava's dictum is put in theological terms, it attains a striking boldness. People ought to show greater respect to the Rabbis, because the Rabbis' law is better than that originally given by God! This elevated conception of the midrashic enterprise, which may well have been shared by many of the classical sages, certainly calls for some explanation. Perhaps nothing less than such boldness could support fidelity to Torah in the face of the powerful critique--expressed saliently in Paul's epistles--that fulfilling the demands of God's law is incompatible with human weakness. Living "under the law" in its plain meaning, with its harsh condemnation of any willful sinner, may indeed be untenable. If Torah law was not to be superseded, its punitive stance had to be corrected to accommodate human frailty.

I offer this suggestion in lieu of a proper theological account--a difficult-to-meet desideratum, in which the project of improving God's law would have to be squared with the notion of an all-wise and benevolent God. If this seems too daunting, let us consider the alternative understanding of Rava's statement, focusing not on the value of midrashic law but on rabbinic authority. Such a focus involves a subtly different sense of standing before the Torah: here, it is not so much an expression of reverence as an acknowledgment of authority. People rise before the Torah scroll to declare their allegiance to its commands; and they are fools not to recognize the superior authority of the rabbis, who have the final word in determining halakha.

This interpretation fits well with the discussion about the blessing before lighting a Hanukkah candle. There, no one doubts that a commitment to halakha implies a duty to observe Rabbinic decrees. But however great the Rabbis' authority, there is some hesitation with regard to the religious status of observing their decrees: Can their decrees truthfully be called something that "God commanded"? And the answer is that yes, in a sense it is God's command to observe even laws that are derabbanan (ordained by the rabbis)--without blurring the distinction between such laws and God's own commands, the laws that are de'orayta.

But if Rava's main purpose is to exalt the Rabbis' authority over that of de'orayta law, how are we to understand the Talmudic perplexity over Hillel's enactment of prosbul? Why does the Talmud ask, "Is such a thing possible, that according to the Torah [de'orayta] . . . yet Hillel enacted that...?"

Perhaps, indeed, not all the sages shared Rava's celebration of rabbinic power. It is noteworthy that according to Abaye, Rava's contemporary, an enactment like Hillel's proshbul is restricted to alterations of rabbinic laws. Rava himself, not surprisingly, is prepared to go much further, allowing for outright rabbinic abrogation of the biblical law of debt remission: "The court has the power to expropriate."

Even this power, however, appears to be restricted to, "[intervention] in monetary matters [mamona]," which--as Rashi explains--"does not constitute 'uprooting something from the Torah.'" This implies that the Torah's criminal or ritual law, by contrast, would not be subject to similar rabbinic abrogation or circumvention. And even with regard to the proshbul itself, the ensuing Talmudic discussion reveals great unease. Why is the proshbul depicted as so problematic, rather than as a fine instance of rabbinic improvement (or at least authority) over the given biblical law?

The answer may lie in Shmu'el's pejorative description of the proshbul as a "judicial insult." According to the mishna, Hillel sought a remedy for a difficult situation: continued upholding of the law of remission was producing unacceptable results. But he did not act to change (or reinterpret) the law. Instead, he arranged to harness the court's power to circumvent it: that is the "insult." Hillel's enactment may indeed encourage extension of credit to the needy and work for the general benefit of mostly everyone. But even if it truly promotes the great end of *tikkun olam*, this is achieved through an objectionable legal mechanism.

The proshbul is problematic, then, because it fails to employ the full rabbinic power of midrash. In some sense, admittedly, it does rely on the midrashic exclusion of notes of credit consigned to the court from the law of remission. In fact, several traditional commentators suggest--citing the Sifre to Deuteronomy 15:3 (piska 113)--that this midrashic innovation and Hillel's institution of the proshbul are one and the same. But the Talmudic discussion here clearly views the two halakhic moves as distinct, and directs its criticism not to the midrashic reinterpretation, but to Hillel's abrogation of Torah law.

The insufficiently clear boundary here between midrash and enactment may be due to the nascent condition of midrash in Hillel's time. Subsequently, the full flowering of reinterpretation as the chief mode of halakhic creativity heralded the supremacy of the Oral Law over the written Torah. Radical reinterpretation characterizes midrashic treatment of the biblical text and then in turn the treatment of the Mishnah by Talmudic amora'im and of the Talmud by authors of responsa and codes. True, explicit enactments by rabbis--and later by community leaders--continue to be promulgated beside (and sometimes even against) Torah law. Such enactment is prone to continued scrutiny and restriction, as exemplified in the Talmudic discussion of proshbul. But in assessing the true scope of rabbinic authority, we must not allow such discussions to eclipse the central importance and value of midrashic creativity, celebrated by Rava.

Appendix: Three Medieval Theories of Jewish Law
Geonim (restorative); Rambam (accumulative); Ramban and Tosefot (constitutive)
By Moshe Halbertal²⁰

Sources: Rambam, Mishne Torah, Book of Knowledge Yesodei Torah chapters 7-10; Judges Chapters 1-2; Sefer Mitzvot Second Klal with Ramban's critique

Introduction –

Why does Rambam bother to write a book on how to “count” the 613 mitzvot? Rambam disagrees fundamentally about the definition of *d'oraita* inherited from the Geonim. The Geonim count as mitzvot of the Torah commandments that appear in *drashot* using verses even though they violate the *pshat* of the verse. But we know that *ein pasuk yostzei midei p'shuto*. But Rambam reduces these rabbinic *drashot* to the status of human interpretations with a lower legal status that is open to debate. The Rambam is the first one to say that much of the Oral Torah was a result of creative human interpretation, not merely tradition from Sinai. That is how he understood the vast debates within Oral Torah as natural result of human interpretation. Any halakha learned by 13 midot has authority of *derabbanan*, but it is *d'oraita* only if it is written in the Written Torah or rabbis say explicitly that it was learned by Oral Tradition from Moshe. When the Karaites challenged the authority of the rabbinic tradition because of all the debates, then Geonim said there was negligence in transmission of Sinai tradition. But that opens up all of Torah to doubt. Rambam preferred to insist that there was core of undisputed tradition back to Moshe the great philosopher/prophet but naturally human areas of interpretation remained areas of dispute.

