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The Rules of Law: The Talmudic Endeavor to Decide Dispute

Every legal system goes through stages of growth followed by efforts at assembling and systematizing this growth through codification. Roman law went through centuries of growth before Hadrian began to unify the unwieldly mass of laws present throughout his empire. This codificatory project continued until Justinian's monumental code was completed four centuries later.[1]

The rabbinic halakhic tradition begins with controversy. *M. ʿEd.* 2:2 introduces the earliest sages of the Second Temple period as pairs of disputants. This trend continues with Shammai and Hillel and their Houses as controversy continues to grow until the full gamut of opinions finds expression in the mouths of the Tannaim at Yavneh and in the Galilee. The task falls to R. Akiba and Rabbi to collect this mass of traditions and arrange it into a code, the Mishnah. The process of codification, however, did not stop there as the Amoraim grappled to decide between the many opinions expressed within the Mishnah. This secondary codification will be the subject of this chapter. By analyzing how the Amoraim went about resolving these disputes, we will gain insight into their views about halakhic uniformity and pluralism in general.

As we will see below, the Yerushalmi formulates and implements a set of rules for deciding disputes while the Bavli rejects these rules explicitly. This suggests that the Yerushalmi has a greater penchant for halakhic uniformity than does the Bavli. The Bavli does, however, assume that most Tannaitic disputes are decided by the Amoraim on an ad hoc basis. Both Talmuds single out a handful of cases in which the normal legislative process breaks down. In some of these cases, the Talmuds allow one to choose any one of the options and practice accordingly. The theoretical implications of this explicit pluralism will be further analyzed. The end of this chapter will offer a reason for the split between the Yerushalmi's and the

1. See further below, pp. 77–80.

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Bavli's use of rules based on the historical context of codificatory efforts in the Roman and Sasanian Empires.

Rules for Deciding Halakha in Tannaitic Controversies

Scholars debate whether the Mishnah was meant as a normative law code or an anthology of Tannaitic traditions for study. On the one hand, the Mishnah often presents one opinion anonymously or in the name of the sages,[2] even when that opinion is named in the parallel Tosefta.[3] This would indicate that the redactor intended to choose that opinion as the halakha.[4] On the other hand, the Mishnah often does not indicate which opinion to follow, or contradicts itself in different places.[5] Yaakov Elman, however, denies the basis of this dichotomy: "The division between a code or an anthology was not as great as nineteenth- and twentieth-century scholars imagined. Nor was the division between a formal legal work—code or anthology—and a study text."[6] Rather, Elman suggests, based on parallels to Roman legal writings, that "Rabbi wished to provide a collection that could be used for both study *and* decision making."[7] Stephen Wald similarly bridges the gap between the two extreme possibilities:

2. See Hezser, *Social Structure*, 241 and 245.

3. See, for example, *m. Ḥul.* 8:4 compared with *t. Ḥul.* 8:6.

4. The reason the Mishnah records minority opinions at all is addressed at *m. ʿEd.* 1:5–6 and *t. ʿEd.* 1:4; see below, p. 274.

5. See a summary of these arguments in Strack and Stemberger, *Introduction*, 135–38; and further in Louis Ginzberg, *On Jewish Law and Lore* (Philadelphia: Jewish Publication Society of America, 1955), 159f.; Alexander Guttmann, *Rabbinic Judaism in the Making* (Detroit: Wayne State University, 1970), 240–45; Baruch Bokser, "Jacob N. Epstein on the Formation of the Mishnah," and Gary Porton, "Hanokh Albeck on the Mishnah," both published in Alan Avery-Peck and Jacob Neusner, eds., *The Mishnah in Contemporary Perspective* (Leiden: Brill, 2006), 37–55, 209–24; David Halivni, "The Reception Accorded to Rabbi Judah's Mishnah," in *Jewish and Christian Self-Definition: Volume Two, Aspects of Judaism in the Graeco-Roman Period*, ed. E. P. Sanders (Philadelphia: Fortress, 1981), 204–12; Faur, *Golden Doves*, 99; Abraham Goldberg, "The Mishna—A Study Book of Halakha," in *The Literature of the Sages: Part One*, ed. Shmuel Safrai (Philadelphia: Fortress, 1987), 213–14; Zlotnick, *The Iron Pillar*, 181–227; Elon, *Jewish Law: History, Sources, Principles*, 3:1057f.; Fisch, *Rational Rabbis*, 171f.; Heger, *Pluralistic Halakhah*, 175f.; and David Kraemer, "The Mishnah," in *The Cambridge History of Judaism IV: The Late Roman-Rabbinic Period*, ed. S. Katz (Cambridge: Cambridge University Press, 2006), 304–6 and 311–13.

6. Elman, "Order, Sequence, and Selection," 75.

7. Ibid., 70. Cf., however, Jacob Neusner, "The Mishnah in Roman and Christian Contexts," in *The Mishnah in Contemporary Perspective*, ed. Alan Avery-Peck and Jacob Neusner (Leiden: Brill, 2006), 1:121–34, who contends that the Mishnah is not comparable to Roman codes but is rather *sui generis.*

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> The question of the form and purpose of the final redaction of the Mishnah has long been a topic of scholarly debate. In the twentieth century this debate focused on the question whether the Mishnah should be seen as a code of relatively self-consistent and authoritative religious practice (Epstein), or as an anthology of frequently contradictory sources (Albeck). As so formulated, this dispute seems somewhat artificial. On the one hand, there is no reason to assume that the final redaction of the Mishnah was governed by one single overriding principle. On the other hand, the redaction of the Mishnah could reflect a preliminary, but as yet incomplete, effort to bring order and consistency to the body of tannaitic halakhah.[8]

Whether or not Rabbi meant the Mishnah to be a code, however, many Amoraim nevertheless looked to it as a source for halakha.[9] These Amoraim formulated meta-halakhic rules that specify how to decide between two sides of a controversy where there is no clear majority and where the Mishnah or relevant *baraitot* provide no indication as to which opinion is preferred. These rules are listed in both Talmuds. First, the Yerushalmi version at *y. Ter.* 3:1 (42a):

> [A] רבי יעקב בר אחא בשם רבי יוחנן הלכה כדברי רבי
> [B] ...רבי בא בר כהן בעא קומי רבי יוסי לא כן אמר רבי חייה בשם רבי יוחנן רבי וחביריו הלכה כרבי ואמר רבי יונה ואפילו רבי אצל רבי לעזר בי רבי שמעון
> [C] אמר ליה בגין דתני לה רבי ישמעאל בי רבי יוסי בשם אביו ואמר רבי יוסי בשם רבי יוחנן רבי יוסי וחביריו הלכה כרבי יוסי מחביריו דלא תיסבור למימר אוף הכא כן לכן צריכה מימר הלכה כרבי
> [D] רבי זעירא רבי יעקב בר אידי בשם רבי יוחנן ר׳ מאיר ורבי שמעון הלכה כרבי שמעון רבי שמעון ורבי יהודה הלכה כרבי יודה ואין צריך לומר רבי מאיר ורבי יהודה שהלכה כרבי יהודה
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> [A] R. Yaʿaqov bar Aḥa [said] in the name of R. Yoḥanan, "The halakha (regarding *t. Ter.* 4:7) follows the view of Rabbi."
> [B] ... R. Ba bar Kohen asked in the presence of R. Yose, "Has R. Ḥiyya not said in the name of R. Yoḥanan, '[In a dispute between] Rabbi and his colleagues, the halakha follows Rabbi,' and R. Yonah said, 'Even between Rabbi and R. Eleazar b. R. Shimon'?"
> [C] He [R. Yose] said to him [R. Ba bar Kohen], "Because of what

8. Stephen Wald, "Mishnah," *Encyclopedia Judaica* (2007): 14:326. Elizabeth Shanks Alexander, *Transmitting Mishnah: The Shaping Influence of Oral Tradition* (New York: Cambridge University Press, 2006), 173, similarly finds that "the pedagogical and normative functions of the Mishnah are compatible, rather than mutually exclusive."

9. The same interpretive shift happened to the Talmud itself, which was first composed as a work of theoretical law but was then taken by the Geonim to be a code of applied law; see Hanina Ben-Menahem, "The Second Canonization of the Talmud," *California Law Review* 28, no. 1 (2006): 37–51.

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> is taught by R. Ishmael b. R. Yose in the name of his father [at *t. Ter.* 4:6 and *y. Ter.* 2:3 (41c)]. For R. Yose said in the name of R. Yoḥanan, 'In a dispute between R. Yose and his colleagues, the halakha accords with R. Yose.' So that you not think that here, too, [the halakha follows R. Yose], therefore, [R. Yoḥanan] needed to state that the halakha follows Rabbi."
> [D] R. Zeira and R. Yaʿaqov bar Idi [said] in the name of R. Yoḥanan, "In a dispute between R. Meir and R. Shimon, the halakha follows R. Shimon. [In a dispute between] R. Shimon and R. Yehudah, the halakha follows R. Yehudah. It thus goes without saying [that in a dispute between] R. Meir and R. Yehudah, the halakha follows R. Yehudah."

This *sugya* is the *locus classicus* of the Yerushalmi for the rules of deciding halakha. Significantly, all of the rules are quoted in the name of R. Yoḥanan.[10] We can enumerate at least four basic rules within this *sugya*: (1) Rabbi and his colleagues, the halakha follows Rabbi; (2) R. Yose and his colleagues, the halakha follows R. Yose; (3) R. Meir and R. Shimon, the halakha follows R. Shimon; (4) R. Shimon and R. Yehudah, the halakha follows R. Yehudah. Each of these rules is used throughout the Yerushalmi, as we will see below.

Compare the Yerushalmi above with the *locus classicus* of the Bavli about the rules of decision making at *b. ʿErub.* 46b-47b:

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10. R. Yonah's statement in line B is only a clarification of R. Yoḥanan's broader rule. "R. Yonatan" is named in the continuation of this *sugya* as the author of a rule that is almost exactly the same as line D. However, "Yonatan" there is likely a scribal error and should be corrected to "Yoḥanan"; see Yehuda Brandes, "The Beginnings of the Rules of Halachic Adjudication: Significance, Formation and Development of the Rules Concerning the Tanaic Halacha and Literature" (Ph.D. diss., Hebrew University, 2002), 232 n. 4 (Hebrew). The central role of R. Yoḥanan in formulating these rules of decision making is noted by Yitzhak D. Gilat, "Lo titgodedu," *Bar Ilan* 18–19 (1981): 84 n. 26; Hanokh Albeck, *Introduction to the Talmud Bavli and Yerushalmi* (Tel-Aviv: Dvir, 1987), 184–85 (Hebrew); and Heger, *Pluralistic Halakhah*, 266. See also Ginzberg, *Law and Lore*, 163. R. Yoḥanan, unlike his colleague Resh Laqish, is portrayed in many sources as a staunch supporter of the Patriarch and takes a positive attitude toward kingship and authority in general; see Reuven Kimelman, "Rabbi Yohanan of Tiberias: Aspects of the Social and Religious History of Third Century Palestine" (Ph.D. diss., Yale University, 1977), 107–18. R. Yoḥanan's efforts to impose uniformity on all of the rabbis through these rules is in step with this characterization. Kimelman, ibid., 69–75, also argues that R. Yoḥanan pushed for the "professionalization of the Rabbinate," which included encouraging rabbis to serve as judges on courts. He points to many parallels between instructions of R. Yoḥanan and judicial principles taught by Roman jurists. As we will argue below, pp. 77–80, R. Yoḥanan's formulation of rules is similarly parallel to Roman codificatory efforts and rules.

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[A][1] רבי יעקב ורבי זריקא אמרו: הלכה כרבי עקיבא מחבירו, וכרבי יוסי מחבריו, וכרבי מחבירו.[11]
[2] למאי הלכתא? רבי אסי אמר: הלכה, ורבי חייא בר אבא אמר: מטין, ורבי יוסי ברבי חנינא אמר: נראין.
[3] כלשון הזה אמר רבי יעקב בר אידי אמר רבי יוחנן: רבי מאיר ורבי יהודה—הלכה כרבי יהודה. רבי יהודה ורבי יוסי—הלכה כרבי יוסי, ואין צריך לומר רבי מאיר ורבי יוסי—הלכה כרבי יוסי. השתא במקום רבי יהודה—ליתא, במקום רבי יוסי מיבעיא?
[4] אמר רב אסי: אף אני לומד רבי יוסי ורבי שמעון—הלכה כרבי יוסי. דאמר רבי אבא אמר רבי יוחנן: רבי יהודה ורבי שמעון הלכה כרבי יהודה. השתא במקום רבי יהודה ליתא, במקום רבי יוסי מיבעיא?
[5] איבעיא להו: רבי מאיר ורבי שמעון מאי? תיקו.

