

Rebellious Elder: Tannaitic and Amoraic Transformation of a Biblical Institution

One way in which the rabbis grounded their authority to legislate halakha for all of Israel is by appropriating for themselves the positions previously held by the judges and priests during Temple times. Deuteronomy 17:8–13 grants full judicial authority to the high court in Jerusalem, which can mete out the death penalty for anyone who disobeys its decision. The Tannaim and Amoraim reinterpret various aspects of these verses so that the law refers to their own halakhic rulings. It is interesting to note that the rabbis use this law not so much to assert their authority over the masses but rather to suppress dissenting rabbis from breaking away from the mainstream rabbinic rulings. While no Tanna or Amora goes to the extreme of advocating the death penalty for a colleague who disobeys the majority decision, there is still a wide range of opinions about how fully the biblical law should be mapped onto rabbinic disputes.

The extent to which various rabbis confine the law to the biblical context, prop it up as a theoretical model, or attempt to use it in practice can reveal their general attitude toward dealing with rabbis who espouse divergent halakhic practices. In this chapter, we trace the ways in which the Tannaim, and Palestinian and Babylonian Amoraim transformed the biblical law with an eye toward how this transformation reflects on their attitude regarding halakhic pluralism. We will show that while Palestinian texts attempt to extend the law of rebellious elder into the rabbinic period, the Bavli greatly limits its application to the point of being almost completely obsolete. This reflects the Yerushalmi's relative intolerance for diversity compared to that of the Bavli.

The Biblical Law

As part of its regulation of the judicial branch of the government, Deuteronomy requires all regional courts to answer to a central high court.¹ Deuteronomy 17:8–13 details the process and punishments involved:

(ח) כִּי יִפְלֵא מִמֶּךָ דְבַר לְמִשְׁפָּט בֵּין דָּם לְדָם בֵּין דִּין לְדִין וּבֵין נֶגַע לְנֶגַע דְבָרֵי רִיבֹת בְּשַׁעֲרֵי
 וְקִמְתָּ וְעָלִיתָ אֶל הַמָּקוֹם אֲשֶׁר יִבְחַר יְהוָה אֱלֹהֶיךָ בּוֹ:
 (ט) וּבָאתָ אֶל הַכֹּהֲנִים הַלְוִיִּם וְאֶל הַשֹּׁפֵט אֲשֶׁר יִהְיֶה בַּיָּמִים הַהֵם וְדִרְשָׁתָּ וְהִגִּידוּ לְךָ אֵת
 דְבַר הַמִּשְׁפָּט:
 (י) וְעָשִׂיתָ עַל פִּי הַדָּבָר אֲשֶׁר יִגִּידוּ לְךָ מִן הַמָּקוֹם הַהוּא אֲשֶׁר יִבְחַר יְהוָה וְשִׁמְרָתָּ לַעֲשׂוֹת
 כְּכֹל אֲשֶׁר יֹרֹדָהּ:
 (יא) עַל פִּי הַתּוֹרָה אֲשֶׁר יֹרֹדָהּ וְעַל הַמִּשְׁפָּט אֲשֶׁר יֹאמְרוּ לְךָ תַעֲשֶׂה לֹא תִסּוּר מִן הַדָּבָר אֲשֶׁר
 יִגִּידוּ לְךָ יָמִין וּשְׂמָאל:
 (יב) וְהָאִישׁ אֲשֶׁר יַעֲשֶׂה כְזָדוֹן לְבַלְתִּי שָׁמַע אֶל הַכֹּהֵן הַעֹמֵד לְשַׁרְתָּ שֵׁם אֵת יְהוָה אֱלֹהֶיךָ אוֹ
 אֶל הַשֹּׁפֵט וּמַת הָאִישׁ הַהוּא וּבְעֵרְתָּ הָרַע מִיִּשְׂרָאֵל:
 (יג) וְכָל הָעָם יִשְׁמְעוּ וְיָרְאוּ וְלֹא יִזְדוּן עוֹד:

⁸If a case is too baffling for you to decide, be it a controversy over homicide, civil law, or assault—matters of dispute in your courts—you shall promptly repair to the place that the LORD your God will have chosen, ⁹and appear before the levitical priests, or the magistrate in charge at the time, and present your problem. When they have announced to you the verdict in the case, ¹⁰you shall carry out the verdict that is announced to you from that place that the LORD chose, observing scrupulously all their instructions to you. ¹¹You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left. ¹²Should a man act presumptuously and disregard the priest charged with serving there the LORD your God, or the magistrate, that man shall die. Thus you will sweep out evil from Israel: ¹³all the people will hear and be afraid and will not act presumptuously again.²

A number of issues present themselves when interpreting this pericope. These issues are discussed in rabbinic sources, medieval commentaries, and modern scholarship. We will first try to recover the original intent of the biblical law in order to better appreciate how it was later transformed by the rabbis.

1. This court may have had larger legislative and executive duties as well, but this passage emphasizes the role of the court as final deciders in difficult cases or making the law in the absence of any other precedent. It was not a court of appeals in the sense that they overruled a decision of a lower court, but rather was consulted when the local authorities could not come to a decision.

2. NJPS translation.

First, it is not clear to whom the law is being addressed. The first two verses address a local judge who does not know the law regarding a particular case, “If a case is too baffling for you....”³ However, vv 10–13 seem to address the citizen of Israel who is to carry out the teaching of that high court in practice. Verse 12 clearly refers to “the man who acts,” that is, the litigant, not the judge.⁴ It would be strange for a local court to refuse to decide according to the ruling of the high court to whom it deferred. If the local court felt strongly about a case it would not have needed to request a decision from the higher court in the first place. Even if the judges are the ones charged to go to the high court, however, the severe punishment must be aimed at the litigants as a deterrent for the rest of the nation. It seems clear that it is one of the litigants who is most likely to reject the pronouncement of the high court on a new law that does not go in his favor. The passage begins addressing the local court, for it is they who will refer the case to the high court. But the focus of the law applies to the litigants themselves.

Second, who is to sit on the court? Deuteronomy 17 envisions a court made up of a combination of priests and nonpriests, which would be natural in Jerusalem—the city of priests. The relationship between the priests and the nonpriestly judges, however, is not clear.⁵ Third, the location of

3. Peter C. Craigie, *The Book of Deuteronomy* (Grand Rapids, MI: Eerdmans, 1976), 252, writes that “the local judges were to inquire about the case” not the litigants, but see n. 6 there. See also Jeffrey Tigay, *The JPS Torah Commentary: Deuteronomy* (Philadelphia: Jewish Publication Society, 1996), 164, who compares the judges who bring cases to the high court with the elders who bring cases to Moses in Deut 1:17. The chiefs similarly bring the difficult cases to Moses in Exod 18:22. The existence of local courts is mandated by Deut 16:18–20. The word “בשעריך—in your gates” in Deut 17:8 refers back to the same word in 16:18 and probably denotes not just “your cities” in general but rather the courts or councils of elders, which would meet at the city gate.

4. See Tigay, *Deuteronomy*, 165.

5. Regarding the placement of priests on the high court, a feature reiterated in Deut 19:17 and 21:5, it is obvious throughout the Bible that priests dealt with more than just the cult. Leviticus 10:11 commands them to teach the people all of the laws, and Deut 17:18, 31:9 and 24 place them in charge of safekeeping the scroll of the Torah. Ezekiel 44:24 attributes adjudication of both ritual and civil laws to the levitical priests. In later times, 1 Chron 23:4 counts 6,000 Levites as officers and judges. It may have been the common practice to have priests and lay judges together as seen in 2 Chron 19:8–11, where Jehoshaphat makes a court in Jerusalem with priests, Levites, and laymen. In that case there seems to be some separation of powers between the head priest who presides over matters of God and the head of the house of Judah who presides over royal matters.