Definition – Interpretation is an attempt by the judge to share in the authority of the author of the original text. But it is also an expansive attempt to extend realm of application of the text to broader areas.

But Rambam's move is problematic because he will only admit that a good interpretation of the Torah is only *derabbanan*, not fully *d'oraita*. That limits our human ability to participate in God's direct authority that was limited to Moshe. So one's interpretation is not fully deductive and analytic, not completely entailed in original Biblical axiom. It is an inference, more inductive than deductive. It is an “*anaf*” branch rather than an *ikkar*, a trunk. Thus **Rambam** protects Torah core from the pathos of interpreters to identify them without gap absolutely with the voice of Revelation. However Ramban (Nachmanides) wants to help identify core with the interpretation, so all inferences based on 13 middot are counted as *d'oraita*, hence a Jew obeying halakha is obeying will of God and feeling presence of God, not merely listening to the rabbis. .

I. GEONIM – RESTORATIVE of Lost Knowledge

1-**The theory of truth** that halakha is true or false based on its correspondence to God's original laws (oral or written) given at Sinai

²⁰ Summarized from oral tapes originally taught to the Hartman Institute Center for Rabbinic Enrichment, 2002

2- **The theory of interpretation** is restorative not creative for it seeks to resurrect lost original messages

3- **The Theory of controversy** as negative for it reflects a failure of memory due to negligent transmission of original revelation, which was full, clear cut and complete

4- **The theory of authority** is that the earlier the better because closer to original and because less opportunity for interruption or corruption of transmission

II. RAMBAM - ACCUMULATIVE

1-**The theory of truth** is that halakha is true or false based on its coherence, not its correspondence, to a core revelation. Sinai gives us core traditions about which there is no controversy (like *halakha l'Moshe mi Sinai*) and then room for creative expansion using human intelligence, which must cohere rationally with the core but into which controversies may intervene. Ideally however there should be no controversies for the test of coherence can eliminate them. Rambam never praises *elu velu dvrei elohim hayim* pluralism of halakha.

2- **The theory of interpretation** is creative and expansive, based on human understanding and the 13 *midot* (which Rambam calls “deductive” from roots or trunk to branches, though we might call them inductive inferences – not necessary entailment). Rambam says that every midrash halakha is *derabbanan* unless it says that they are *doraita* explicitly.

3- **The theory of controversy** is possible for it is only human interpretation without explicit tradition. Some human interpretations are additions beyond God’s original message. In fact the interpreters’ additions can be repealed later on by same kind of court. Only the core is immutable.

4- **The theory of authority** is *not* derived from approximating the original voice of God But by human acceptance of the authority in practice. There is no privileged authority to being older and closer to original revelation for the revelation is preserved in tact without loss or dispute. In fact the later rabbis have benefit of cumulative rabbinic additions to Torah.

II. RAMBAN (Ritba, Ran etc) AND BAALEI HATOSEFOT (Tosafot from Shantz student of R. Yitzchak HaZaken) CONSTITUTIVE

1-**The theory of truth** is that halakha is *not* true or false but depends on will of scholars even if he tells you that left is right etc.

2- **The theory of interpretation** is constitutive of whole revelation. The original Torah was given with internal pluralism of views (unlike the Rambam). The Torah was given *al daat hachamim nitna Torah* – so that God intended the rabbis to determine the law to be applied. God gives authority to whatever they decide within the multiple semantic possibilities

implicit in the Torah. So rabbinic *drashot* are constitutive additions to Torah and *ein pasuk yostzei midei p'shuto* does not privilege one *pshat* reading but only maintains that new interpretations do not exclude or replace *pshat* ones. Each new interpretation adds to the multiplicity intended by God. Ramban (contra Rambam) says that every midrash halakha is *doraita* as separate mitzvah unless it says explicitly that they are *derabbanan*.

3- **The theory of controversy** is positive and they praise *elu velu dvrei elohim hayim* pluralism of halakha. Tosefot always quote *yesh lomar* as alternative views of equal legitimacy. God gave plural meanings (out of which controversy emerges) already at Sinai. Decisions are not about truth as correspondence to original and not as coherence with core but as constitutive of the core.

4- **The theory of authority** derives from Rabbis who are granted by God the power to determine what God meant. So there is no right or wrong in halakha beyond what the rabbis say. There is no left or right, true or false in reading the cores Torah but only what the Rabbis say it is. They constitute the text itself, not just its interpretation as an add-on.

Problems of Interpretation:

Question – is commentary more like **discovery** (that downgrades creativity of interpreter but aggrandizes the original message) or **invention** (that aggrandizes the interpreter but undermines his claim to derive authority from the original revelation)?