[B][1] אמר רב משרשיא: ליתנהו להני כללי.
מנא ליה לרב משרשיא הא?
אילימא מהא דתנן, **רבי שמעון אומר...**
ואמר רב חמא בר גוריא אמר רב: הלכה כרבי שמעון. ומאן פליג עליה—רבי יהודה.
והא אמרת: רבי יהודה ורבי שמעון הלכה כרבי יהודה? אלא לאו שמע מינה: ליתנהו.
ומאי קושיא? דילמא: היכא דאיתמר—איתמר, היכא דלא איתמר—לא איתמר?
[2] אלא מהא, דתנן...**דברי רבי יהודה. רבי שמעון אומר...**
ואמר רב חמא בר גוריא אמר רב: הלכה כרבי שמעון. ומאן פליג עליה—רבי יהודה.
והא אמרת: רבי יהודה ורבי שמעון הלכה כרבי יהודה?
ומאי קושיא? דילמא הכא נמי, היכא דאיתמר—איתמר, היכא דלא איתמר—לא איתמר?
[3] אלא מהא, דתנן...**דברי רבי מאיר. רבי יהודה אומר... רבי יוסי אומר... רבי שמעון אומר...**
ואמר רב חמא בר גוריא אמר רב: הלכה כרבי שמעון. ומאן פליג עליה—רבי יהודה?
והא אמרת: רבי יהודה ורבי שמעון הלכה כרבי יהודה?
ומאי קושיא? דלמא הכא נמי, היכא דאיתמר—איתמר, היכא דלא איתמר—לא איתמר?
[4] אלא מהא, דתנן...רבי מאיר אומר... **רבי יהודה אומר: אחד עני ואחד עשיר...**
ומתני ליה רב חייא בר אשי לחייא בר רב קמיה דרב: אחד עני ואחד עשיר, ואמר ליה רב: סיים בה נמי: הלכה כרבי יהודה.
תרתי למה לי? והא אמרת רבי מאיר ורבי יהודה הלכה כרבי יהודה?
ומאי קושיא? דילמא רב לית ליה להני כללי?
[5] אלא מהא, דתנן...**רבי יהודה אומר...רבי יוסי אומר...**
הכי אמר רבי יוחנן: הלכה כרבי יוסי. מכלל דיחידאה פליג עליה? אין, והתניא ... **דברי רבי מאיר. רבי יוסי מתיר...**
למה לי? והא אמרת רבי מאיר ורבי יוסי הלכה כרבי יוסי?
ומאי קושיא? דלמא לאפוקי מדרב נחמן אמר שמואל, דאמר: הלכה כרבי מאיר בגזירותיו?[12]

11. The exact text of this line cannot be determined as it is subject to many textual variants in manuscripts. Ms. Munich reads, "הלכה כר' עקיבא מחבירו ולא מחבירו והלכה כר' יוסי אפי' מחבריו." Ms. Vatican 109 reads, "כר' עקיבה מחברו כר' יוסי מחברו כר' מחברו <הלכה>." See Brandes, "Beginnings of the Rules," 236–37.

12. *B. Ketub.* 57a and 60b.

[6] אלא מהא, דתניא...**אמר רבי יהודה...רבי יוסי אומר...**
ואמר רבי יוחנן: הלכה כרבי יוסי.
ולמה לי? והא אמרת: רבי יהודה ורבי יוסי הלכה כרבי יוסי?

אמר אביי: איצטריך, סלקא דעתך אמינא: הני מילי—במתניתין, אבל בברייתא—אימא לא, קא משמע לן.
אלא הכי קאמר: הני כללי לאו דברי הכל נינהו, דהא רב ליח ליה הני כללי.

[A][1] R. Yaʿaqov and R. Zeriqa said: The halakha is always in agreement with R. Akiba when he differs with his colleague, with R. Yose when he differs with his colleagues, and with Rabbi when he differs with his colleague.
[2] How [are these rules] to be applied? R. Assi said, "[They determine] normative practice." R. Ḥiyya bar Abba said, "[They determine which way] we incline." R. Yose son of R. Ḥanina said, "[They determine which view is] apparently preferable."
[3] In the same sense did R. Yaʿaqov b. Idi rule in the name of R. Yoḥanan: [In a dispute between] R. Meir and R. Yehudah, the halakha accords with R. Yehudah; between R. Yehudah and R. Yose, the halakha accords with R. Yose; and there is no need to state that between R. Meir and R. Yose the halakha accords with R. Yose, for, since [it has been established that the opinion of the former is] not normative where it is opposed by that of R. Yehudah, can there be any question where it is opposed by that of R. Yose?
[4] R. Assi said: I also learn that in a dispute between R. Yose and R. Shimon the halakha is in agreement with R. Yose; for R. Abba has said in the name of R. Yoḥanan that in a dispute between R. Yehudah and R. Shimon the halakha is in agreement with R. Yehudah. Now, [since the latter's opinion is] of no consequence where it is opposed by R. Yehudah, can there be any question [as to its inconsequence] where it is opposed by that of R. Yose?
[5] The question was raised: What [is the halakha where a ruling is a matter of dispute between] R. Meir and R. Shimon? This [question] is left standing.

[B][1] Rav Mesharsheya stated: These rules are to be disregarded. From where does Rav Mesharsheya derive this view?
If it be suggested: From the following where we learned, **R. Shimon says …**
Rav Ḥama bar Goria stated in the name of Rav, "The halakha is in agreement with R. Shimon." And who is it that differs with him? R. Yehudah.

But [this cannot be reconciled with what] you have stated: "[In a dispute between] R. Yehudah and R. Shimon, the halakha is in agreement with R. Yehudah"? Rather, to the contrary, [the rules] are to be disregarded.
But what is the difficulty? Perhaps where a decision to the contrary has been stated the rules are to be disregarded, but where no such decision has been stated the rules remain in force?

[2] [Rav Mesharsheya's view] is rather derived from the following where we learned, **… so R. Yehudah. R. Shimon says …**
Rav Ḥama bar Goria stated in the name of Rav, "The halakha is in agreement with R. Shimon." And who is it that differed from him? R. Yehudah.
But [this cannot be reconciled with what] you have stated: "[In a dispute between] R. Yehudah and R. Shimon, the halakha is in agreement with R. Yehudah"?
But what is the difficulty? Perhaps here, too, where a decision to the contrary has been stated, the rules are to be disregarded, but where no such decision has been stated the rules remain in force?

[3] [Rav Mesharsheya's view] is rather derived from the following where we learned, **… so R. Meir. R. Yehudah says … R. Yose says … R. Shimon says …**
Rav Ḥama bar Goria stated in the name of Rav, "The halakha is in agreement with R. Shimon." And who is it that differed from him? R. Yehudah.
But [this cannot be reconciled with what] you have stated: "[In a dispute between] R. Yehudah and R. Shimon, the halakha is in agreement with R. Yehudah"?
But what is the difficulty? Perhaps here too where a decision to the contrary has been stated the rules are to be disregarded, but where no such decision has been stated the rules remain in force?

[4] [Rav Mesharsheya's view] is rather derived from the following where we learned, **… R. Meir says … R. Yehudah says: [It applies to] both rich and poor …**
And when R. Ḥiyya b. Ashi taught Ḥiyya b. Rav in the presence of Rav [that the halakha applies to] both rich and poor, Rav said to him: "Conclude this also with the statement, 'The halakha is in agreement with R. Yehudah.'"
What need was there for a second statement seeing that you have already stated, "In a dispute between R. Meir and R. Yehudah, the halakha is in agreement with R. Yehudah"?

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> But what is the difficulty? Perhaps Rav does not accept these rules?
> [5] [Rav Mesharsheya's view] is rather derived from the following where we learned **… R. Yehudah says … R. Yose says …**
> Thus said R. Yoḥanan: "The halakha is in agreement with R. Yose." Does this then imply that only an individual opinion is against him? Yes, and so it was taught **… so R. Meir, but R. Yose permits ...**
> What need was there [to state this] seeing that you have already stated, "In a dispute between R. Meir and R. Yose, the halakha is in agreement with R. Yose"?
> But what is the difficulty? Perhaps [R. Yoḥanan intended] to indicate that the halakha was not in agreement with Rav Naḥman who said in the name of Shmuel: "The halakha is in agreement with R. Meir in his restrictive decrees"?[12]
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> [6] [Rav Mesharsheya's view] is rather derived from the following where it was taught **… R. Yehudah said … R. Yose said …**
> R. Yoḥanan said: "The halakha is in agreement with R. Yose."
> But what need was there [for this specific statement] seeing that it has already been laid down, "In a dispute between R. Yehudah and R. Yose, the halakha is in agreement with R. Yose"?
> Abaye replied: This was necessary since it might have been presumed that [the rules] applied only to a Mishnah but not to a *baraita*; hence we were informed [here of R. Yoḥanan's decision].
> Rather, [Rav Mesharsheya] meant this: Those rules were not unanimously accepted, since Rav in fact did not accept them.

This *sugya* is made up of two parts: [A] a list of the rules and how they should be applied, and [B] a discussion of whether and by whom these rules have been accepted as normative. Thus, the two parts of the *sugya* actually stand in tension with each other, one stating the rules and the other questioning them. The first part is parallel to the Yerushalmi presentation,[13] while the second part is unique to the Bavli. The Yerushalmi never doubts the authority of the rules, not in *y. Ter.* 3:1 (42a) nor anywhere else. Yehuda

13. See Brandes, "Beginnings of the Rules," 235, for a chart comparing the two lists of rules. Significantly, the Bavli confirms that all of the rules originate from R. Yoḥanan and his students. Another rule quoted in the name of R. Yoḥanan, which does not appear in this list (and, in part, contradicts it), is, "אמר רבה בר בר חנה אמר רבי יוחנן: הלכה כרבי יהודה לענין שבת, והלכה כרבי יוסי לענין תרומה—Rabbah bar bar Ḥannah said in the name of R. Yoḥanan: The halakha follows R. Yehudah concerning Shabbat and the halakha follows R. Yose concerning *terumah*" (*b. Šabb.* 35a).

Brandes writes that he cannot find one *sugya* in the entire Yerushalmi that expresses opposition to the rules.[14]

Even within part A, the Bavli quotes a dispute among Palestinian Amoraim about whether these rules always define the halakha absolutely or whether they are mere guidelines or suggestions that can be disregarded based on other considerations. If this dispute is authentic, it probably reflects an early stage in the propagation of the rules in Palestine when they were still being questioned. Even so, it is significant that the Yerushalmi makes no mention of it[15]—perhaps because the editors of the Yerushalmi already accepted the rules as absolute. The Bavli, however, does quote the controversy and leaves it open-ended, suggesting that the Bavli redactors themselves saw reason to doubt the categorical application of these rules.[16]

Brandes attempts to separate between the Amoraic and Stammaitic layers and motivations within part B. He explains that Rav Mesharsheya himself rejected all of the rules listed in part A. The Stam, however, having accepted the rules, did its best to tone down Rav Mesharsheya's statement. The Stam therefore introduced a list of cases in order to prove that the rules were accepted by some and in fact were rejected only by Rav.[17] This reconstruction fits in with Brandes's overall conclusion that these rules were not accepted by Babylonian Amoraim of the early generations but were gradually accepted until, by the time of the Stam, they were fully implemented.[18]

I would like to offer a different reading of this *sugya*. Brandes does not provide sufficient evidence that the rules were accepted by the Stam. In fact, as I will discuss below, he himself cites many texts in which the Stam ignores the rules. Rather, I believe that the motivation of the Stam in this *sugya* is precisely to question the authority of these rules, not to minimize Rav Mesharsheya's rejection.

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14. Ibid., 334.

15. A decision using מטין does appear in the Yerushalmi in the name of R. Yoḥanan at *y. Ber.* 5:2 (9b). Decisions using נראין appear in the name of R. Yehoshua ben Levi at *y. Šabb.* 2:3 (5a) and R. Yehudah ben Pazzi at *y. Pesaḥ.* 1:5 (27d), et al. However, those decisions are about specific issues, not general rules. Indeed, the Bavli may have borrowed the language of these local decisions that employ מטין and נראין and generalized them to apply to the rules. If this reconstruction is accurate, then the dispute in the Bavli is in large part an invention of the Bavli, probably meant to weaken the authority of the rules right from the start.

16. Brandes, "Beginnings of the Rules," 238–39. Brandes suggests that line 2 applies only to the more general rules in line 1 but not to those in lines 3–4. He further hypothesizes that line 2 originally applied to all the rules but that the editor of this *sugya* moved it in order to limit its impact. Rashi, however, explains that the words כלשון הזה (which appear nowhere else in the Bavli) instruct the reader that the discussion of line 2 applies to the next line as well.

17. Ibid., 188 and 239.

18. Ibid., 283.

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Rav Mesharsheya's statement is suspect since it occurs again in a completely different context at *b. ʿErub.* 56a. That *sugya* quotes a *baraita* that lists a number of astronomical laws by which to orient oneself. On that *baraita*, Rav Mesharsheya says, "ליתנהו להני כללי—Those rules are to be disregarded," and proceeds to cite another *baraita* that contradicts those rules. The formula "ליתנהו להני כללי" is also stated by two other Amoraim in two unrelated contexts.[19] Assuming that Rav Mesharsheya did not say the same words twice about different issues, the possibility exists that the editors of this *sugya* transferred the words from *b. ʿErub.* 56a.