Craigie, *The Book of Deuteronomy*, 252, suggests that “the particular function of the priests would be to legislate on matters of ceremonial law, and that of the judge to legislate on matters of civil and criminal law” (even though he rejects such a clear distinction in a theocracy so both priests and judges saw all cases). However, we see the priest being part of the judgment in a civil case in Deut 19:17. Deuteronomy 21:5 also says about the priests that “by their word every dispute and every assault shall be settled.” S. R. Driver, *Deuteronomy*, International Critical Commentary (Edinburgh: T. & T. Clark, 1978), 209, commenting on v.

the court is confined to “the place that the Lord your God will have chosen,” as part of the Deuteronomic program of centralization. This requirement, however, will be questioned in rabbinic texts.

Finally, what types of cases were reviewed by this court? The plain meaning of “between blood and blood” here connotes different types of injury or killing; the court may have difficulty distinguishing between murder and manslaughter in a particular case.⁶ נגע can mean leprosy when joined with a modifier, as in נגע צרעת;⁷ but, by itself, it means a blow⁸ or affliction.⁹ The latter definitions better fit the rest of v. 8, which introduces and concludes the list of items with words relating to civil laws, namely, ריבה and משפט.¹⁰ Questions of purity and impurity were usually decided by an individual priest and did not require deliberation before a court.¹¹ Therefore, this high court dealt primarily with matters of civil and criminal dispute. The Midrashim and Talmuds will address all of these issues.

12, suggests that although the priests and lay judges were involved in all cases, “the verdict was delivered sometimes by the ecclesiastical president of the board, sometimes by its civil president; the procedure may have varied according to the nature of the case under consideration.”

Other scholars resort to source criticism and find two strands of court traditions here. Some say that the priests are original while others argue that the judges are original. Steuernagel says two independent traditions are combined here. Originally there were two types of courts, but then both types were combined because of centralization. These views are summarized in Moshe Weinfeld, *Deuteronomy and the Deuteronomistic School* (Oxford: Clarendon, 1972), 235–36. See also Yehezkel Kaufmann, *History of Israelite Religion from Antiquity to the End of the Second Temple*, 3 vols. (Jerusalem: Mosad Bialik, 1955–1960), 2:466–67 (Hebrew); and Alexander Rofe, *Introduction to Deuteronomy* (Jerusalem: Akademon, 1988), 75–85 (Hebrew).

6. The phrase בין דם לדם is interpreted by *Sifre* 152, cited below p. 312, to refer to purity laws regarding different categories of uterine bleeding. However, there is no indication that such cases require any judgment by a priest or outside authority. Unlike Leviticus 13–14, where a decision by a priest is required, Leviticus 15 assumes that a woman can determine the status of blood on her own based on its timing. See also Rashbam, Ibn Ezra, and Ramban to Deut 17:8.

7. Leviticus 13:2. When נגע stands alone in this chapter, it usually has a definite article, thus referring to the specific affliction in question to decide whether or not that affliction is a case of leprosy. Only in Lev 13:22 is נגע used alone to refer to the impurity of the affliction, but even here it only has this specific connotation because of the context. Generally, the word means any affliction, whether impure or not.

8. See Deut 21:5. Cf. Gen 26:11; and 32:26, 33. See also Tigay, *Deuteronomy*, 373 n. 37.

9. See Exod 12:1; 1 Kings 8:37–38; Ps 38:12; and Prov 6:33.

10. For ריב in a civil context see Exod 21:18. Ibn Ezra, Ramban, and Shadal already explain Deut 17:8 to refer only to civil and criminal law. See also Isaac Sassoon, *Destination Torah* (Hoboken, NJ: Ktav, 2001), 292–95.

11. See Leviticus 13–14.

Rabbinic Interpretation of Biblical Passages

Tannaitic sources on this passage are found in *Sifre Deuteronomy* 152–155, *m. Sanh.* 11:2–4, and *t. Sanh.* 3:4, 7:1, 11:7, and 14:12. This law comes to be known as *zaken mamre*, rebellious elder, in these sources. This name itself is a significant departure from the original law, as we will see below. In both Talmuds, the major discussion of this topic is presented as commentary on *m. Sanh.* 11:2–4.¹² Other references to and stories involving the rebellious elder will be discussed below.