Maimonides is seeking an in-between status of **extension, accumulation, and dialogic expansion**. So interpreters i.e. Rabbis are based on untouchable core of revealed *d'oraita* and their interpretations are only *derabbanan*, not the word of God at same level. Yet their extension (which is not restorative) is also not just invention (which uses *asmachta* of verse without really inferring it from text). Rambam will not allow any person to claim to issue *derabbanan* unless they are authorized rabbis. But how can we distinguish between a plain invention and an inferred expansion? Perhaps it depends on having a community of interpreters who accept the authority of the expansive interpretations. For example, Christian community accepted the claim that New Testament is a direct continuation of O.T. In fact the distinctions of core from expansion and from invention are never simply clear and easily agreed.

Ronald Dworkin's *Laws Empire* uses the image of the chain novel where each chapter is subsequently added by a different author.

Question – why does **Rambam** separate interpretation from core?

He wants to save the text from total deconstruction, from delegitimation of the anarchy of multiple interpreters.

While **Ramban** wants every detail of halakha as interpreted by rabbis to count as revelation so I feel in doing rabbis' words that I am doing God's will derived from every *keter* on a letter.

Contemporary Views of Halakha

Geonim tradition continues to some Lithuanian Gedolim who claims all was given at Sinai. A modern day example of this theory is that according to this tradition, the answers to electricity were already foreseen.

Rambam's accumulative view has not continued.

Ramban's constitutive view is held by Ritba, Maharshal, Meir ibn Gabai, Havot Yair, Rav Kook and generally in Kabbalists, who were pluralists.

Contemporary Theories of Law

Geonim follow the legal school of **Originalism**, or **Intentionalism**, which is the search for the original intentions of the authors of the text based on the historical context, use of language, diaries (like conservative Supreme Court justices like Scalia). For new situations like electricity they try to imagine what they would have said. The theory of truth is restorative, to correspond to historical truth of their views as literally preserved. .

Ronald Dworkin holds **Rambam's** accumulative view that Rabbis are adding creatively to a tradition into which they want to cohere. It is like a **chain novel** where author A adds a second chapter in spirit of Author A's first chapter and so on. He does not rewrite the original as in constitutive view nor claim to recover original of Author. Moshe Halbertal once told Dworkin that the Bible is the first chain novel where different authors over many years add chapters with same main characters and common themes of *brit*.

Rambam's notion of a core self-understood text is like the notion of a "pre-interpretative" understanding. It means that when I hear someone speak I do not interpret him unless there is ambiguity. On the core I know what he means. Not everything is "up for grabs" as a postmodern deconstructionist would say. For example, *Lo Tirzach* cannot be read ala Rashkolnikov as *Lo, Tirzach!* as a nihilist command.

Ramban = Postmodern views that there is no fixed meaning to the text, so no priority to the past but rather an active reader constitutes the text. For example, on Yom Kippur we pray "*Eil Rachum ... yinakeh*" and we leave out the Biblical conclusion of the limits of mercy in Exodus 33 "*yinakeh lo yinakeh.*"

However Moshe Halbertal rejects the post-modernist view for moral, among other reasons, since it denies the basic truth or reality out there that limits me. For example, I will never be as tall as Walt Chamberlain, even if my mother says I am the biggest person in the world as far as she is concerned. To accept the limits is healthy.

TB Temurot 16a -At the first stage of transmission between Joshua and Moshe 300 laws were forgotten. That notion undermines the reliability of all tradition, but it is also a cautionary tale about the legal catastrophe and threat to leadership if one does not preserve oral tradition, reflected in the tale of Rabbi Eliezer. Joshua forgets tradition because of arrogance, claiming he does not need to be reminded of the law by Moshe. Subsequently, the

people want to kill Joshua, who starts a war to distract them. We see Joshua is a failure as a scholar so he resorts to the role of general.

However Moshe Halbertal reads them in a Rabbi Joshua mode that says we need to revive the lost past otherwise we have nothing left. How does Moses' Joshua try to recover lost chain?

1. **Ongoing revelation by turning to prophets.** BUT “*lo bashamayim*” – no laws from heaven and in fact no prophet has the power to promulgate new law or even re-new laws lost. Later in tradition rabbis like Yosef Karo did report halakha based on prophetic voices, *maggid*].
2. **Otniel ben Knaz conquers *kiryat sefer*** - he restores the lost the laws by his creative interpretative *pilpul*. His military prowess is read as scholarly re-conquest. Still interpretation here is restorative in its goal.
3. **TB Menahot** contains the story of God adding crowns to the letters of the Torah, which Moshe cannot understand, but Akiva will. Interpretation is creative rooted in Torah but goes far beyond what Moshe himself, in the original revelation, could have ever understood. Meaningless textual decorations are resource for creating many new laws. But at least Moshe gets credit for “*Halakha l’Moshe miSinai.*” Thus the rhetorical cover of creative interpretation as if it were originally given at Sinai is revealed. Akiva’s life ends in tragedy due to his boldness in trying to force God’s hand in the Bar Kochba Revolt but his method, his interpretative boldness, is identified with the crown of Torah that makes him higher than Moshe. This intimates Ramban’s constitutive approach that wipes out the distinction between tradition and interpretation.

Appendix of Sources

***TB Eruvin 13b* – three year debate of school of Hillel and Shammai ended with a Bat Kol about *elu v'elu*.²¹**

Rabbi Aba, citing Shmu'el, said: For three ears, Bet Shammai and Bet Hillel disagreed.

These said: The law should be according to us, while those said: The law should be according to us. [Then] a Bat Kol was pronounced: “These and those are the words of God; and the law is according to Bet Hillel.