In fact, the quotation in *b. ʿErub.* 56a seems to read more smoothly than it does here where the continuation of the *sugya* questions the quotation and ends up reinterpreting it. Rav Mesharsheya at *b. ʿErub.* 56a means to say that everyone should disregard the rules since another *baraita* contradicts them. The issue at hand is astronomical laws in which only one source can be correct. This is also the sense of these words in the other two contexts in which they appear.[20] In *b. ʿErub.* 47a, however, he means only that he himself or some group of rabbis do not recognize the rules. The wording of the statement fits the sense at *b. ʿErub.* 56a better. If it is the Stam who applied Rav Mesharsheya's statement to this context, then it is precisely the Stam who wishes to cast doubt on the rules of R. Yoḥanan.

What might have been the goal of the Stam in constructing part B of this *sugya*? It seems that they first transferred Rav Mesharsheya here to dismiss the rules entirely by challenging whether they were ever accepted. The Gemara then cites six test cases. The first four are all decisions made by Rav. This hardly seems coincidental. The first three attempts all have the same caveat, that is, perhaps the rules apply only in the absence of a decision regarding that specific case. This set of three cases is obviously a literary creation since only the first case is necessary to make the point.[21] Cases

19. *B. Yebam.* 64b and *b. Ḥul.* 136a.

20. In *b. Ḥul.* 136a, the suggested rules are rejected based on a *baraita*, and in *b. Yebam.* 64b, they are rejected based on the Mishnah itself. The literal translation of the phrase ליתנהו להני כללי is "these rules do not exist" (see Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Period* (Ramat-Gan: Bar Ilan University Press, 2002), 629). This suggests that the rules are false deductions without logical basis. Such is the usage in all contexts except *b. ʿErub.* 47a where Rav Mesharsheya can only mean that he and his group do not accept the rules of R. Yoḥanan. Rav Mesharsheya cannot say that the rules do not exist since R. Yoḥanan does declare and use them. R. Yoḥanan's rules are not based on any logical deduction but rather on his own authority. The end of the *sugya* must reword the phrase precisely because the original wording does not fit this case. Therefore, we can assume that Rav Mesharsheya did not use this phrase with regard to R. Yoḥanan's rules but rather that it was transferred to *b. ʿErub.* 47a by the Stam.

21. See Halivni, *Meqorot u-mesorot*, *ʿErubin*, 138 n. 1*. On the predominance of lists of three in the Bavli, see Shamma Friedman, "Some Structural Patterns of Talmudic Sugyot," *Proceedings of the Sixth World Congress of Jewish Studies* 3 (Jerusalem: World Union of Jewish Studies, 1977): 389–402 (Hebrew).

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2 and 3 do not technically pose any problem since they are also exceptions to the rule in which there was an explicit ruling. Nevertheless, the repetition of such cases does have a rhetorical effect of making the audience realize how futile the rules are if there can be so many exceptions. In the fourth case, Rav adds a decision that happens to accord with R. Yoḥanan's rules, a statement that would be superfluous had Rav accepted the rules in general. This case finally establishes that Rav not only lists exceptions when necessary but that he completely ignores R. Yoḥanan's rules (if, in fact, he had ever heard of them).

The next two cases test whether anyone did accept the rules. After all, even R. Yoḥanan who formulated them seems to ignore them at times. These questions are resolved, and the formula is updated to say that the rules are accepted by some but not by all since Rav does not use them. That the conclusion of the entire *sugya* is the same as the conclusion after the fourth question [B][4] proves that this *sugya* is a literary creation rather than a genuine logical debate. That is, the *sugya* uses proofs and disproofs as a rhetorical device to convey a certain point of view. The addition of two more exceptional cases after establishing that Rav does not use the rules gives the impression that others may also not have used the rules, even though that cannot be proven. The goal of part B of the *sugya* is to deconstruct part A. It casts doubt on the ubiquity and usefulness of the rules set forth so authoritatively by R. Yoḥanan's school by showing that Rav (perhaps representing the Babylonian tradition) never accepted them and by further demonstrating that even R. Yoḥanan (perhaps representing the Palestinian school) needs to constantly defend them against possible exceptions.

Having analyzed where these rules originated, we can also look at where and when these rules were accepted. Ephraim Halivni finds that the rules are never fully accepted but rather are treated like any other Amoraic statement that later Amoraim could disregard. He finds examples of decisions that flout these rules as well as decisions in accordance with the rules in which the rule is not cited; both types of decisions, however, show an indifference to the rules. He finds no distinction between Palestinian and Babylonian or early and late Amoraim; in his view, all Amoraim took the rules with a grain of salt.[22]

Brandes also analyzes each rule set forth in the *sugyot* above. Brandes, however, finds that Palestinian Amoraim generally accept the rules while Babylonian Amoraim use them only sporadically and often ignore them.[23] Brandes further claims in his summary that the rules gain acceptance by

22. Ephraim Halivni, *The Rules for Deciding Halakha in the Talmud* (Lod: Mechon Haberman le-Meḥqere Sifrut, 1999), 142–47.

23. This trend has also been pointed out by Eliyahu Zeni, *Rabanan Sabora'e u-kelale ha-halakha* (Haifa: Ofaqim Rehabim, 1992), 298–99.

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the late Babylonian Amoraim and especially by the Stam. This conclusion, however, is not backed up by his own analysis. As we shall see, Brandes himself cites a number of counterexamples.

A general assumption already found in both Talmuds is that when someone decides a case in agreement with a rule but without citing it, then he must not have felt compelled by the rule. If he did, then he would not need to proclaim an explicit decision since the rule makes such a decision superfluous.[24] This assumption is based on the notion that there is a strict economy of words used by the Amoraim, who would never utter a statement that could be logically derived. We should leave open the possibility, however, that an Amora may state such a decision simply in order to confirm the application of the rule in a given case.

Usage of Rules in the Yerushalmi

We will test the theories of Halivni and Brandes with examples from the rules regarding R. Yose and his colleagues. A number of Yerushalmi *sugyot* quote these rules and use them to challenge anyone who decides a halakha against them or even in accordance with them since there is no need to make an explicit ruling once the rules are in effect. For example, *y. Ter.* 11:5 (48b) reads:

> דבי רבי ינאי הלכה כרבי שמעון רבי יעקב בר אחא בשם רבי יאשיה הלכה כרבי שמעון
> ר׳ יוסי צירניא בעא קומי רבי ירמיה דלא כן מה נן אמרין רבי מאיר ורבי שמעון אין הלכה כרבי שמעון
> אמר ליה של בית קודמין היא והא רבי יודה אומר מעין שניהן ור׳ יוסי אומר מעין שניהן ורבי יודה ורבי יוסי הלכה כרבי יוסי
> The school of R. Yannai [says], "The halakha accords with R. Shimon." R. Yaʿaqov bar Aḥa [says] in the name of R. Yoshiah, "The halakha accords with R. Shimon."
> R. Yose of Sidon asked in the presence of R. Yirmiah, "[Why must they state that the halakha follows R. Shimon?] For if that is not the case, what is it that we say, '[In a dispute between] R. Meir and R. Shimon, does the halakha not accord with R. Shimon?'"
> He said to him, "[The issue was argued] by a previous group. Behold, R. Yehudah's view incorporates aspects of both [R. Meir and R. Shimon] and R. Yose's view incorporates aspects of both. [In a dispute between] R. Yehudah and R. Yose, the halakha accords with R. Yose."

24. This assumption is accepted by Brandes but not by Halivni, *Rules*, 142–43.

The *sugya* addresses how to decide between the four Tannaim listed in *m. Ter.* 11:10. Two traditions of Palestinian Amoraim decide according to R. Shimon. R. Yose of Sidon questions the need for such a ruling since it can be derived from a rule. R. Yirmiah responds that the explicit decision is necessary because it actually opposes the rule. R. Yose and R. Yehudah are also part of this debate; without an explicit ruling according to R. Shimon, one would have applied the rule that the halakha follows R. Yose when in dispute with his colleagues. Paradoxically, the rules are more easily justified against a decision that opposes them, which can be viewed as an exception, than by a decision that agrees with them.

The rules are here cited by R. Yose of Sidon and R. Yirmiah. In most other *sugyot*, the rules are cited by the anonymous voice of the Yerushalmi.[25] In the next two examples, the Stam of the Yerushalmi challenges decisions that agree with the rules. In *y. Yebam.* 4:11 (6a),[26] R. Ḥaninah son of R. Abbahu quotes a decision made by three Palestinian rabbis in accordance with R. Yose. The anonymous voice of the Yerushalmi then wonders why this was necessary when such a decision could be derived from the rules. This question reveals the viewpoint of the Yerushalmi that the rules were accepted by the Amoraim and therefore that any ruling in accordance with them is superfluous.

Even more striking is a similar Yerushalmi *sugya* that has a parallel in the Bavli. *Y. Ber.* 2:4 (4d) relates:

> רב אומר הלכה כדברי שניהן להקל
> דלכן מה כן אמרין סתמה ורבי יוסי הלכה כסתמא רבי יוסי ורבי יודה הלכה כרבי יוסי ומה צריכה למימר רב הלכה כדברי שניהן להקל
> אלא בגין שמע דתני לה ר׳ חייא בשם ר׳ מאיר לפום כן צריך למימרא הלכה כדברי שניהן להקל
>
> Rav says the halakha follows the opinion of both of them in their leniencies.
> If that is not the case, what is it that we say, "An anonymous opinion and R. Yose, the halakha follows the anonymous opinion. R. Yose and R. Yehudah, the halakha follows R. Yose"? Why was it necessary to say that Rav rules like both of them in their leniencies? Rather, because he heard that we have learned [a *baraita* of] R. Ḥiyya in the name of R. Meir,[27] therefore he needed to say that the halakha follows both of them in their leniencies.

Rav issues a decision concerning *m. Ber.* 2:3 in accordance with the rules. As in the previous text, the Yerushalmi wonders why such an obvious

25. See *y. Maʿas.* 1:5 (49b) and examples below.
26. See parallel at *y. Nid.* 1:34 (49b).
27. Referring to *t. Ber.* 2:13.

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ruling needed to be stated. Interestingly, the Yerushalmi here assumes that Rav knew and accepted the rules that were formulated by R. Yoḥanan, his younger contemporary, and which the Bavli explicitly says Rav rejected.[28] This assumption probably reflects the attitude of the Yerushalmi's Stam[29] who did accept the rules as absolutely binding. Compare this with the Bavli at *Ber.* 15b:

> אמר רבי טבי אמר רבי יאשיה: הלכה כדברי שניהם להקל.
>
> R. Ṭabi said in the name of R. Yoshiah: The halakha follows both of them in their leniencies.

The Bavli here quotes the same ruling as the Yerushalmi[30] but does not continue with the question of the Yerushalmi that such a ruling is obvious. This would be especially striking if the Bavli redactors were aware of this question in the Yerushalmi and purposely omitted it. But even if not, it is significant that the Bavli did not ask such a question on its own.

There are also examples of the Yerushalmi ignoring the rules. In *y. Qidd.* 4:6 (66a), for example, R. Yoḥanan says, "The halakha is in accordance with R. Yose," without making reference to his own rule.[31] However, even though the Yerushalmi in some places asks about such "obvious" decisions, this does not mean that the Yerushalmi needs to do so in every case. R. Yoḥanan may just be stating the obvious or preventing his audience from taking some overriding factor into consideration. Additionally, some decisions may date back to a time before the rules were disseminated. We cannot automatically deduce from here that R. Yoḥanan ignored his own rules. Only a case of the Yerushalmi disagreeing with the rules without justification would prove that the Yerushalmi sometimes ignored the rulings. Such cases, however, are rare if they exist at all.[32] We will see in the next chapter that the Yerushalmi considers these rules to be so comprehensive and authoritative that it has difficulty coming up with any cases in which both sides of a controversy could actually be practiced since the halakha is already decided by these rules.[33]

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28. This is pointed out by Brandes, "Beginnings of the Rules," 338.

29. On the Stam of the Yerushalmi, see Halivni, "Aspects of the Formation of the Talmud," 355–56.

30. Ironically, the Bavli quotes this ruling in the name of the Palestinian Amora R. Yoshiah, a student of R. Yoḥanan, while the Yerushalmi quotes it in the name of Rav the Babylonian.

31. See also *y. Taʿan.* 2:14 (66b) and discussion at Halivni, *Rules*, 41, and Hidary, "Tolerance for Diversity," 411–12.

32. Brandes, "Beginnings of the Rules," 249 n. 51, finds only one case in the Yerushalmi where Amoraim decide against R. Yose, at *y. Šabb.* 6:5 (8c). However, that case involves the colleagues of R. Yanai, the first-generation Palestinian Amora who preceded R. Yoḥanan and therefore would not have known the rules.