Tannaitic sources begin to reinterpret this passage in various ways and transform it into a law that would be relevant to their contemporary circumstances. The original biblical law spoke to the needs of a sovereign nation in need of a civil and criminal judicial authority in order to maintain peace and justice. The rabbis, under foreign rule and without a centralized judicial system, transposed this passage to the realm of rabbinic dispute and halakhic decision making. *M. Sanhedrin* 11:2 sets forth the basic procedure of this case:

[A] זקן ממרא על פי בית דין שנאמר כי יפלא ממך דבר למשפט וגו'
 [B] שלשה בתי דינין היו שם אחד יושב על פתח הר הבית ואחד יושב על פתח העזרה
 ואחד יושב בלשכת הגזית באים לזה שעל פתח הר הבית ואומר כך דרשתי וכך דרשו
 חבירי כך לימדתי וכך לימדו חבירי אם שמעו אומרים להם
 ואם לאו באין להם לאותן שעל פתח העזרה ואומר כך דרשתי וכך דרשו חבירי כך לימדתי
 וכך לימדו חבירי אם שמעו אומרים להם
 ואם לאו אלו ואלו באים לבית דין הגדול שבלשכת הגזית שממנו יוצאת תורה לכל ישראל
 שנאמר מן המקום ההוא אשר יבחר ה'
 חזר לעיר ושנה ולימד כדרך שהיה למד פטור ואם הורה לעשות חייב שנאמר והאיש אשר
 יעשה בזדון אינו חייב עד שיורה לעשות
 [C] תלמיד שהורה לעשות פטור נמצא חומר קולו:

[A] An elder who rebels against the court as the verse says, “If a matter of law should be too exceptional for you...” (Deut 17:8).

[B] There were three courts there. One sat at the entrance to the Temple mount, one sat at the entrance to the courtyard, and one sat in the chamber of hewn stone.¹³ They came to that which was

12. Chapter 11 of the Mishnah became the tenth chapter in most manuscripts and all printed editions of the Bavli. On the history of this change see Mordechai Sabato, *A Yemenite Manuscript of Tractate Sanhedrin and Its Place in the Text Tradition* (Jerusalem: Yad Izhak Ben-Zvi, 1998), 220–21 (Hebrew).

13. On the meaning of this location see Guttman, *Rabbinic Judaism in the Making*, 27. We must agree with Guttman that “These Mishnah passages show that the Tannaim did not intend to describe the ‘Sanhedrin’ of Javneh, nor to give a historical account of the Sanhedrin of Jerusalem, but rather attempted to describe the *ideal* Sanhedrin” (ibid., 23). This chapter

at the opening of the Temple mount and he says, “Such have I interpreted and such have my friends interpreted; such have I taught and such have my friends taught.” If they learned [that law previously] they tell them.

If not, they come to those at the entrance to the courtyard and he says, “Such have I interpreted and such have my friends interpreted; such have I taught and such have my friends taught.” If they have learned [that law previously] they tell them.

If not, these and those come together to the great court in the chamber of hewn stone from which Torah comes forth to all of Israel, as the verse says, “From that place that God will choose” (Deut 17:10).

If he returns to his city and repeats and teaches just as he had taught before, he is innocent. However, if he issues a practical ruling, he is liable, as the verse says, “Should a man act presumptuously” (Deut 17:12). He is not liable until he issues a practical ruling.

[C] If a student teaches in practice he is innocent. His stringency turns out to be his leniency.

Whom Does the Law Address?

The Mishnah labels the subject of this law a “rebellious elder,” and quotes the passage beginning in Deut 17:8, even though the verse makes no mention of an elder. Part C of the Mishnah explains further that the law does not apply to a student but only to one who has authority to decide halakha, whom the Mishnah calls a זקן, “wise elder.”¹⁴ A similar limitation is also found in *Sifre* 152 on that same verse:

too will not deal with the history of the Sanhedrin or of the institution of the rebellious elder but rather will trace the intellectual history of what the Tannaim and Amoraim taught about how a theoretical Sanhedrin would deal with a hypothetical rebellious elder. For a discussion of the historical Sanhedrin, see above p. 7 n. 21; and Hugo Mantel, *Studies in the History of the Sanhedrin* (Cambridge: Harvard University Press, 1965), 54–101.