But since these and those are the words of God, why was it granted to Bet Hillel that the law be established according to them? Because they were tolerant, meek and related both their own words and Bet Shammai's words. Moreover, they placed Bet Shammai's words before their own. This teaches you that whoever humbles himself is exalted by the Holy One, while whoever exalts himself is humbled by the Holy One.

Mishna Hagiga 3:2: “Torah scholars forbid and permit yet both must be honored as will of God”

Mishna Eduyot 1:5 “Why do we report the legal view of a single scholar [the overruled minority] along with the majority view, even though the minority view is not the halakha but rather the majority? For if a Beit Din sees the minority opinion as valid, then they may use it as a precedent [for deciding the law differently].”

TB Sanhedrin 17a: “No one may be seated as member of the Sanhedrin until they show that they know how to prove the purity of an impure dead animal (*sheretz*) in 150 ways.”

***TB Baba Metzia 59a-b* – the *Tanur shel Aknai* debate between traditionalist, Eliezer, and creative interpreter, Yehoshua ending with the excommunication of Eliezer and then the Divine retribution wreaked on Rabban Gamliel, head of the Sanhedrin at the time.**

²¹ **TB Gittin 6b** - *Theoretical debate of Evyatar and Yonatan interpreting a Biblical narrative quoted by God in the heavenly Beit Midrash even though it recognizes the pluralism of the Torah study. Elu v'elu divrei Elohim Hayim*

TRADITIONALIST Background Sources:

The Biography of Eliezer- a disciple of Beit Shammai: ²²

Pirkei Avot 1:1 “Moshe received the Torah from Joshua and handed it over to the Elders...” (Literally “tradition” means to hand over). “Know that every mitzvah given by God to Moshe Rabbenu was given with its interpretation.” (Rambam Introduction to the Mishna, Seder Zeraim)

TB Sanhedrin 88b Rabbi Yossi says, “Originally there were no disputes in Israel but rather the Sanhedrin sitting in Temple decided.” When an issue arose then the local courts decided issues based on tradition, otherwise they appealed to a higher court that might have a tradition. If there was no tradition then majority rule decided the issue once and for all. (*Shmua*). (See also Rambam Hilchot Mamerim 1:4 and the ruling on the rebellious judge, *Zaken Mamrei*, as culpable only if he claims that his *sevarah* contradicts the court’s *shmua* in TB Sanhedrin 88a in name of Rav Kahanna).

TB Sotah 47b: “When the arrogant in their intelligence increased, then disputes in Israel increased. When the number of students of Hillel and Shammai who did not study with their teachers sufficiently increased, then disputes in Israel increased and the Torah was made into two Torahs.”

²² Tosefta Yevamot 3:4; TB Sukkah 28a; Avot d Rabbi Natan 14, Horayot 14a and Pirkei Avot 2:8; contrast with **Elazar ben Arach** the overflowing spring versus the sealed cistern and with Seder Elyahu Zuta 2 - two servants of God given task to “keep” wheat and flax for the Master- one traditional and one creative. Source taken from Sefer HaAggadah pgs. 221 and 222

TB Temurot 16 a – Joshua’s arrogance causes loss of 300 halakhot taught by Moshe²³

"Rav Yehudah reported in the name of Shmu'el: Three thousand traditional laws were forgotten during the period of mourning for Moses.

They said to Yehoshua: Ask.'

He replied:" *It is not in heaven.*"

[After describing several cases where Pinhas and Joshua tried in vain to recover the lost laws by appealing directly to God, the Talmud quotes Rabbi Abbuha, who said]: "Otniel, the son of Kenaz, restored [these forgotten teachings] by means of his dialectics" (BT Temurah 16a).

²³ TB Temurot 16 a -

At the first stage of transmission between Joshua and Moshe 300 laws were forgotten. That notion undermines the reliability of all tradition, but it is also a cautionary tale about the legal catastrophe and threat to leadership if one does not preserve oral tradition. This can pertain to the story of Rabbi Eliezer. Joshua forgets tradition because he was so arrogant as to claim he did not need to be reminded by Moshe. The people want to kill Joshua so he starts a war to distract them. Thus Joshua, a failure as a scholar, becomes a general. The ideal of the Roman male hero- the warrior - is downgraded as a failed intellectual.

However Moshe Halbertal reads this text in a Rabbi Joshua mode. Here is a more optimistic worldview that says we need to revive the lost past otherwise we have nothing left and we can revive the forgotten past through the power of human reason. How does the Rabbinic Joshua try to recover lost chain? The option of **ongoing revelation by turning to prophets** is blocked by "*lo bashamayim*" - no new laws are permitted to come from heaven (even in the generation immediately following Moshe and Sinai) and in fact no prophet has the power to promulgate new law since Moshe the prophet or even the right to re-new laws lost. Otniel ben Knaz conquers *kiryat sefer* = he restores the lost the laws by his creative interpretative *pilpul*. His military prowess is read as scholarly re-conquest. Still interpretation here is restorative in its goal.

To summarize, in TB Temurot 16a - 300 halakhot were forgotten by Joshua after death of Moshe because of Joshua's arrogance and could not be recovered by renewed revelation because law is no longer in heaven even in era of Joshua. Joshua lacked the power of Moshe in revelation and in memory. To distract the people from their anger at Joshua for being a failed transmitter of traditions who forgot 300 laws, Joshua started a war. Thus prophecy ends and its is replaced by memory of traditions however when memory fails then the scholar of Pilpul (Otniel ben Knaz) can renew lost traditions. This becomes model for Rabbis after the destruction of the Temple and the loss of remembered Oral Traditions. Oral Torah, in new sense as creative interpretation, replaces and reconstructs lost traditions of revelation. In fact forgetfulness gives birth to the scholar as creative interpreter and scholar of Oral Torah.