33. *Y. Pesaḥ.* 4:1 (30d). See text below, p. 99. This Yerushalmi *sugya* applies the rules

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Usage of Rules in the Bavli

Unlike the Yerushalmi, where the rules are generally accepted as binding, the picture in the Bavli is much less consistent. As in the Yerushalmi analysis, we focus on the Bavli's use of rules regarding R. Yose when in dispute with one of his colleagues. The Bavli often records decisions in favor of R. Yose, sometimes attributed to named Amoraim and other times stated by the Stam.[34] Except for *b. ʿErub.* 46b–47b, where the very validity of the rules is in question, the Bavli very rarely asks why such "redundant" decisions are necessary.[35] Of course, the Yerushalmi also does not always ask this question, but it does ask it more often. Even more significantly, there are many decisions in the Bavli that contravene the rules without any attempt at justification.[36] In some cases, a decision only partially agrees with but also partially opposes R. Yose, again without justification.[37] This rarely occurs in the Yerushalmi.[38]

Brandes cites a number of *sugyot* from which he tries to prove that the later Amoraim and the Stam did finally accept the rules. One example is *b. B. Bat.* 168a:

> אמר רב נחמן אמר רבה בר אבוה אמר רב:[39] הלכה כרבי יוסי. כי אתו לקמיה דרבי אמי, אמר להו: וכי מאחר שרבי יוחנן מלמדנו פעם ראשונה ושניה הלכה כרבי יוסי, אני מה אעשה? ואין הלכה כרבי יוסי.
>
> Rav Naḥman [said] in the name of Rabbah bar Abuha in the name of Rav: The halakha accords with R. Yose. When they came before R. Ammi, he said to them: "Since R. Yoḥanan has taught us time

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even retroactively and assumes that the Tannaim themselves abided by them and practiced accordingly.

34. Decisions according to R. Yose when in dispute with R. Yehuda are stated in the name of the following: Rav, *b. B. Bat.* 136a, 168a; R. Yoḥanan, *b. ʿAbod. Zar.* 13a; Ula, *b. ʿErub.* 41a; Rav Yosef, *b. Naz.* 39a, *b. Moʿed Qaṭ.* 12a; R. Yirmiah, *b. Beṣah* 4b; Ravina, *b. Moʿed Qaṭ.* 11a; R. Zeira and Stam, *b. Qidd.* 73a.

Decisions according to R. Yose when in dispute with R. Meir are stated in the name of the following: Rav Yehudah in the name of Shmuel, *b. Qidd.* 72b; R. Yoḥanan, *b. Yoma* 12b; and R. Aba, *b. Nid.* 9a.

35. The Bavli never asks such a question regarding the rules relating to R. Yose. *B. B. Meṣiʿa* 38b does ask such a question regarding a different rule.

36. Decisions against the rules are stated by the following Amoraim: Rav Naḥman, *b. Ketub.* 69b; Rava, *b. Nid.* 63b; and Rav Ashi, *b. B. Bat.* 173b. See Brandes, "The Beginnings," 249 n. 51, for more examples.

37. See R. Yoḥanan or R. Yose bar R. Ḥanina, *b. Pesaḥ.* 100a; ʿUla, *b. Moʿed Qaṭ.* 17b; and Stam, *b. Roš. Haš.* 19b.

38. See above, n. 32.

39. Ms. Escorial adds אין, and ms. Paris adds אין in the margin. All other mss. follow the text above. The addition of אין brings this *sugya* in closer conformity with the parallel *sugya* at *b. Ned.* 27b; see Tosafot ad loc. According to that version, Rav decided against R. Yose and the Stam decide in agreement with him, but neither opinion cites the rules.

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and again that the halakha accords with R. Yose, what can I do?" The halakha, however, does not follow R. Yose.

Brandes sees in this *sugya* the beginnings of the usage of this rule in the Bavli. There are, however, many problems with such a reading. First, as Brandes himself points out, it is not clear if R. Ammi heard R. Yoḥanan many times concerning the rules in general or concerning the law in this specific case only.[40] Second, R. Ammi is a Palestinian Amora. Third, and most importantly, the Stam ends the *sugya* with a ruling against R. Yose. In fact, Minyomi, Rav Naḥman,[41] and Rav Ashi[42] also decide against R. Yose in this matter.[43] This *sugya* actually challenges Brandes' hypothesis that the rules were accepted in Babylonia by the time of the late Amoraim and the Stam.[44]

Brandes further cites three *sugyot* where Rav Naḥman and the Stam decide according to R. Yose because, "רבי יוסי נימוקו עמו—R. Yose's reasons support him."[45] In one such *sugya*, the Stam says that Rabbah falsely quoted a law in R. Yose's name in order to convince Rav Yosef to follow it.[46] These examples do show that there was a preference for R. Yose in Babylonia as well. However, that they do not cite R. Yoḥanan's rules in these cases where it would have been very appropriate to do so shows that these rules were widespread neither among the Babylonian Amoraim nor among the Stam.[47] The phrase, "רבי יוסי נימוקו עמו," derives from a *baraita*[48] and implies a general preference for R. Yose but not an absolute rule that one must follow him. The Bavli, at least in these instances, continues the methodology of decision making used by the late Tannaim and early Amoraim before R. Yoḥanan in which each case was decided on its own merit.[49] There were some general preferences, but no rules.

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40. See Brandes, "Beginnings of the Rules," 247 n. 42.

41. *B. B. Meṣiʿa* 66a.

42. *B. B. Bat.* 173b.

43. They do not mention R. Yose explicitly, but they do say, "אסמכתא לא קניא," which is the position attributed by the Gemara (*b. B. Bat.* 68a) to R. Yehudah in opposition to R. Yose who says, "אסמכתא קניא."

44. Notice that the decision of Rav is ignored by subsequent Babylonian Amoraim. The Babylonian Amoraim feel free to challenge not only the rules of R. Yoḥanan, but also decisions by earlier Amoraim about specific issues; more on this below.

45. *B. B. Qam.* 24a, *b. ʿErub.* 14b, and *b. ʿErub.* 51a. See Brandes, "Beginnings of the Rules," 247–49. This statement does not appear in the Yerushalmi.

46. *B. ʿErub.* 51a.

47. Brandes himself points out that the citation of this reason instead of the rule shows that rules were still being ignored by the Amoraim. However, in two of these cases it is the Stam who cites the rule to explain the actions of an Amora. Since the Stam quotes, "R. Yose has his reasons," rather than R. Yoḥanan's formulation, we can deduce that even the Stam never accepted the rules. See also Halivni, *Rules*, 79–80.

48. *B. Giṭ.* 67a.

49. See Brandes, "Beginnings of the Rules," 94–229.

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Outside of *b. ʿErub.* 46b, the rules, "רבי יהודה ורבי יוסי—הלכה כרבי יוסי" and "רבי יוסי ורבי שמעון—הלכה כרבי יוסי" never appear again in the Bavli. The rule "רבי מאיר ורבי יוסי—הלכה כרבי יוסי," which is a derived rule, is quoted only twice more in the Bavli, both times within one *sugya*. In *b. Sanh.* 27b, Rav Aḥa b. Yaʿaqov uses it against a criminal who tries to go free by following a decision against R. Yose. In *b. Sanh.* 27a, the rule is quoted by the Stam to justify a ruling according to Abaye whose ruling agrees with R. Yose. This shows that some rules were known by some Babylonian Amoraim and Stammaim but the rules rarely appear and are mostly disregarded.

We have analyzed in depth only the three rules involving R. Yose. A full analysis of all of the rules is beyond the scope of this chapter. Based on the conclusions of Halivni and Brandes for rules involving other Tannaim, however, the same seems to hold true for those rules as well. These rules were created by R. Yoḥanan and his students and were widely embraced throughout the Yerushalmi but not in the Bavli where the Amoraim and the Stam seldom refer to them.

Besides the rules that govern the statements of individual Tannaim, the circle of R. Yoḥanan also formulated more general rules such as "הלכה כסתם משנה—the halakha follows the anonymous opinion in the Mishnah."[50] This rule, too, is widely accepted in the Yerushalmi, which seems to think that the halakha follows the anonymous opinion because the anonymous opinion represents the majority opinion.[51] The Bavli, on the other hand, asks over 150 times, "מאן תנא—who is the [anonymous] Tanna?" An individual Tanna is named, in most cases by an early Amora, and the halakha is then decided sometimes according to and sometimes against the anonymous opinion. In these and other cases, the early Babylonian Amoraim treat the anonymous opinion in the Mishnah just like any other named opinion.[52]

Later Amoraim, from the fourth generation on, do think the anonymous opinion represents the halakha. Rather than quote R. Yoḥanan's rule, however, they say, "הלכה כר'... דסתם לן תנא כוותיה—The halakha follows R. … because the Tanna [who composed the Mishnah] taught anonymously according to him."[53] That is, even though the anonymous opinion is an identifiable individual, the editor of the Mishnah taught it anonymously

50. *B. Yebam.* 16b and see over twenty other citations in the Bavli in Abraham Liss, *The Babylonian Talmud with Variant Readings* (Jerusalem: Yad Harav Herzog, 1983), 1:168 (Hebrew). The Yerushalmi does not quote this rule in R. Yoḥanan's name, but R. Eliezer does quote it to R. Yoḥanan in *y. Taʿan.* 2:13 (66a) = *y. Meg.* 1:4 (70d). See Brandes, "Beginnings of the Rules," 285f.

51. Brandes, "Beginnings of the Rules," 286–97.

52. See ibid., 180f.

53. *B. Pesaḥ.* 13a, *b. Yebam.* 101b, *b. Qidd.* 54b, et al. See Brandes, "Beginnings of the Rules," 183f. and 313f.

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because he wanted that to be the halakha.[54] Furthermore, even in the later period, the Bavli does not apply this rule consistently.[55]

Brandes shows that the Bavli only quotes R. Yoḥanan's formula, "הלכה כסתם משנה," in order to challenge a contradictory decision of R. Yoḥanan himself. Every one of the over twenty citations of the rule in the Bavli fits into this pattern. Brandes concludes, "It seems that the Bavli does not ask from the rule of R. Yoḥanan about other Amoraim because it did not accept the rule as a general rule that is binding upon all Amoraim, but rather only upon R. Yoḥanan himself, the author of the rule."[56] That the Stam asks these questions regarding only R. Yoḥanan implies that the rule was not fully accepted in Babylonia even as late as the Stam.

Brandes shows the same pattern to be true regarding other general rules of decision making such as, "הלכה כדברי המכריע—the halakha follows the one who tips the scale," and even, "יחיד ורבים הלכה כרבים—[In a dispute between] an individual and many, the halakha follows the many."[57] All of these rules are formulated within the circle of R. Yoḥanan. Even if some of them are based on prior preferences, the late Tannaim and early Amoraim never treat them as rules. Once the rules are formulated, Palestinian Amoraim accept them as binding, and sometimes the Yerushalmi even retrojects them to early Amoraim. The first three generations of Babylonian Amoraim, on the other hand, do not mention the rules, while later Babylonian Amoraim and the Stam use the rules sometimes but not as systematically as in the Yerushalmi.

Brandes offers explanations for why these rules were formulated. He argues that the rabbis who lived near the time of the Mishnah's publication viewed the Mishnah as just another collection of Tannaitic sayings. A couple of generations later, when the Mishnah came to be viewed as an authoritative halakhic work, the necessity arose for rules that would enable one to know which opinion in Mishnaic controversies was to be followed.

Brandes further argues that the impetus to make rules did not arise out of the blue. The Tannaim themselves yearned for an ideal state of a unified halakha agreed upon by all. The late Tannaim and early Amoraim already began formulating procedures for courts, for travelers, and for one who receives contradictory decisions from two rabbis. They also began to make generalizations from practices that tend to follow certain rabbis. Brandes also explains that R. Yoḥanan was capable of establishing this set of rules because of his towering stature in the Palestinian rabbinic community.

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54. See Benjamin Lewin, *Iggeret Rav Sherira Gaon* (Jerusalem: Makor, 1972), 55.
55. Brandes, "Beginnings of the Rules," 314–15.
56. Ibid., 292.
57. Ibid., 176–80, 316–22, and 325–31.

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While this is all plausible enough, Brandes does not offer any reason why the Babylonians did not formulate rules themselves or, more importantly, why they did not accept R. Yoḥanan's rules. I suggest that the difference between the Talmuds on this issue is one manifestation of a more general difference between the Talmuds regarding tolerance for diversity of halakhic practice. The Yerushalmi seeks uniformity of practice by constructing and upholding these rules. R. Yoḥanan's set of rules ensures that all rabbis, even those in future generations, will come to the same halakhic conclusions when deciding between opinions of the Tannaim. The Bavli, on the other hand, shows tolerance for diversity by deconstructing the rules. According to the Bavli, each rabbi, as a transmitter and interpreter of tradition, must decide each issue on its own merits and cannot be bound by categorical rules. We will see more manifestations of this difference in attitude between the Talmuds in the coming chapters.

In addition to the rules adjudicating Tannaitic controversy, the Bavli also mentions rules regarding controversies between Amoraim such as, "הלכה כרב באיסורי וכשמואל בדיני—The halakha follows Rav in [ritual] prohibitions and Shmuel in civil law," and, "רב ורי יוחנן הלכה כרי יוחנן—Rav and R. Yoḥanan, the halakha follows R. Yoḥanan."[58] These rules are analyzed by Ephraim Halivni who finds that many of the rules cited in the Bavli about how to decide between various Amoraim were not formulated until after the redaction of the Bavli was complete, that is, after the Amoraim and even later than the Stam.[59] Other rules that may have been formulated and used by certain Amoraim were, like the rules regarding Tannaitic dispute, never widely accepted by other Amoraim nor even by the Stam.[60] Therefore, these rules do not serve as evidence of a program of unified codification in the Bavli. To the contrary, the lack of agreement by the Amoraim and the Stam about how to decide such cases reflects a view that the Bavli does not require uniform standards of decision making.