14. *Zaken* is used in the sense of a high judge in *m. Zebah.* 1:3; *t. Sukkah* 4:6; *t. Šeqal.* 3:27; *t. Sanh.* 7:11; 8:1; *t. Hul.* 2:24; *t. 'Ohal* 17:12; *t. Yad.* 2:18; *Semaḥot* 3:10; 8:7; and 11:19. It is used in the sense of a great scholar in *y. 'Abod. Zar.* 2:8 (42a) (see text below, p. 329 n. 104) and as an honorific, as in Shammai ha-Zaken, Hillel ha-Zaken, Rabban Gamaliel ha-Zaken, etc. The term derives from the seventy elders who assisted Moses in Exod 19:7; Num 11:16–17; and Deut 27:1. See further at Mantel, *Sanhedrin*, 99; Hezser, *Social Structure*, 277–86; and Miller, *Sages and Commoners*, 438.

The description of the elder as “ממרד—rebellious” may predate the Mishnah. See Aaron Shemesh, “Halakha u-nevu'ah: navi sheqer ve-zaqen mamre,” in *Renewing Jewish Commitment: The Work and Thought of David Hartman*, ed. Avi Sagi and Zvi Zohar (Jerusalem: Shalom Hartman Institute and Hakibbutz Hameuchad, 2001), 925 n. 6. Shemesh traces the

הגזית ושאר בתי דינין של עשרים ושלושה היו בעיירות של ארץ ישראל ושאר¹⁷ בתי דינין של שלושה שלושה¹⁸ היו בירושלם אחד בהר הבית ואחד בחיל נצרך אחד מהן הלכה הולך לבית דין שבעירו אין בית דין בעירו הולך לבית דין הסמוך לעירו אם שמעו אמרו לו¹⁹ אם לאו הוא ומופלא²⁰ שבהם באין לבית דין שבהר הבית אם שמעו אמרו להן ואם לאו הן²¹ ומופלא שבהן באין לבית דין שבחיל אם שמעו אמרו להן ואם לאו אילו ואילו הולכין לבית דין הגדול שבלשכת הגזית... נשאלה שאילה אם שמעו אמרו להם ואם לאו עומדין למינין רבו המטמאין טימאו רבו המטהרין טהרו משם היה יוצאת הלכה ורווחת בישראל משרבו תלמידי שמאי והילל שלא שימשו כל צורכן הרבו מחלוקות בישראל.

R. Yose said: At first there were no divisions within Israel except within the court of seventy-one members in the chamber of hewn stone. And there were other courts of twenty-three members in the cities of the land of Israel. And there were other courts of three each in Jerusalem, one on the Temple mount and one at the *hel* (rampart).

If one²² was required [to learn] a halakha, he would go to the court in his town. If there was no court in his town, he would go to the court in the next town. If they had heard [the law], they told him. If not, he and *mufla* among them would come to the court that was on the Temple Mount. If they had heard [the law], they told them. And if not, they and the *mufla* among them would come to the court that was at the *hel*. If they had heard they told them, and if not, these and those would go to the high court that was in the chamber of hewn stone....

first edition of *t. Sanh.* 7:1, as well as the version of the Tosefta in *y. Sanh.* 1:4 (19c) and *b. Sanh.* 88b read בית דין or סנהדרין without the preposition. In these versions the high court is not an exception to the condition of unity but rather it begins the list of various courts. See partial translation on p. 167. This list introduces the next part of the Tosefta, which delineates the procedure for moving from the lowest to the highest court. See Rosen-Zvi, "Ha-umnam," n. 140, who argues that the versions without the preposition are original.

17. Ms. Vienna and the first edition of *t. Sanh.* 7:1, mss. Erfurt and London and first edition of *t. Hag.* 2:9, *y. Sanh.* 1:4 (19c) and *b. Sanh.* 88b read ושני. Ms. Vienna of *t. Hag.* 2:9 reads שני.