CREATIVE INTERPRETATION School, Yehoshua:

TJ Berachot 1:4,3b: *haham adif minavi* – The statements of the Rabbis take priority over those of the prophet.

Maimonides, Introduction to the Commentary on the Mishna:

God did not permit us to learn the law from the prophets but from the halakhic authorities, men of reason and knowledge. The Torah does not instruct us [when we have legal questions] ‘you shall go to the prophet who will be in those days,’ but rather “you shall... appear before the priests the Levites and the judge who will be in those days.” (Deuteronomy 17:9)

The law follows the view of 1001 halakhic authorities who are not prophets and not that of the 1000 great prophets.

Aryeh Leib HaKohen, Ketzot HaHoshen:

Certainly one should be fearful of stating matters of Torah erroneously and human wisdom falters in the search for truth... However **the Torah was not given to ministering angels but to humankind**, who are endowed with human reason... God gave the Torah to administer as human understanding determines it to be, even if that determination falls short of objective truth. Thus if one brings forth a completely new idea, it need only be true by the measure of human reasoning... ‘Truth should sprout from the earth’ and the truth is what the halakhic authorities, exercising their human intelligence agree is true.

Nissim Gerondi, HaRan:

We have been commanded to obey their decision whether it represents the truth or its opposite ... for the power of decision-making has been entrusted to the halakhic authorities for each generation. Whatever they decide is what God has commanded (*Derashot HaRan* #7)

Maharal of Prague (16th century):

There is no inconsistency here [between obeying God’s word and obeying whatever the rabbis say]. Since the same God who commanded the observance of the Torah, prescribing what is prohibited and what is permissible, also commanded that “you must not deviate from the verdict that they [the judges in those days] pronounce to you” (Deuteronomy 17:9), *lo tasur*). (*Gur Aryeh* on Dt 17:9).

Maharal,

(*Netivot Olam*, part one, 69):

“Even if the judges fear that they will deviate from the truth and their verdict will deviate from the truth, still the wise have nothing but what their personal reason (*sechel*) allows them to understand from the Talmud. Even if their reason and wisdom mislead them, God loves them when the verdict is based on what reason requires. ‘A judge has nothing but what one’s eyes see’- *ein ladayn elea rak ma she-einav ro-ot*. Deciding from one’s reason is better than relying on some composition [Shulchan Aruch, for example] where the judge does not understand its rationale, for that is like a blind person [pointing out the way] on the road.”

TB Menachot 29b -Moshe at Mount Sinai traveling into the future to see Akiva, student of Yehoshua, explaining the Torah of Moshe in such creative ways that it is unrecognizable to Moshe.

Rav Judah said, citing Rav:

When Moshe ascended to heaven [to receive the Torah] he found the Holy One sitting and fashioning coronets for the letters.

[Moshe] said to Him: "Master of the world, who requires you [to do this]?"

[God] replied: "There is a person who will come to be after many generations, called Akiva ben Yosef; he will one day expound heaps upon heaps of laws from each and every horn."

[Moshe] said before God: "Master of the world, show him to me."

[God] replied: "Turn around." He turned around and [found himself] behind the eighth row [in the Talmudic academy--behind the regular students arranged in order of excellence in the first seven rows]. Moses did not understand the discussion and was dazed. When [Akiva] came to a certain point, his students asked him "Whence do you know this?" Akiva replied, "[This is] a law [given] to Moses from Sinai." (*Halakha l'Moshe miSinai*).

Then Moses was calmed.

But Moshe turned back and stepped before the Holy One and said: "Master of the world, You have such a person, yet You give the Torah through me?"

God replied: "Be still, that is how it entered my mind."

Then Moshe said: "Master of the world, you have shown me his Torah; show me his reward."

God said: "Turn around." He turned around and saw Akiva's flesh being weighed in a butcher shop.⁸

Moshe exclaimed: "Master of the world, such Torah and such a reward?"

God replied: "Be still, that is how it entered my mind." (TB Menachot 29b)

TB Menachot 29b:

Rabbi Yehuda said in the name of Rav:

When Moshe went up to on High, he found God sitting and fastening crownlets to the letters of the Torah. He asked: Master of the universe, why are you delaying [in this way the giving of the Torah]?

God responded: There will be a man who will live many generations from now whose name is Akiva son of Joseph who will derive myriads of laws from every jot and title of every letter.

Moshe said to God: Master of the universe, allow me to see him."

God replied: Turn around. i.e. Moshe was somehow transported in a time machine into the future and entered Rabbi Akiva's Beit Midrash].

Moshe went and sat behind the eight rows of students and did not understand what was being said and he felt faint. But when the discussion reached the question of Rabbi Akiva's students: 'Rabbi, what is the source of the authority of these teachings?'

Rabbi Akiva replied: '*Halakha L'Moshe miSinai*- this is law given to Moshe at Sinai.' Then Moshe felt at ease.

Rabbi Yannai, a disciple of Rabbi Yehuda HaNasi, says, “If the Torah had been given *hatucha*, cut and dried [i.e. rigid and inflexible] then there would be no leg to stand on [i.e. there would be no way to apply it to varied situations.] So “when God spoke to Moshe” (Exodus 23:2), means that Moshe asked: Master of the Universe, reveal to me what the halakha is. God responded: ‘Follow the majority rule’ – if there are more who argue to acquit, acquit. If there are more to convict, convict. Thus the Torah is interpreted with 49 facets for impurity and 49 facets for purity.” (**TY Sanhedrin 4:2**).