Besides the rules discussed until now, both Talmuds contain hundreds of decisions regarding individual cases. These are introduced by the term "הלכה" when stated by the Amoraim, and "והלכתא" when added by the Stam or the Saboraim. It is difficult to know whether the Amoraim meant such statements to be binding on all of their colleagues. But even if they did, their colleagues evidently thought otherwise. Certainly in the Bavli, and apparently even in the Yerushalmi, decisions about individual

58. *B. Bek.* 49b and *b. Beṣah* 4a, respectively.

59. See further in Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven and London: Yale University Press, 1998), 165, 181, and citations in footnotes there; Jackob Spiegel, "Later (Saboraic) Additions in the Babylonian Talmud" (Ph.D. diss., Tel Aviv University, 1975), 153–62 (Hebrew); and Zeni, *Rabanan*, 301–66.

60. See Halivni, *Rules*, 84–128; and Hidary, "Tolerance for Diversity," 418–22.

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cases by one Amora were often disregarded by their colleagues. They were treated like any other statements by Amoraim, which could be opposed.[61]

Indeterminacy and Pluralism

Despite all the rules and decisions throughout the Talmud, there are still many issues concerning which the halakha is not clearly defined, either because no decision has been given or because contradictory decisions are recorded. Legal theorists discuss the indeterminacy inherent in all legal systems. No matter how much is legislated, there will always be ambiguity due to the open texture of language and the impossibility for humans to predict and legislate for every contingency that may crop up in the future.[62]

The more indeterminate a legal system, the less one can expect the system to produce a single solution to a given question and the more diversity of practice will arise. Halakha, like every legal system, contains indeterminacy,[63] and even the rules discussed above about how to decide between disputes are themselves sometimes indeterminate. How does one act when no rule applies to a particular dispute and no clear halakhic decision has been given regarding it?[64]

In this regard, Ben-Menahem distinguishes between pluralism, which is necessarily built into the law because of general indeterminacy, and "explicit pluralism," which is overtly legislated by the law in a specific

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61. See examples at *b. Ber.* 27b, *b. Šabb.* 22a and 45b, *y. Šabb.* 3:7 (6c, see parallel cited below, p. 74) and 6:2 (8a), and more general statements at *b. Nid.* 7a, *b. B. Bat.* 130b, and *y. Ḥag.* 1:8 (76d). See further discussion at Hidary, "Tolerance for Diversity," 422–33.

62. See H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 124f. See also Nahmanides to Deut 6:18 and Rabbi Vidal Yom Tom of Tolosa in his Magid Mishneh to *Hilkhot Shekhenim* 14:5.

63. See Aryeh Botwinick, "Underdetermination of Meaning by the Talmudic Text," in *Commandment and Community: New Essays in Jewish Legal and Political Philosophy*, ed. D. Frank (New York: State University of New York Press, 1995), 113–40.

64. One solution is provided by *t. ʿEd.* 1:5 (= *b. ʿErub.* 7a):

> היו שנים אחד אוסר ואחד מתיר אחד מטמא ואחד מטהר אם יש חכם אחר נשאלין לו ואם לאו הולכין אחר המחמיר ר׳ יהושע בן קרחה אומר דבר מדברי תורה הולכין אחר המחמיר מדברי סופרים הולכין אחר המיקל.
>
> If there were two [sages], one prohibiting and one permitting, one declaring impure and one declaring pure, if there is another sage, one asks him. If not, one goes according to the stringent view. R. Yehoshua ben Qorḥa says, if it is a matter of Torah law, one follows the stringent view; if it is a matter of rabbinic law, one follows the lenient view.

However, this seems to address an individual who asks different rabbis rather than how rabbis themselves decide between opinions of their predecessors. See Gerald Blidstein, "ʿAl hakhraʿat ha-halakha bi-zman ha-zeh: ʿiyyun ba-Rambam hilkhot mamrim 1, 5," *Dine Israel* 20–21 (2001): 7–9.

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case.[65] He searches for legislation that grants its addressee "full autonomy to follow either of the two conflicting modes of behaviour"[66] with no hierarchical preference. He finds such examples in one formulation that the Talmud uses to deal with legal doubt in which the legislator is unable to decide between two competing opinions.

I would like to further explore the contexts and variations of this formula in order to gain a more precise evaluation of the extent and nature of the pluralism they encode. The complete Aramaic formula appears three times in the Bavli:

1. *b. Šabb.* 61a

אמר רב יוסף: השתא דתניא הכי, ואמר רבי יוחנן הכי, דעבד הכי—עבד, ודעבד הכי—עבד.

Rav Yosef said, "Now that we have learned this and R. Yoḥanan has said that, one who acts this way has acted [legitimately] and one who acts that way has acted [legitimately]."

2. *b. Šebu.* 48b

אמר רב חמא: השתא דלא איתמר הלכתא לא כרב ושמואל ולא כרבי אלעזר, האי דיינא דעבד כרב ושמואל—עבד, דעבד כרבי אלעזר—עבד.

Rav Ḥama said, "Since the halakha has not been stated either like Rav and Shmuel or like R. Eleazar, a judge who rules according to Rav and Shmuel has acted [legitimately] and one who rules according to R. Eleazar has acted [legitimately]."

3. *b. Ber.* 27a

השתא דלא אתמר הלכתא לא כמר ולא כמר, דעבד כמר—עבד, ודעבד כמר—עבד.

Since the halakha has not been stated either like this master or like that master, one who acts according to this master has acted [legitimately] and one who acts according to that master has acted [legitimately].

The first text involves a ritual matter concerning the proper order to put on one's shoes. Regarding an unresolved contradiction on this issue between R. Yoḥanan and a *baraita*, Rav Yosef, a third-generation Babylonian, declares both views to be valid.[67] In the second text, Rav Ḥama, a

65. Ben-Menahem, "Is There," 165–66.

66. Ibid., 168.

67. The issue of which shoe to put on first does not seem to be a major halakhic issue or even a custom; nevertheless, the language of this *sugya*, "has acted [legitimately]" (which assumes that one can don shoes in an illegitimate way), implies that this is not considered a trivial matter.

In the continuation of the *sugya* not cited here, Abaye seems to disagree, saying that either R. Yoḥanan did not know the *baraita*—in which case the halakha should follow the

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fifth-generation Babylonian Amora, uses the formula concerning a monetary matter of collecting debts from an inheritance.[68] The choice here is given to the judge. The third text concerns a ritual issue of prayer times.[69] The Stam concludes that since the halakha cannot be established either way, both opinions are valid and one may choose which to follow. In all three instances, there is some disagreement about this solution within the *sugya,* but the pluralistic solution is upheld by the final statement.

Ben-Menahem concludes from these examples that the Talmud does not always assume there is one uniquely correct answer to any given question. Christine Hayes, however, has recently questioned Ben-Menahem's use of these examples as evidence of a pluralistic attitude. In her reading, these statements do not endorse two equally correct answers but rather only state that "there are two candidates for the title of 'right answer' between whom we lack the means to choose."[70] That is, these statements endorse two opposing opinions not because they are both correct but rather because we have no means to determine which is correct and so we throw up our hands and accept the legitimacy of both even though one of them is wrong. Hayes posits that these formulae "declare that actions taken in accordance with either view are—*ex post facto*—allowed to stand without challenge."[71] She points to the tense of the verb "עבד" as indicating a past action: "A perfect verb indicates only that rulings already rendered will be respected with no

baraita—or he did know it and nevertheless rejected it—in which case the halakha should follow R. Yoḥanan. Either way, both opinions cannot be correct. Rav Naḥman bar Isaac encourages one to be stringent and fulfill both opinions. Rav Ashi ends the *sugya* the way it began, seemingly agreeing with Rav Yosef that either practice is valid.

68. The general law of *m. Šebu.* 7:7 is that if one lends money to someone and both parties die, the lender's children may collect only after swearing that the loan, to their knowledge, was still not collected. In *b. Šebu.* 48b, Rav and Shmuel qualify that this only applies when the lender dies before the borrower, but if the borrower dies first then the lender would already have been obligated to swear to the borrower's children that he was not repaid and that oath cannot be taken by the children because that information cannot be known to them. Since the lender's children cannot fulfill this obligation to swear, they do not get paid. R. Eleazar disagrees and says the lender's children can swear to the best of their knowledge and that is sufficient for them to collect, even if the borrower dies first.

Because no explicit decision by subsequent Amoraim is transmitted regarding which opinion to follow, Rav Ḥama grants a judge of such a case full autonomy to choose between these two equally viable, though contradictory, viewpoints. In the continuation of the *sugya*, Rav Papa, Rav Ḥama's colleague, agrees. An anonymous scholar attempts to challenge a judge who decides according to one view, but Rav Ḥama has the last word.

69. The Talmud endeavors to establish the halakha regarding the latest time one may recite the *minḥa* prayer. In the previous lines of this *sugya*, Rav Isaac remains silent when asked about this issue, indicating that he could not decide and had received no tradition about it. Rav Ḥisda then attempts to bring a proof one way, but it is rejected by the Stam, which has the last word.

70. Hayes, "Legal Truth," 83–84.

71. Ibid., 84.

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reference to their correctness or desirability."[72] That these statements only recognize the validity of a ruling after it has been given but do not endorse both views *ante factum*, argues Hayes, suggests that the rabbis adopt a monistic view. She therefore concludes that "the '*de-avad keX/haki avad*' cases are not evidence for a pluralistic view of law in the Talmud."[73]

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72. Ibid., 82.

73. Ibid., 84. In the context of this chapter, it is sufficient for me to point to the fact of practical pluralism encoded in this formula in order to argue that the more often this formula is offered as a solution and even presented as the conclusion of a *sugya*, the more tolerance this reflects for practical pluralism. I also believe further, though this point is not essential to my argument here, that the formula reflects an attitude of theoretical pluralism, that is, the authenticity of more than one view at the legislative and ontological levels within the legal system (see above, pp. 3-4). This argument is further developed in Richard Hidary, "Right Answers Revisited: Monism and Pluralism in the Talmud," *Dine Israel* 26–27 (2009–2010): 229-55 in response to Hayes's first article.

Hayes subsequently responded to my article in "Theoretical Pluralism in the Talmud: A Response to Richard Hidary," *Dine Israel* 26–27 (2009–2010): 257-307. In her response, Hayes clarifies that she agrees that these and many other statements in the Talmud project practical pluralism and denies that she ever meant to say that these statements endorse practical monism. However, I do not believe that I have misinterpreted Hayes's first article; I suspect that she said what she meant and that her second article reinterprets her first according to her now more clarified views. Just to cite one example, Hayes writes: "Amoraic authorities declare that actions taken in accordance with either view are—*ex post facto*—allowed to stand without challenge. This should not be construed as a declaration that both views are correct and carry an equal endorsement as the course of action to be taken" (Hayes, "Legal Truth," 84). Even her myriad pages of "midrashic pyrotechnics" cannot remove her original statement from its *peshat.*

Be that as it may, we now agree that this formula does encode practical pluralism, but we still disagree on whether it also assumes a stance of theoretical pluralism. Hayes states that "it is certainly *possible* to read these texts as asserting the authenticity or truth value of both positions." However, she continues, "a *better* explanation is that incompatible views are recognized in order to avoid paralysis in the face of a procedural breakdown. This explanation is better because it finds *explicit textual support in three of the five cases*. . . . I did not say that it is *wrong* to claim that the views are authentic, but only that we simply *do not know* and cannot ascertain the authenticity of the two views in question due to a lack of information in these texts—they are *inconclusive* on that point one way or the other" ("Theoretical," 284–85; all italics in the original). My position, however, is that the conjunction of this formula when read in light of programmatic statements lends to a strong argument for theoretical pluralism. Hayes herself says that programmatic statements should be tested to see if legal pronouncements also reflect their sentiments. This formula is precisely the confirmation for which we were looking. In fact, the fifth example of this formula below from *b. Ber.* 11a involved the Houses of Shammai and Hillel, which is also the subject of the most famous programmatic statement, "These and those are the words of the living God."

One important root of our disagreement lies in whether the legitimacy of a law presumes its authenticity. Hayes writes, "A norm can fail to meet authenticity criteria but because it meets validity criteria, it becomes the legitimate halakha. We see this in programmatic texts like the famous oven of Akhnai story in which the halakhic view endorsed by God (and indicator of *authenticity*) is rejected by the procedural principle of majority rule" ("Theoretical," 262). Hayes correctly anticipates the weakness in this argument, which rests on the assumption that "the fundamental *authenticity* criterion is conformity to the will of

I will now revisit Ben-Menahem's analysis of this formula in order to show that it does indeed project a view of pluralism at both the practical and theoretical levels. Hayes's grammatical argument for this phrase being *ex post facto* is problematic. One manuscript actually does read "עביד," indicating a participle.[74] But even for the rest of the versions that read "עבד,"[75] it is not accurate to treat this as a past tense verb. The perfect tense indicates an action that is completed, whether its completion occurs in the past, present, or future.[76] This sense may be more accurately rendered into English by the present tense, as Sokoloff translates: "the one who acts in this manner does so (properly) and the one who acts in that manner does so (properly)."[77] According to this understanding, the phrase can refer to an *ante factum* situation as well.