18. *B. Sanh.* 88b reads עשרים ושלושה. Ms. Vienna and first edition of *t. Sanh.* 7:1 read שלושה only once.

19. Mss. Erfurt and London of *t. Hag.* 2:9 and *y. Sanh.* 1:4 (19c) also read לו. Ms. Vienna and first edition of *t. Sanh.* 7:1 and the first edition of *t. Hag.* 2:9 read להם. Ms. Vienna of *t. Hag.* 2:9 and *b. Sanh.* 88b read להן.

20. Ms. Erfurt of *t. Hag.* 2:9 reads מופלג.

21. The parallel in *t. Hag.* 2:9 has הוא in ms. Vienna but הן in ms. Erfurt.

22. The Tosefta literally translates, "if one of them requires a halakha." The pronoun here seems *prima facie* to refer to the immediately preceding list of courts. However, it would not make sense to say that if the court requires a halakha then it should go to the court. Therefore, the referent must be to any individual.

A question would be asked. If they heard they told them. If not, they would take it to a vote. If those who declared it impure had the majority, they declared it impure; if those who declared it pure had the majority, they declared it pure. From there did the law emanate and spread throughout Israel. Once the students of Shammai and Hillel, who did not serve sufficiently, became numerous, divisions multiplied in Israel.²³

Part B of the Mishnah is a modified excerpt from this Tosefta. The Tosefta seems to be more original because it provides a more detailed account of the court system and the entire description integrates more smoothly with the context of the Tosefta.²⁴ The Tosefta describes the ideal system of old where every local controversy would be decided at some point in the judicial hierarchy. In the Mishnah, however, the description is somewhat superfluous, since all we need to know is the final stage of the *zaken* receiving instruction from the supreme court.²⁵

That the Mishnah must be derived from the Tosefta is most evident when analyzing the subjects of the verb in each. The Tosefta does not deal with litigants but rather with one who “was required [to learn] a halakha.” That person goes to the local court. If the local court does not know, then the inquirer goes along with the *mufla* of the local court to the court at the Temple Mount. The Tosefta starts with a single person, *נצרך אחד מהן הלכה*, *הולך*, and turns to the plural at the next stage once the *mufla* of the local court joins him, *הוא ומופלא שבהם באין*. If that court also does not know, the inquirer and the *mufla* of the local court go along with the *mufla* of the court at the Temple Mount to the court at the *hel*. If they too do not know, then “these and those—אלו ואלו” go to the highest court. Albeck explains that *אלו ואלו* refers here to the previous group of the inquirer and two *mufla* judges along with the entire court at the *hel*.²⁶

The Mishnah, however, skips the first stage of the Tosefta that takes place at the local court. The Mishnah begins with a single person, *זקן ממרא*,

23. *T. Sanh.* 7:1. See pp. 167–69 for further analysis of parts of this Tosefta. Parallels are found in *t. Hag.* 2:9, *y. Sanh.* 1:4 (19c), and *b. Sanh.* 88b.

24. Brandes, “Beginnings of the Rules,” 94 n. 1, assumes that the longer Tosefta must include later additions to the earlier Mishnah. I disagree for the reasons spelled out in this and the next paragraphs.

25. Note that the biblical law does not necessarily refer to a permanent court but rather could be an ad hoc council put together when necessary. The first reference to a permanent court in the context of this law is Josephus, *Antiquities*, 4.8.14, who says that difficult cases go to the holy city where “the high priest, the prophet, and the council of elders (*gerousia*)” determine it. Josephus adds the reference to a court, thus predating this aspect of the interpretation found in the Mishnah. See also Steve Mason, ed., *Flavius Josephus: Translation and Commentary* (Leiden: Brill, 2000), 3:410–11; and Goodblatt, *Monarchic Principle*, 95–97.