Seder Eliyahu Zuta (Chapter 2) describes an argument against Karaite presented as the loyal slave who when asked to care for wheat and flax, kept it intact in a locked treasure box. “When God gave the Torah to Israel, the Torah was granted as a raw material – grain to be made into flour and flax to be made into a garment.” (See the full story of two slaves). Contrast Eliezer versus Elazar ben Arach

TB Baba Metzia 86a – Heavenly Beit Midrash invites Rabbah bar Nachmani to settle their heavenly halakhic disputes

Background Sources on Pluralism:

Halakha and the Aggadah- Traditionalists and Innovators Taken from an essay by David Hartman

Rav Ami and Rav Assi were sitting before Rabbi Isaac the blacksmith. One asked him to treat of the Halakha and the other of the Aggadah. When he began a Halakha, he was prevented by the latter; when he began an Aggadah he was prevented by the former.

Rabbi Isaac is a blacksmith. He knows the peaceful handling of fire. Certainly he is not here by accident. You will also see that there is a link between what was said earlier about youth and the remainder of our text.

He then said to them: I will tell you a parable. This can be compared to a man who had two wives, one young and the other old. The young one tore out his white hair, the old one his black hair, and he became bald on both sides.

I know that baldness is not a debasement. It is only a laying bare of the skull. When the skull is full of intelligence- as sometimes happens to it- one forgets about the baldness, but sometimes the baldness disfigures.

There is Aggadah and Halakha. Aggadah and Halakha are, in this text, compared to youth and old age. I defined them completely differently when I said: Halakha is the way to behave; Aggadah is the philosophical meaning- religious and moral- of this behavior. It is, however, not certain that the two definitions contradict each other. The young obviously think that the Halakha is gray hair, mere forms: forms that have lost their color. The young woman plucks them out; the young interpret to the point of uprooting the roots of the terms. The old woman is the traditional point of view: orthodoxy that reads the texts literally. She preserves them in their decay. For her, there is no text to rejuvenate, the white hairs still stand. They count. In contrast to the young woman, she plucks out all the black hairs, which are harbingers of all the vitality, all the impatience of innovative interpretation. At issue is the very division of the community of Israel, its splitting apart into youth and non-youth. Everywhere from that moment, there is violence...

This division into young and old, this separation into revolutionaries and traditionalists, is condemned. The text is against the cult of the traditional and against the cult of the modern! The spirit loses its sovereignty in such cults. The one group wants to renew to the point of rediscovering a religion of dances and shows; the other group because of its respect for white hair, sees frivolity everywhere. But the spirit is not bigamous! What is terrible is this bigamy of the spirit that the two wives, old and young, represent, maturity as conservatism and youth as a search for novelty at any price.

Mishna Sanhedrin Chapter 4: 5

God created all humanity from one human being to teach us God's greatness. A human ruler mints all the coins in the same image [with the image of the sovereign imprinted on them identically as a sign of the sovereign's power]. However the Sovereign of Sovereigns, God created each human being in the image of the first human being no one is identical with any other."

Mekhilta dRabbi Yishmael (see also Shemot Rabbah 29,1 and Pesikta Drabbati on Exodus 19):

"All the people saw the voices' – How many voices were there? ... The Torah was meant to be heard in voices according to the strength of each human listener as it says in Psalms 'The voice of God is in the power' – the power of each human being."

In the same way God appeared to each generation in a different way and the manna tasted differently to each age bracket.

Reb Haim of Volozhin (1749-1821) celebrates the individualism as religious value by quoting:

Bemidbar Rabbah Pinchas 21,2 "The halakha is that when one sees a large mass of people then one makes a blessing: **Baruch Chacham Razim!** Blessed is the God of Secrets. For just as none of the faces are the same, so too none of the intellects are identical, rather each and every person has their own independent intellect (*daat*)."

Shemot Rabbah 41,6:

What did God do when the forty days on Mount Sinai were finished? God gave the Torah as a gift to Moshe... But how could Moshe learn the whole Torah in 40 days when the Torah is described as 'longer than the earth and wider than the ocean'? The answer is that God only taught Moshe the general principles."

The Spanish philosopher **Yosef Albo**:

"It is logically impossible for God's Torah to be complete in the sense that it offers detailed rules for all cases. For the individual situations are constantly changing and are too numerous to be included in any book. Therefore God gave Moshe the general principles hinted at in the Torah, so that the wise of every generation could derive the ever-new particulars... Those are the principles mentioned as the 13 categories by which the Torah is interpreted." (*Sefer Halkarim*, Section 3 Chapter 23).

Baruch Chacham Razim - Tanchuma Buber Pinchas 1:

If one sees a large population of human beings [some say 600,000], recite the blessing: '**Baruch Chacham Razim**, Blessed be God who knows the secrets, for that is the way of God's world. Just as human faces differ from one from the other, so their *daat* personalities differ and each one has their own *daat*, personality. ...

Thus just before his death Moshe asked God: "Master of the Universe, You know the *daat* of each and every one of them [the 600,00 children of Israel]. ..Appoint a leader for them who

will *sovel*, bear with them, be patient and tolerate each and everyone according to their *daat*.”