Furthermore, it is manifest that these formulae do apply *ante factum* based on their contexts. The first case cited above discussed which shoe one should put on first. Rav Yosef declares that one acts properly whether he has put on the right or the left shoe first. How can one understand this statement as being only *post factum*? What is one supposed to do *ante factum*? Does this statement require that one go barefoot because we cannot decide which shoe to put on first? Surely, the permission to allow either foot to go first must apply *ante factum*.

Similarly in the second case, a judge must either rule according to Rav and Shmuel who allow the orphans to swear and collect, or like the sages who do not. The judge cannot simply refuse the case because he cannot decide. This view is affirmed by the statement of Rav Papa, which immediately follows that of Rav Ḥama: "Rav Papa said, 'We do not tear up a document of orphans, nor do we collect with it. We do not collect with it

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God" (ibid., 261 and see n. 7 there). The point of this story is precisely that the Author's interpretation is irrelevant because authenticity depends solely on the Text that He has given. As the law of *Horayot* teaches, if a court, through normal procedures, issues a ruling in error because it contradicts a learned tradition, then this ruling may not be followed by those who know better and atonement is required for those who follow it (see below, chaper 7). Such a ruling is valid but it is still not legitimate because it is inauthentic in that it does not conform to the sources of written and oral Law. I would thus argue that legitimacy is an indicator of authenticity and therefore rulings that tolerate practical pluralism, especially when alternative solutions are available, are good indicators of theoretical pluralism as well.

In the end, we agree on much more than we disagree about and I thank Prof. Hayes for her collegiality and for helping me to clarify many matters, both in this debate and through her many other writings that have been essential to my development and research.

74. Ms. Oxford of *b. Ber.* 27a.

75. עבד also appears in a quotation of *b. Šebu.* 48b in ms. Sassoon of *Halakhot pesuqot* (ed. S. D. Sassoon, *Sefer halakhot pesuqot* [Jerusalem: Ḥebrat Meqiṣe Nirdamim, 1951], 125). I thank Moshe Morgenstern for this reference.

76. See E. Kautzsch and A. E. Cowley, *Gesenius' Hebrew Grammar* (Oxford: Clarendon, 1910), 309–13. The usage of the tenses in ancient Hebrew and Aramaic are similar.

77. Sokoloff, *A Dictionary of Jewish Babylonian Aramaic*, 836. I thank Moshe Bernstein and Elitzur Avraham Bar-Asher for helping to clarify these grammatical points.

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for perhaps we agree with Rav and Shmuel; we do not tear it up because a judge who rules according to R. Eleazar has acted [legitimately].'" Rav Papa addresses the case *ante factum* and states that the loan contract should remain unpaid in the hands of the lender's inheritors and await judgment. If one option were preferable over the other, then Rav Papa should have required that the contract either be destroyed or presented for payment immediately. Thus, we can conclude that Rav Ḥama and Rav Papa deem both options legitimate even *ante factum*.[78]

In the third case, the choice is not between two mutually exclusive options as it is in the previous two. Rather, everyone agrees one can recite *minḥa* before *pelag*; the question is only whether one can still recite it afterward. Therefore, one can be stringent not to pray either *minḥa* or *arbit* between *pelag* and sunset and thus act in agreement with all opinions. In this case, one could assume an *ante factum* preference not to pray at all during this time and then state that *post factum* one has fulfilled his obligation if he did recite either prayer. Such an *ante factum* preference is never stated, however, and so this statement too is likely to be meant *ante factum*.

Once we confirm that this formula applies *ante factum*, we must conclude that the judge has discretion to choose either possibility. We can therefore uphold Ben-Menahem's reasoning that in these cases, the judge is granted "full autonomy to make a choice between conflicting and incompatible norms and that consequently in those instances no one uniquely correct answer exists."[79] These cases describe situations of procedural breakdown where neither law has been established as the halakha. The formula therefore comes to say that although neither has been validated, we will consider both options as valid. In a typical case where there is no procedural breakdown, the rabbis, as legislators, confront a range of authentic and theoretically correct possibilities. From among these possibilities, they choose one as the only legitimate law for practice. However, when, as in the cases discussed here, there is no clear choice, then the range of theoretical possibilities, all of which have truth value, remain available.[80] I will now confirm this reading on the basis of a number of variations on this formula wherein a practical choice is made available even when there is no procedural breakdown or where procedural breakdown is resolved differently.

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78. Rambam, *Mishneh Torah*, *Hilkhot malveh ve-loveh* 17:3, however, does think that Rav and Shmuel are to be preferred and that R. Eleazar is only valid *ex post facto*. He derives this from Rav Naḥman's statement earlier in the *sugya* that he would not repeal Rav and Shmuel but would also not add to it, implying that he accepts its present application. Rav Ḥama, however, does not express any preference. Rav Papa's language does seem to prefer Rav and Shmuel ("for perhaps we agree with Rav and Shmuel") over R. Eleazar ("a judge who rules according to R. Eleazar has acted [legitimately]"), but this is not decisive.

79. Ben-Menahem, "Is There," 165.

80. For more on theoretical pluralism in the Talmud, see Hidary, "Right Answers Revisited."

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In addition to the three Aramaic statements cited above, there are also two Hebrew parallels to the second half of this formula:

4. *b. B. Bat.* 124a-b

אמר רבה בר חנא אמר ר׳ חייא: עשה כדברי רבי—עשה, כדברי חכמים—עשה; מספקא ליה: אי הלכה כרבי מחבירו ולא מחביריו, או הלכה כרבי מחבירו ואפילו מחביריו.

Rabbah bar Ḥannah said in the name of R. Ḥiyya, "If one acted according to Rabbi, he has acted [legitimately]; [if one acted] according to the sages, he has acted [legitimately]." He was in doubt whether halakha follows Rabbi [when in dispute] with his colleague but not his colleagues or whether halakha follows Rabbi [when in dispute] with his colleague and even with his colleagues.

5. *b. Ber.* 11a

תני רב יחזקאל: עשה כדברי בית שמאי—עשה, כדברי בית הלל—עשה.

Rav Yeḥezkel learnt: If one acts in accordance with the opinion of Beth Shammai, he has acted [legitimately]; [if he acts] in accordance with the opinion of Beth Hillel, he has acted [legitimately].[81]

These Hebrew Tannaitic formulations are probably earlier than the Amoraic Aramaic variations. The context of statement 4 is a *baraita* discussing a case where the value of an inheritance increases from the time of the father's death to the time when the inheritance is divided. The anonymous opinion rules that the firstborn son is not entitled to a double share of the increased value but only of the original value, while Rabbi rules that the firstborn son does receive a double portion even of the increase. For whatever reason,[82] R. Ḥiyya does not decide between them but rather endorses both options. Since this is a monetary case, a judge must decide between the two opinions and neither is given preference. We can therefore assume that the statement refers to an *ante factum* situation. This is confirmed by contrasting it with a subsequent statement in the same *sugya*:

אמר רבא: אסור לעשות כדברי רבי, ואם עשה עשוי, קא סבר: מטין איתמר.

Rava said, "One may not act according to Rabbi; but if he already did, then it was [legitimately] done." He thought it [the rule about Rabbi and his colleague] was said to incline [towards the sages].

81. See the extended citation and discussion of this statement below, pp. 222–24.

82. The explanation given in the Aramaic part of statement 4, "... מספקא ליה," is surely a Stammaitic gloss. The rules for deciding between Tannaitic opinions were first formulated by R. Yoḥanan and his students so this explanation is somewhat anachronistic; see above, pp. 44–54.

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Rava says one must follow the sages *ante factum*, but Rabbi's opinion is also allowed to stand *post factum*. Note that Rava's statement uses the passive participle (עשוי) in contrast with the perfect (עשה) used in R. Ḥiyya's statement. Even more significantly, Rava's statement clearly distinguishes between *ante* and *post factum* situations; R. Ḥiyya does not. The differences in verb tenses and sentence structures between Rava's statement and the other five statements quoted, Hebrew and Aramaic, confirm that the latter address even *ante factum* situations.

In one sense, Rava's pluralism, although only *post factum*, may actually represent a deeper form of pluralism than the others. The Stammaitic gloss explains that Rava thinks the rule concerning how to decide between Rabbi and his colleagues is not definitive but merely a suggestion to incline toward the opinion of the sages.[83] In contrast, R. Ḥiyya thinks the rule is definitive and only tolerates both options here because he is unsure what the rule is. R. Ḥiyya's pluralism results from a breakdown in the legislative process due to doubt about a legislative principle. Rava's pluralism, although only *post factum*, is built into the legislative process.[84] That Rava still validates Rabbi's view *post factum*, even though he has decided that the halakha follows Rabbi's opponent, suggests that Rava is not a theoretical monist but rather accepts more than one opinion as true. If he thought that Rabbi's opinion had no theoretical truth value, then he should not have allowed a ruling according to Rabbi to stand.

In contrast to the previous four statements, statement 5 does not include a justification for pluralism based on legislative doubt. In the previous statements, pluralism is presented as an unfortunate result of a breakdown in the legislative process. In statement 5, on the other hand, the lack of any justification or apology suggests that this pluralism is perfectly acceptable.[85] No hint is given that one should ultimately triumph over the other; these are simply two valid options. In this sense, statement 5 is similar to that of Rava in statement 4 except that Rava allows only *post factum* pluralism while statement 5 permits it even *ante factum*.

Furthermore, statement 5 appears within the discussion of *m. Ber.* 1:3 regarding whether one must stand during the recitation of *shema* in the morning and lie down during its recitation at night—the opinion of Beth Shammai—or whether the position of recitation does not matter—the opin-

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83. This understanding of the rules harks back to the three-way controversy about the nature of these rules recorded in *b. ʿErub.* 46b, above, p. 47.

84. In addition, R. Ḥiyya's pluralism can apply only to a limited number of cases that involve Rabbi versus the sages. On the other hand, if Rava fully adopts the position of R. Assi cited in the previous note, then his *post factum* acceptance of rejected views could apply to all decisions based on these rules.

85. Reading it in light of the other parallel formulae, one could, perhaps, assume a breakdown in the legislative process to decide between the Houses as the basis for this statement as well. However, this statement is a *baraita* and predates its parallels.

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ion of Beth Hillel. In this case, unlike the previous ones, it is possible to be stringent like Beth Shammai and fulfill all opinions. If only one view were correct but we were not sure which it was, then the ruling should have been to lie down.[86] Since one is not forced to choose between the two positions, this permission to choose reflects genuine legal pluralism at both the theoretical and practical levels. That is, both views are theoretically authentic possibilities and therefore both views may be legitimately practiced.

Moreover, this statement addresses not only the issue of reciting *shema* but rather all disputes between the Houses.[87] Rav Yeḥezkel's formulation also has a parallel in the Tosefta and the Yerushalmi where it clearly applies to all disputes between the Houses.[88] The Tosefta reads: "Choose either according to Beth Shammai with their leniencies and stringencies or according to Beth Hillel with their leniencies and stringencies." This statement explicitly permits *ante factum* choice between the two Houses and covers all cases, including those where a compromise or stringent position may be possible. This is therefore a significant expression of pluralism. *B. ʿErub.* 7a further extends this choice to controversy between any Tannaim and Amoraim.[89]

One can get added perspective on this formula by comparing it to four others that begin with the same formula as the first three texts cited above but that have different endings. *B. Nid.* 6a (=*b. ʿErub.* 46a) reads:

> תא שמע, מעשה ועשה רבי כרבי אליעזר. לאחר שנזכר אמר: כדי הוא רבי אליעזר לסמוך עליו בשעת הדחק.
> והוינן בה: מאי לאחר שנזכר? אילימא לאחר שנזכר דאין הלכה כרבי אליעזר אלא כרבנן, בשעת הדחק היכי עביד כותיה?
> אלא דלא איתמר הלכתא לא כמר ולא כמר, וכיון שנזכר דלאו יחיד פליג עליה אלא רבים פליגי עליה, אמר כדי הוא רבי אליעזר לסמוך עליו בשעת הדחק.

> Come hear: It happened that Rabbi acted according to R. Eliezer. After he remembered he said, "R. Eliezer is worthy to be relied upon under extenuating circumstances."
>
> We analyzed this: What does "after he remembered" mean? If it means after he remembered that halakha does not follow R. Eliezer but rather the sages, how does he act according to him [R. Eliezer] even under extenuating circumstances?

86. See, however, below, p. 172 n. 33.

87. See the continuation of this *sugya* and Moshe Benovitz, *Talmud ha-Igud: BT Berakhot Chapter I* (Jerusalem: Society for the Interpretation of the Talmud, 2006) (Hebrew), 509 and 513–14.

88. *T. Sukkah* 2:3, *t. Yebam.* 1:13, *t. ʿEd.* 2:3, and *y. Ber.* 1:4 (3b). See further, ibid., 512, and see below, p. 191.