26. Albeck, *Mishnah, Nezikin*, 458.

but then jumps to the plural, באים, without explanation, even though the continuation offers only the voice of a single person in front of the court, כך דרשתי וכך דרשו חברי כך לימדתי וכך לימדו חברי. The next stage at the court situated at the entrance of the courtyard presents the same problem of the plural, באין, followed by the statement of only a single person. The Mishnah removes any mention of the *mufla* here, thus causing confusion about who joins the litigant in going to the next court.²⁷ At the final stage of the Mishnah, the plural is doubled to אלו ואלו באים. It is not at all clear to which two groups of people this refers since nobody besides the elder himself is mentioned beforehand as coming to the next court. Rather, the Mishnah seems to have kept the language of the Tosefta even though the singular and plural nouns and verbs no longer fit into the new context, which removes the *mufla*.²⁸

More significant than these procedural details, however, is the change in context between the two texts. The Tosefta, making no explicit reference to Deuteronomy 17, deals with legal controversy and how it was resolved through the judicial system during ideal times.²⁹ The Mishnah, on the other hand, codifies the laws stemming from Deuteronomy 17, which deals with civil suits and individual cases. By importing the Tosefta's discussion of legal controversy into the context of the rebellious elder, the Mishnah effectively rewrites the law of Deuteronomy 17 to be one concerning not the masses and their lawsuits but the rabbis themselves and their controversies. As was mentioned above, this is evident just from giving Deuteronomy 17 the title זקן ממרא, which itself limits the applicability of the law to senior rabbis. This textual appropriation from a context of rabbinic controversy realizes even further the rewriting of the biblical law to adapt it to rabbinic ideology.³⁰ If, according to the biblical law, it is the litigants who go to the high court, in the Tannaitic reinterpretation, it is the judges (Sifre) or the rabbis (Mishnah) who go to the court.

The substance of the cases is also different. The Mishnah inserts into the Tosefta a sample query of the court: ואומר כך דרשתי וכך דרשו חברי כך לימדתי

27. The version of the Tosefta in *b. Sanh.* 88b has already been updated to conform to the Mishnah by removing *mufla* and adding "ואומר כך דרשתי וכך...חברי". The Bavli also substitutes the court at *hel* mentioned in the Tosefta with the court at the entrance to the *'azarah*, which is mentioned in the Mishnah.

28. The removal of the word *mufla* from the Mishnah's quotation of *t. Sanh.* 7:1 may be part of the same updating as the replacement of *mufla* in Sifre 152 with *zaken* in *m. Sanh.* 11:2, as noted above n. 15.

29. The Tosefta is likely based on the outline of Deuteronomy 17, in which a local person who does not know the law goes to inquire at the Temple court. See Rosen-Zvi, "Ha-'umnam," who calls the Tosefta a "concealed midrash" to Deuteronomy 17. Still, the Tosefta does not deal with the law of the rebellious elder but rather focuses only on the normal procedure of the court.

30. For an unconvincing treatment of the differences between this Mishnah and Tosefta, see Fisch, *Rational Rabbis*, 66–68.

וכך לימדו חבירי. The content of the dispute does not involve any litigants but rather interpretations of Scripture (כך דרשתי) or traditional teachings (כך לימדתי). The language used in this Mishnah does not fit well with the context of a baffled court. “Such have I interpreted and such have they interpreted” sounds not so much like a speechless court that cannot come up with an answer but rather like a study session where there are too many opinions. This is not a group of baffled judges but a clash between a majority and a minority group of rabbis. The Mishnah ends, “if he goes back and teaches as he used to.” This deals not with a citizen involved in litigation but rather an interpreter and teacher of the law. The important matter is not how he himself practices when he goes back to his town, as the verses imply, but rather how he teaches others to practice.³¹

Fraade’s comments on *Sifre* 152 are equally true for the Mishnah: “The intellectual and teaching role of the central courts is emphasized, rather than their strictly juridical function and authority. The central courts decide not so much between conflicting parties in a civil or criminal dispute as between *sages* who differ in their legal interpretations.”³²

Where Does the Law Apply?