(Bein Samchut p. 444 Hebrew)

Rav Haim ben Bezalel, (the brother of the Maharal of Prague, 16th c.) opposed the exclusive authority of the Shulchan Aruch on the grounds that “just as nature of creation continues today, as it did once, to distinguish between differing faces of each human beings, so one should believe that wisdom is divided up in the hearts of these varying persons.” (*Vikuach Mayim Haim*, Introduction 5b).

Maharshal, Rabbi Shelomo Idels, (17th c.) explains “*Baruch Chacham Razim*” to refer to “the 600,000 differing *deot* that constitute as the whole of all possible aspects of the wisdom, hence the Torah was given in the desert to 600,000 people so that the Torah would include every possible *deah* and aspect of wisdom” (Maharshal on TB Berachot 58a). This develops the Lurianic view of Safed that “the Torah is the root of 600,000 souls of Israel, hence there are 600,000 interpretations” (*Sefer HaKavanot of the Ari*).

Rav Naftali Tzvi Berlin, HaNetziv (Lithuania 19th c. under the Czar) in *HaEmek Davar* on the Tower of Babel (Genesis 11) describes the crime of the builders of the tower to be their **totalitarian pursuit of unity**:

“The whole land spoke one language and *dvarim achadim*, unanimous things” (Genesis 11:1) “It was not the content of the things that aroused God to oppose their plan, but the fact that they were unanimous, whatever they were... and that they decided to kill anyone who thought differently than their *deah*... Since people’s *deot* are not identical, the builders of the tower feared that people would abandon their one view and consider alternative thoughts.... Hence they decided to kill anyone who had a *deah* different than theirs...so too they prohibited travel from one city to another... and they used the tower as a **watchtower** to observe and keep control all their residents. ...From there they sent out emissaries to maintain surveillance over all their domain [secret police] and under them served military officers to punish all violators and throw them into the furnace.”

In the same spirit the Netziv characterized the sins of “the righteous in the Second Temple who suspected anyone else’s piety if they behaved differently than their notion of piety. They suspected them of being sectarians, Sadducees or Epikoruses, and that lead to bloodshed.”²⁴

Talmud - Mas. Baba Metzia 59b

“...and this was the oven of ‘Aknai.1 Why [the oven of] ‘Aknai? — Said Rab Judah in Samuel's name: [It means] that they encompassed it with arguments² as a snake, and proved it unclean. It has been taught: On that day R. Eliezer brought forward every imaginable argument,³ but they did not accept them. Said he to them: ‘If the halakha agrees with me, let this carob-tree prove it!’ Thereupon the carob-tree was torn a hundred cubits out of its place — others affirm, four hundred cubits. ‘No proof can be brought from a carob-tree,’ they retorted. Again he said to them: ‘If the halakha agrees with me, let the stream of water prove

²⁴ Compare to George Orwell's *1984* which is based on Soviet Communist totalitarian mind control.

it! Whereupon the stream of water flowed backwards — ‘No proof can be brought from a stream of water,’ they rejoined. Again he urged: ‘If the halakha agrees with me, let the walls of the schoolhouse prove it,’ whereupon the walls inclined to fall. But R. Joshua rebuked them, saying: ‘When scholars are engaged in a halakhic dispute, what have ye to interfere?’ Hence they did not fall, in honor of R. Joshua, nor did they resume the upright, in honor of R. Eliezer; and they are still standing thus inclined. Again he said to them: ‘If the halakha agrees with me, let it be proved from Heaven!’ Whereupon a Heavenly Voice cried out: ‘Why do ye dispute with R. Eliezer, seeing that in all matters the halakha agrees with him!’ But R. Joshua arose and exclaimed: ‘It is not in heaven.’⁴ What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one incline.⁵

R. Nathan met Elijah⁶ and asked him: What did the Holy One Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, ‘My sons have defeated Me, My sons have defeated Me.’ It was said: On that day all objects which R. Eliezer had declared clean were brought and burnt in fire.⁷ Then they took a vote and excommunicated him.⁸ Said they, ‘Who shall go and inform him?’ ‘I will go,’ answered R. Akiba, ‘lest an unsuitable person go and inform him, and thus destroy the whole world.’⁹ What did R. Akiba do? He donned black garments and wrapped himself in black,¹⁰ and sat at a distance of four cubits from him. ‘Akiba,’ said R. Eliezer to him, ‘what has particularly happened to-day?’¹¹ ‘Master,’ he replied, ‘it appears to me that thy companions hold aloof from thee.’ Thereupon he too rent his garments, put off his shoes, removed [his seat] and sat on the earth, whilst tears streamed from his eyes.¹² The world was then smitten: a third of the olive crop, a third of the wheat, and a third of the barley crop. Some say, the dough in women's hands swelled up.

A Tanna taught: Great was the calamity that befell that day, for everything at which R. Eliezer cast his eyes was burned up. R. Gamaliel¹³ too was traveling in a ship, when a huge wave arose to drown him. ‘It appears to me,’ he reflected, ‘that this is on account of none other but R. Eliezer b. Horcanus.’ Thereupon he arose and exclaimed, ‘Sovereign of the Universe! Thou knowest full well that I have not acted for my honor, nor for the honor of my paternal house, but for Thine, so that strife may not multiply in Israel! ‘At that the raging sea subsided.