89. See below, p. 232. This point is also made by Ben-Menahem, "Is There," 171.

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> Rather, the halakha had been stated neither according to this master nor according to that master. Once he remembered that it is not an individual who disputes him [R. Eliezer] but rather that many dispute him, he said, "R. Eliezer is worthy to be relied upon under extenuating circumstances."

R. Eliezer rules leniently regarding a woman who does not have a period for three months but then sees blood that we do not retroactively declare impure whatever she touched before but assume that this blood is the first occurrence; the rabbis disagree. Rabbi at first follows R. Eliezer but then changes to rule like his detractors while still permitting one to follow R. Eliezer when there is a pressing need. The anonymous redactor explains that at first Rabbi thought the halakha was not established either way between the two views and so he could choose either opinion, as per the formula seen in the previous cases.[90] Once he remembered that it was the majority against R. Eliezer, he had to prefer the majority,[91] but he still upheld some level of legitimacy for R. Eliezer. It is noteworthy that on the original assumption that the disagreement was between individuals, Rabbi did not simply act stringently to prohibit whatever she touched out of doubt. This again suggests that there is more than one correct answer to a question. Otherwise, why not just be stringent?

Here are three more variations on this formula:

> אמר רב הונא בר תחליפא: השתא דלא איתמר הלכתא לא כמר ולא כמר, כל דאלים גבר.
> Rav Huna bar Taḥlifa said, "Since the halakha has not been stated either according to this master or according to that master, whoever is stronger prevails."[92]

> השתא דלא אתמר לא הכי ולא הכי, תפסה—לא מפקינן מינה, לא תפסה—לא יהבינן לה.
> Since [the halakha] has not been stated either this way or that way, if she is in possession of it [her ketubah], then we do not take it from her, but if she is not in possession of it, then we do not give it to her.[93]

> השתא דלא איתמר הלכתא לא כהלל ולא כרבנן—מברך על אכילת מצה ואכיל, והדר מברך על אכילת מרור ואכיל, והדר אכיל מצה וחסא בהדי הדדי בלא ברכה זכר למקדש כהלל.

90. See further analysis in Louis Ginzberg, *A Commentary on the Palestinian Talmud*, 4 vols. (New York: Jewish Theological Seminary of America, 1941), 1:83–84.

91. This criterion is not consistent since two of the cases above also involve an individual opinion against the sages. Apparently, R. Yehudah (*b. Ber.* 27a) and R. Yoḥanan (*b. Šabb.* 61a) were considered of high enough stature to be able to balance the majority.

92. *B. Giṭ.* 60b.

93. *B. Ketub.* 64a.

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> Since the halakha has not been stated either according to Hillel or according to the sages, one recites a blessing "on eating *maṣah*" and eats and then recites a blessing "on eating *maror*" and eats, and then eats *maṣah* and *ḥasah* together without reciting a blessing in memory of what Hillel did [during the time of] the Temple.[94]

The first text states that since there is no set halakha, there is no rule of law and the court dismisses the case, thus allowing the parties to settle matters outside of the law.[95] The second text similarly rules that since we cannot decide the halakha, there is no legally rightful claimant to the property, which by default remains with whoever has it; we simply retain the status quo. These two solutions can work for monetary laws but not for ritual law. The third text says that when there is no clear decision, one should try to fulfill both views. This is also the strategy of Rav Naḥman bar Isaac in *b. Šabb.* 61a who advocates fulfilling both opinions, a solution that is not always practicable. None of these three texts simply chooses one view or endorses both views. This suggests that all three assume a monistic view that there is only one right answer, which, in these cases, cannot be accessed.[96]

These are all alternatives to the either-or solution provided by the texts quoted above. *B. Šebu.* 48b is a monetary case in which the Talmud

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94. *B. Pesaḥ.* 115a.

95. The phrase כל דאלים גבר also occurs twice at *b. B. Bat.* 34b, one of them in the name of Rav Naḥman. See the analysis of Samuel Atlas, *Pathways in Hebrew Law* (New York: American Academy for Jewish Research, 1978), 76–82 (Hebrew). This law is similar to Rav Naḥman's ruling, "עביד אינש דינא לנפשיה—one may take the law into his own hands" (*b. B. Qam.* 27b), on which see Emanuel Quint and Niel Hecht, *Jewish Jurisprudence: Its Sources and Modern Applications* (New York: Harwood Academic Publishers, 1986), 2:91f.

96. These cases of legal doubt are comparable to cases of circumstantial doubt. *Y. Šabb.* 7:1 (9a) and *b. Šabb.* 69b discuss what happens if someone is lost or taken captive and does not know what day is Shabbat. Rav Naḥman bar Yaʿaqov in the Yerushalmi says that he must rotate which day he observes as Shabbat in order to observe Shabbat at least once every few weeks. Rava in the Bavli says he should do only the minimum amount of work to stay alive every day of the week. Both sages believe that there is only one objective day of Shabbat and therefore prescribe being stringent to try and cover all bases. We thus see that when there is only one correct law that is not known then the rabbis tend to impose stringencies that maximize chances of fulfillment. It then stands to reason that when the rabbis permit one to choose between possibilities, even where they could be stringent, then they do not think there is only one correct answer. In the case of Shabbat, Rav and Shmuel seem to think that there is a subjective element in the day of Shabbat and therefore allow one to begin counting the week from the day he remembers. They do not permit one to randomly choose one day of the week, in which case we could have interpreted their opinion as another way of dealing with doubt about an objective truth. Rather, they require that one recreate the subjective experience of counting the days of creation. For further analysis of this *sugya* see Stephen Wald, *BT Shabbat Chapter VII*, Tamud Ha-Igud (Jerusalem: Society for the Interpretation of the Talmud, 2007) (Hebrew), 59–64.

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could have said, "Whoever is stronger prevails," or, "If he is in possession of it, then we do not remove it, but if he is not in possession of it, then we do not give it to him." In *b. Šabb.* 61a, one opinion actually does suggest that one should fulfill both opinions; but the other solutions in that *sugya* do not agree. One could similarly legislate that one should not recite *minḥa* in the late afternoon, just to be stringent, a road not taken by *b. Ber.* 27a. That the Talmud in those three cases decides to leave it up to the judge or the individual to decide which opinion to follow, even where alternative solutions are possible, does not fit well with a monistic view but rather suggests a genuinely pluralistic attitude. If a rabbi chooses to endorse two opposing positions rather than rule stringently, attempt to fulfill both, or excuse himself completely by leaving the status quo or putting the case back into the hands of the litigants, then such a rabbi ascribes some level of authenticity to both positions.

Based on this analysis, I conclude that the above-quoted either-or formulae (statements 1–5) surely permit *ante factum* pluralism of practice. Statements that offer the either-or option only when no legislative solution is possible could be understood as reflecting a negative attitude toward such pluralism. If other less pluralistic options are available, however, and yet the either-or option is still endorsed, then we can detect a somewhat positive outlook even in these statements. Statements that offer the either-or option even when not presented with a legislative breakdown reflect an even higher degree of comfort with halakhic pluralism. Significantly, all of the Bavli *sugyot* that include the either-or formula conclude the *sugya* with a pluralistic ruling, even when more monistic strategies are proposed beforehand.[97]

Yerushalmi Parallels

The Bavli's either-or formula also has a parallel in the Yerushalmi. *Y. ʿErubin* 1:4 (19a) states:

97. *B. Šebu.* 48b and *b. Ber.* 27a end with the complete pluralistic formula, *b. Šabb.* 61a ends with Rav Kahana, who followed the pluralistic formula, and *b. B. Bat.* 124a and *b. Nid.* 6a end with a limited pluralism (only valid after the fact or in extenuating circumstances). If we assume that the last cited opinion in a *sugya* represents its conclusion, then we may assert that all the Bavli *sugyot* prefer a pluralistic option. However, at least two of these *sugyot* (*b. B. Bat.* 124a and *b. Šabb.* 61a) seem to simply list the opinions in chronological order without necessarily preferring the last cited opinion; these two *sugyot* include about the same number of monistic opinions as pluralistic ones. All opinions cited in *b. Šebu.* 48b are pluralistic, except for that of an anonymous sage, which is rejected. Most significant are *b. Ber.* 27a and *b. Nid.* 6a in which the Stam voice leads the discussion to a pluralistic conclusion (though limited in *b. Nid.* 6a).

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רב הונא בשם רב הלכה כרבי מאיר
שמואל אמר הלכה כרבי יודה
רבי יהושע בן לוי אמר הלכה כרבי שמעון
אמר רבי שמעון בר כרסנא מכיון דתימר הלכה כהדין והלכה כהדין מאן דעבד הכין לא חשש ומאן דעבד הכין לא חשש
א״ר מנא מכיון דאיתמר הלכה כרבנן שבקין ליחיד ועבדין כרבנן

Rav Huna in the name of Rav [says]: The halakha follows R. Meir.
Shmuel says: The halakha follows R. Yehudah.
R. Yehoshua ben Levi says: The halakha follows R. Shimon.
R. Shimon bar Carsena says: Since you say the halakha follows them and the halakha follows them, one who acts this way need not worry and one who acts that way need not worry.
R. Manna says: Since it is said, "the halakha follows the sages" [i.e., R. Meir, whose view is stated anonymously in *m. ʿErub.* 1:4], we leave the opinion of the individual and we practice according to the sages.[98]

There are three Tannaitic views regarding the size of the crossbeam used for an *eruv.* Each of three early Amoraim establishes the halakha according to a different Tanna. R. Shimon bar Carsena, a fourth-fifth-generation Palestinian Amora, concludes that all options are therefore valid and so one may practice whichever opinion he prefers. In this case, one could be stringent to satisfy all opinions, so the pluralistic option is especially significant. However, R. Manna, also a fifth-generation Palestinian, does decide between the three Tannaim by assuming that R. Meir represents the majority opinion. This is an argument among Amoraim themselves about the rules of decision making (how to interpret the anonymous Mishnah) and the possibility of there being more than one normative option. The continuation of the *sugya* presents a narrative about Rav going to a certain place and invalidating their *eruv,* which was valid only according to R. Yehudah but not R. Meir. Rav himself did not think that people were at liberty to choose other opinions. Thus, although the Yerushalmi entertains the possibility of pluralism, the continuation of the *sugya* seems to reject that possibility in favor of a more monistic view.

The second half of the R. Shimon bar Carsena's formulation is used in *y. Yoma* 5:5 (42d):

שני כהנים ברחו בפולמוסיות אחד אומר עומד הייתי ומחטא ואחד אומר מהלך הייתי ומחטא
אמר רבי יודן הדא אמרה מאן דעבד הכין לא חשש ומאן דעבד הכין לא חשש.

98. A parallel to the beginning of this *sugya* is found at *y. Šabb.* 3:7 (6c).

> Two priests ran away during the wars. One of them said, "I used to stand and sprinkle." The other said, "I used to walk and sprinkle."
> Rav Yudan said, "About this it is said: One who acts this way need not worry and one who acts that way need not worry."

M. Yoma 5:5 records a dispute between the anonymous opinion and R. Eliezer about whether the high priest walks around the altar while sprinkling each corner or whether he stands in one place while sprinkling. Two priests report that they each practiced differently. Rav Yudan concludes that both methods are valid.

Y. Giṭ. 3:1 (44d) expresses a similar point of view to that of R. Shimon bar Carsena, though not using his formulation:

> אתא עובדא קומי רבי ירמיה ועבד כריש לקיש אמר ליה רבי יוסי שבקין רבי יוחנן ועבדין כריש לקיש אמר ליה הוריותיה דרבי יוחנן הורייה והורייתא דריש לקיש לאו הורייה
> אמר רבי יעקב בר אחא לא ריש לקיש פליג על רבי יוחנן אלא מתניתא שמע ועמד עליה
> אמר רבי יוסי בי רבי בון לא דריש לקיש מתריס לקבל ר׳ יוחנן בגין דאתפלגי עלה אלא בגין מפקין עובד מיניה כד שמע מתני׳ הוא סמך עליה כד דלא שמע מתני׳ הוא מבטל דעתיה מקומי דעתיה דרבי יוחנן
>
> A case came before R. Yirmiah who acted according to Resh Laqish. R. Yose said, "Do you ignore R. Yoḥanan and act according to Resh Laqish?" He responded, "Is the teaching of R. Yoḥanan a [legitimate] teaching and the teaching of Resh Laqish not a [legitimate] teaching?"
> R. Yaʿaqov bar Aḥa said: "Resh Laqish does not disagree with R. Yoḥanan [fundamentally]. Rather, he [Resh Laqish] learned a [different] *baraita* and relied upon it."
> R. Yose b. R. Bon [said]: "It is not that Resh Laqish objects to accepting the opinion of R. Yoḥanan because he [fundamentally] disagrees with him. Rather, it is because a practical case came before him. When he heard a [different] *baraita,* he relied upon it. If he had not heard the *baraita,* he would have nullified his own view before the view of R. Yoḥanan.

This example is included within a conversation between two Amoraim. R. Yirmiah decides a case according to Resh Laqish and is castigated by R. Yose who assumes that the halakha must follow R. Yoḥanan. R. Yirmiah responds with a powerful retort that both opinions are valid and so one can decide either way.[99] Evidently, there was more than one view in Pal-

99. Another Yerushalmi *sugya* quotes a similar conversation:
והוה רבי זעורה מסתכל ביה א״ל מה את מסתכל בי מה ידעת ולא נדע תבין ולא עמנו הוא
R. Zeʿorah was staring at him. He said, "What are you looking at? What do you

estine concerning how to deal with halakhic controversy. We see from R. Yose that there were certain expectations already in place about whom to follow in particular situations; but R. Yirmiah shows that not everyone felt bound by these expectations. Still, even R. Yirmiah is only using a pluralistic argument to defend his own position; he does not necessarily advocate individual choice.

The end of the *sugya* discusses what was behind the disagreement between R. Yoḥanan and Resh Laqish. R. Yaʿaqov bar Aḥa explains that their dispute was not over any fundamental principle, but rather that each just happened to learn a different version of a *baraita*. Pene Moshe comments that this comes to justify R. Yirmiah's position, namely, that both sides represent valid rulings since both are well grounded. One could interpret R. Yaʿaqov to have the opposite force, however: R. Yose is correct that only one opinion can be authentic since they are not based on subjective reasoning but rather on two versions of a *baraita*, only one of which can be original. In fact, the last statement of R. Yose b. R. Bon suggests as much by concluding that Resh Laqish would have easily agreed with R. Yoḥanan had he not heard the *baraita*. This implies that his own opinion is not worthy of competing with R. Yoḥanan's decision but that the alternate *baraita* does counter R. Yoḥanan's source. The last two comments are too ambiguous to conclusively determine the outlook of the *sugya* as a whole.

All in all, we find opposing viewpoints within both Talmuds regarding how to deal with indeterminacy. Certain Amoraic statements—both in the Yerushalmi and in the Bavli—tend toward monism while others tend toward pluralism. The structure and flow of most of the Bavli *sugyot* analyzed in this section, however, tend toward pluralism. The editorial hand of the Bavli concludes each *sugya* on a pluralistic note. The Yerushalmi evidence, on the other hand, is inconclusive. The first Yerushalmi *sugya* quoted above ends on a monistic note; the second example is all pluralistic; and the third is unclear. Even if we cannot gain an adequate sense of the preference of the Yerushalmi's editors, however, it is still significant that a number of Palestinian Amoraim do sometimes express pluralistic sentiments.

Paradoxically, the existence of such cases of indeterminacy presumes that the vast majority of cases are determinate. These cases in which "the halakha was not decided either way" are presented as exceptional and reveal a general assumption that most disputes have been conclusively

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know that we do not know? [What do you] understand that is not [understood] by us?" (*y. Meg.* 4:1 [75a]; the end of the sentence quotes from Job 15:9)

R. Ba in the name of Rav Yehudah offers a radical interpretation of a law. R. Zeʿorah responds with a critical stare. R. Ba retorts that there is more than one way to think about the issue. This comment implies a pluralistic attitude not just on the practical level but perhaps even at the epistemological level.

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decided. Indeed, even though the Bavli rejects the absolute authority of the rules of R. Yoḥanan, it does still use them occasionally. Similarly, even though the Bavli sometimes reports that later Amoraim reject the decisions of earlier Amoraim, in most cases a decision of an early Amora does set a precedent for later generations. The Bavli does not advocate a legislative free-for-all in which any rabbi may choose whatever opinion he likes.

Thus, the difference between Yerushalmi and Bavli attitudes toward pluralism should not be exaggerated. Both Talmuds assume a general consensus in most cases about which opinions should be rejected, and both put limits on the freedom of individual rabbis to decide earlier disputes. Conversely, both Talmuds contain genuine expressions of pluralism. Nevertheless, an important distinction between the Talmuds remains. R. Yoḥanan creates rules of law, a comprehensive scheme to decide all cases, and they are by and large accepted by the Palestinian community, at least as represented in the Yerushalmi. The Bavli, however, resists these rules explicitly. The Bavli is far less willing to allow a system of rules to force uniformity of practice and instead allows individual rabbis to deliberate and decide each case independently.

Historical Context

The penchant for codification in the Yerushalmi may be related to similar trends in Roman law during the late Principate and the Dominate. Roman law incorporated an increasingly large number of sources beginning with the publication of the Twelve Tables in 450 B.C.E. and continuing with subsequent legislation by various assemblies, magistrates, and, later on, imperial edicts and senatorial resolutions.[100] This mass of laws that interpreted and sometimes even overturned preceding laws had grown unwieldy over time and place, prompting a sustained effort at codification beginning with Hadrian and culminating with Justinian's *Digest*.[101] This period from the second to the sixth century also saw the production of the Mishnah and the Palestinian Talmud. Previous scholars have noted parallels between Roman codes and the codificatory activity leading up to the publication of the Mishnah. Lee Levine doubts that it is mere coincidence that "R. ʿAqiva and his colleagues began collecting and organizing rab-

100. See O. F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London: Routledge, 1997); and George Mousourakis, *A Legal History of Rome* (London: Routledge, 2007).

101. Robinson, *Sources of Roman Law*, 16–21; Mousourakis, *A Legal History*, 179–91; and Christine Hayes, "The Abrogation of Torah Law: Rabbinic *Taqqanah* and Praetorian Edict," in *The Talmud Yerushalmi and Graeco-Roman Culture I*, ed. Peter Schäfer (Tübingen: Mohr Siebeck, 1998), 665–67.

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binic traditions under Hadrian, when Julianus, Celsus Pomponius, and others were actively involved in making similar compilations in Rome" and "Rabbi Judah the Prince compiled and edited his Mishnah, and tannaitic midrashim were collected under the Severans, at a time when Gaius, Papinianus, Paulus, and Ulpianus were likewise compiling codices and responsa of Roman law and commenting on earlier legal material."[102]

The findings of this chapter suggest that the link between Roman and halakhic codificatory activities extends even past the Mishnah.[103] In 426 C.E., Theodosius II and Valentinian III issued the "Law of Citations," which "aspired to establish a veritable hierarchy for the opinions of celebrated jurists."[104] This law restated an earlier edict issued by Constantine in 321 C.E. that named five jurists (Gaius, Papinianus, Paulus, Ulpianus, and Modestinus) as authorities whose codes should carry the most weight in court. However, the multiplicity of these divergent law codes themselves required further guidelines as to which code to follow. The Law of Citations thus stipulates:

> When conflicting opinions are cited, the greater number of the authors shall prevail, or if the numbers should be equal, the authority of that group shall take precedence in which the man of superior genius, Papinian, shall tower above the rest, and as he defeats a single opponent, so he yields to two.… Furthermore, when their opinions as cited are equally divided and their authority is rated as equal, the regulation of the judge shall choose whose opinion he shall follow.[105]

One must follow the majority of jurists. When they are equally split, then Papinian is to be followed over his four colleagues. This is similar to R. Yoḥanan's rules that also present a hierarchy of sages. If the Law of Citations were written in Hebrew, it might read: "הלכה כפפיניאן מחבירו אבל לא מחביריו." When this rule too cannot solve the dispute, for example, if Papinian did not comment on that matter, then the judge may choose which opinion to follow. In other words, "מאן דעבד הכין לא חשש ומאן דעבד הכין לא חשש." Although

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102. Lee Levine, *Judaism and Hellenism in Antiquity: Conflict or Confluence?* (Peabody, MA: Hendrickson, 1999), 135. See also Elman, "Order, Sequence, and Selection," 65–70. E. S. Rosental, "Masoret halakha ve-ḥidushe halakhot be-mishnat ḥakhamim," *Tarbiz* 63 (1994): 321–74, points to a further parallel between Justinian's *Digest* (I, 2, 47–48) and the Houses of Shammai and Hillel regarding tradition and innovation in law.

103. See Catherine Hezser, "The Codification of Legal Knowledge in Late Antiquity: The Talmud Yerushalmi and Roman Law Codes," in *The Talmud Yerushalmi and Graeco-Roman Culture I*, 581–641.

104. George Mousourakis, *The Historical and Institutional Context of Roman Law* (Burlington, VT: Ashgate, 2003), 180.

105. *Codex Theodosianus,* 1.4.3.2–4. Translation from *The Theodosian Code and Novels and the Sirmondian Constitution*, trans. Clyde Pharr (Princeton: Princeton University Press, 1952), 15. For an application of this law, see ibid., 9.43.1.

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the Law of Citations is codified later than the Talmudic parallels, it likely has roots in earlier Roman practice.[106] The second part of the Law of Citations is actually already stated ca. 160 C.E. by Gaius in his *Institutes,* 1.7:

> The answers of jurists are the decisions and opinions of persons authorized to lay down the law. If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late emperor Hadrian.[107]

Tony Honoré argues that Gaius's law, which allowed judges freedom to choose between legal authors as long as they were not unanimous, represents an earlier approach to dealing with indeterminacy. Later on, the Law of Citations significantly curtailed this freedom in order "to promote uniform administration of the law."[108] From now on, "a complex system of head-counting is introduced under which the judge will seldom be free to choose the solution he personally prefers."[109] Even with Theodosian's legislation, however, the either-or option remains viable in cases not covered by the majority rule or not discussed by Papinian.

It is possible that a similar development occurred in rabbinic jurisprudence. At an earlier stage, Tannaitic texts offer the either-or option for certain areas of indeterminacy.[110] R. Yoḥanan then added a hierarchy of authorities, although the either-or option still remained in use in cases not covered by R. Yoḥanan's rules. Whatever is their exact development, the Law of Citations and other similar laws may very well have influenced not only R. Yoḥanan's penchant for uniform rules, but perhaps they even served as a model for the forms of these rules. This historical background may further explain why the rules gained widespread acceptance among the Palestinian Amoraim.

To be sure, there were also legal compilations made in Sasanian Babylonia during this period. Most significant is the *Madayan i hazar dadestan* (*The Book of a Thousand Judgements*), compiled ca. 620 C.E.[111] However, while

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106. Just as *Codex Theodosianus* 1.4.3, quoted above, includes laws already declared by Constantine in 321–328 C.E., so too Constantine himself may have been relying on earlier laws or common practices when he formulated his law. R. Yoḥanan died ca. 279 C.E., not long before Constantine's edicts. Also, although the rules are attributed to R. Yoḥanan, they may have been formulated as such only by his students.

107. Edward Poste, *Institutes of Roman Law by Gaius* (Oxford: Clarendon, 1904), 2.

108. Tony Honoré, *Law in the Crisis of Empire, 379–455 AD: The Theodosian Dynasty and Its Quaestors* (Oxford: Clarendon, 1998), 250.

109. Ibid. See also John Methews, *Laying Down the Law: A Study of the Theodosian Code* (New Haven: Yale University Press, 2000), 24–25.

110. See *b. Ber.* 11a, above, p. 68, and references above p. 70 n. 88.

111. For the English translation, see A. G. Perikhanian, *The Book of a Thousand Judgements (A Sasanian Law-Book),* trans. Nina Garsoian (Costa Mesa, CA: Mazda, 1997). For the German translation, see Maria Macuch, *Das sasanidische Rechtsbuch "Matakdan i hazar datistan" (Teil II)*

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this book does quote from a number of previous sources and includes opinions of many jurists, there is no sustained effort at choosing between them nor any general rules about how to decide between these authorities. The *Madayan* can therefore not be classified as a code. In fact, no legal code from Sasanian Babylonia has been preserved.[112] It would seem that diversity of legal sources and opinions was not a major problem for the Sasanians, and they therefore did not have to make concerted efforts at codifying law and developing unifying rules.[113] Ironically, then, it is precisely the great diversity of Roman law that made their legists sensitive to the problems engendered by such diversity and prompted them to codify and systematize their law. Sasanian law, apparently, did not face this challenge. The Babylonian rabbis would therefore also not feel pressure from their surrounding legal culture to codify their laws.[114]

(Wiesbaden: Deutsche Morgenländische Gesellschaft, Kommissionsverlag, F. Steiner, 1981); and idem, *Rechtskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran: Die Rechtssammlung des Farrohmard i Wahraman* (Wiesbaden: Otto Harrossowitz, 1993).

112. See A. G. Perikhanian, "Iranian Society and Law," in *The Cambridge History of Iran, Volume 3(2): The Seleucid, Parthian and Sasanian Periods*, ed. Ehsan Yarshater (Cambridge: Cambridge University Press, 1968), 627–80: "Law was not codified on an all-Iran scale in Sasanian times, and this document [the *Madayan*] is not actually a code but a collection of law-cases embracing all branches of private law" (ibid., 628). See also J. P. de Menasce, "Zoroastrian Pahlavi Writings," in *The Cambridge History of Iran, Volume 3(2)*, 1189; Elman, "Order, Sequence, and Selection," 69; and idem, "Scripture Versus Contemporary Needs: A Sasanian/Zoroastrian Example," *Cardozo Law Review* 28, no. 1 (2006): 153–69.

113. See further below, pp. 374–75.

114. I only claim here that Roman law contained more diversity than Sasanian law, not that Palestinian halakhic traditions or halakhic practices were more diverse than those of the Jews in Babylonia. Although the latter claim may be true, I do not have evidence for it. This book focuses on the attitude of the rabbis toward diversity rather than on the reality of how much diversity existed, partly because Talmudic evidence can more readily address the former than the latter. See above, p. 2.

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