Ima Shalom was R. Eliezer's wife, and sister to R. Gamaliel. From the time of this incident onwards she did not permit him to fall upon his face.¹⁴ Now a certain day happened to be New Moon, but she mistook a full month for a defective one.¹⁵ Others say, a poor man came and stood at the door, and she took out some bread to him.¹⁶ [On her return] she found him fallen on his face. ‘Arise,’ she cried out to him, ‘thou hast slain my brother.’ In the meanwhile an announcement was made from the house of Rabban Gamaliel that he had died. ‘Whence dost thou know it?’ he questioned her. ‘I have this tradition from my father's house: All gates are locked, excepting the gates of wounded feelings.’¹⁷

Our Rabbis taught: He who wounds the feelings of a proselyte transgresses three negative injunctions, and he who oppresses him infringes two. Wherein does wronging differ? Because three negative injunctions are stated: Viz., Thou shalt not wrong a stranger [i.e., a

proselyte],¹⁸ And if a stranger sojourn with thee in your land, ye shall not wrong him,¹⁹ and ye shall not therefore wrong each his fellowman,²⁰ a proselyte being included in ‘fellowman.’ But for ‘oppression’ also three are written, viz., and thou shalt not oppress him,²¹ Also thou shalt not oppress a stranger,²² and [If thou lend money to any of my people that is poor by thee,] thou shalt not be to him as a usurer²³ which includes a proselyte! — But [say] both [are forbidden] by three [injunctions].

It has been taught: R. Eliezer the Great said: Why did the Torah warn against [the wronging of] a proselyte in thirty-six, or as others say, in forty-six, places? Because he has a strong inclination to evil.²⁴ What is the meaning of the verse, Thou shalt neither wrong a stranger, nor oppress him; for ye were strangers in the land of Egypt? It has been taught: R. Nathan said: Do not taunt your neighbor with the blemish you yourself have.²⁵ And thus the proverb runs:²⁶ If there is a case of hanging in a man's family record, say not to him,²⁷ ‘Hang this fish up for me.’

(1) This refers to an oven, which, instead of being made in one piece, was made in a series of separate portions with a layer of sand between each. R. Eliezer maintains that since each portion in itself is not a utensil, the sand between prevents the whole structure from being regarded as a single utensil, and therefore it is not liable to uncleanness. The Sages however hold that the outer coating of mortar or cement unifies the whole, and it is therefore liable to uncleanness. (This is the explanation given by Maimonides on the Mishnah, Kel. V, 10. Rashi a.l. adopts a different reasoning). ‘Aknai is a proper noun, probably the name of a master, but it also means ‘snake’. (Gr. **) which meaning the Talmud proceeds to discuss.

(2) Lit., ‘words’.

(3) Lit., ‘all the arguments in the world’.

(4) Deut. XXX,12.

(5) Ex. XXIII,2; though the story is told in a legendary form, this is a remarkable assertion of the independence of human reasoning.

(6) It was believed that Elijah, who had never died, often appeared to the Rabbis.

(7) As unclean.

(8) Lit., ‘blessed him,’ a euphemism for excommunication.

(9) I.e., commit a great wrong by informing him tactlessly and brutally.

(10) As a sign of mourning, which a person under the ban had to observe.

(11) Lit., ‘what is this day (different) from yesterday (or to-morrow)?’

(12) Rending the garments etc. were all mourning observances. (In ancient times, mourners sat upon the earth, not, as nowadays, upon low stools.) — Weiss and Halevi hotly contest the character of R. Eliezer. The former, mainly on the basis of this story (though adducing some other proof too), severely castigates him as a man of extreme stubbornness and conceit, who would brook no disagreement, a bitter controversialist from his youth until death, and ever seeking quarrels (Dor. II, 82). Halevi (Doroth 1, 5, pp. 374 et seqq.) energetically defends him, pointing out that this is the only instance recorded in the whole Talmud of R. Eliezer's maintaining his view against the majority. He further contends that the meekness, with which he accepted his sentence, though he was sufficiently great to have disputed and fought it, is a powerful testimony to his humility and peace-loving nature.

(13) The Nasi and the prime mover in the ban against R. Eliezer.

(14) After the Eighteen Benedictions there follows a short interval for private prayer, during which each person offered up his own individual supplications to God. These were called supplications (iubj.), and the suppliant prostrated himself upon his face; they were omitted on New Moons and Festivals. — Elbogen, Der judische Gottesdienst, pp. 73 et seqq. Ima Shalom feared that her husband might pour out his grief and feeling of injury in these prayers, and that God, listening to them, would punish R. Gamaliel, her brother.

(15) Jewish months consist of either 30 days (full) or 29 (defective). Thinking that the previous month had consisted of 29 days, and that the 30th would be New Moon, she believed that R. Eliezer could not engage in these private prayers in any case, and relaxed her watch over him. But actually it was a full month, so that the 30th was an ordinary day, when these prayers are permitted.

- (16) I.e., she did not mistake the day, but was momentarily forced to leave her husband in order to give bread to a beggar.
- (17) Lit., 'wrong', v. p. 354, n. 4. She felt sure that R. Eliezer had seized the opportunity of her absence or error to cry out to God about the ban.
- (18) Ex. XXII, 20.
- (19) Lev. XIX, 33.
- (20) Lev. XXV, 17.
- (21) Ex. XXII, 20.
- (22) Ex. XXIII, 9.
- (23) Ex. XXII, 24
- (24) So Rashi in Hor. 13a. Jast.: because his original character is bad — into which evil treatment might cause him to relapse.
- (25) Thus he translates the verse: Do not wrong a proselyte by taunting him with being a stranger to the Jewish people seeing that ye yourselves were strangers in Egypt.
- (26) Lit., 'people say.'
- (27) [So MS.M.; cur. ed. read, 'to his fellow'.]