As part of their reapplication of Deut 17:8–13 from the context of a national high court to the *beth midrash*, the Tannaim also discuss whether the law of the rebellious elder applies to the rabbinic court/council at Yavneh or any other central place where the rabbis met after the destruction of the Temple. Even though the verse limits the law to Jerusalem, “the place that God shall choose,” *Sifre Deut. pisqa* 153 finds an extra word to include Yavneh: ובאת לרבות בית דין שביבנה—“And you shall come (Deut 17:9): this includes the court at Yavneh.”³³ This has the effect of extending the law, which might have become irrelevant with the loss of Jerusalem, into the rabbinic era.

The next *pisqa* of the *Sifre*, however, takes a step back by adding that

31. This point is also expressed by *t. Sanh.* 14:12 and *y. Sanh.* 11:3 (30a), which similarly stress teaching others, although they also require that the elder has practiced or will practice himself. However, *Sifre Deut., pisqa* 155 (ed. Finkelstein, 207) requires that the judge actually perform an action against the high court and does not require that he teach: “אשר יעשה—על” “מעשה הוא חייב ואינו חייב על הוריה” (ed. Finkelstein, 207). It is possible to explain the end of the *Sifre* as “he is not liable if he [only] teaches.” I.e., the *Sifre*’s case is similar to the case of “הורה ולא עשה פטור” in the *Tosefta* and *Yerushalmi* and requires both practicing *and* teaching. *B. Sanh.* 88b, on the other hand, holds one liable whether he performs *or* teaches “אינו חייב: תנו רבנן: אינו חייב עד שיעשה כהוראתו, או שירה לאחרים ויעשו כהוראתו.” See Daniel Sperber, “Sugya aḥat be-masekhet Horayot,” *Sinai* 70 (1972): 3 n. 13, for a slightly different categorization of these sources.

32. Fraade, *From Tradition to Commentary*, 85. Italics are in the original.

33. Ed. Finkelstein, 206. “The place that God shall choose” is always assumed by the rabbis to be Jerusalem, and therefore an extra word is required to include any other location.

only rebellion against the high court in Jerusalem warrants the death penalty: ועשית על פי הדבר על הורית בית דין הגדול שבירושלם חייבים מיתה ואין חייבים מיתה על: על שביבנה הורית בית דין שביבנה—“*You shall act according to the words* (Deut 17:10): One is liable to death for [disobeying] the ruling of the great court in Jerusalem but one is not liable to death for [disobeying] the ruling of the court at Yavneh.”³⁴ Even though no rabbi was allowed to disobey the majority at Yavneh, the Yavnean council could not sentence a colleague to death for doing so.³⁵ This interpretation provides a lower level of authority for the Yavnean court.

The Yerushalmi, however, adds a gloss after quoting this same midrash, which may offer a slightly different explanation: ובאת לרבות בית—דין שביבנה. רבי זעירא אומר לשאיילה—“*And you shall come*: including the court at Yavneh. R. Zeira says, for an inquiry.”³⁶ That is, if an elder rebels against a decision made concerning “an inquiry” asked of the Yavneh court, then that elder is liable to death. However, the Yavneh court itself may not punish him. Only the Jerusalem court can mete out the punishment, perhaps so that the punishment will be made more public³⁷ or perhaps because this law concerns the judicial system of the nation as a whole and so requires the adjudication at the highest court.³⁸ Either way, the Yerushalmi maintains that the reason one is not liable to death for disobeying the Yavneh court is not because it has any less authority but only because that court lacks the means to practically execute the punishment.³⁹ At a theoretical level, however, the Yavneh court may hold the same authority and demand the same level of obedience as the high court of Jerusalem.⁴⁰

34. *Sifre Deut.*, *pisqa* 154 (ed. Finkelstein, 207).

35. This reading takes the two statements of the Sifre as complementing each other, not disagreeing. See *ibid.*, 206, comment on line 10, for this reconciliation. It would be incorrect to interpret the second statement to mean that one is not liable in Yavneh and therefore permitted. It is clear from the next line in that *pisqa* that a distinction is being made between מיתה חייבים and a general prohibition. See more on this below.

36. *Y. Sanhedrin* 11:3 (29d).

37. *M. Sanhedrin* 11:4 rules that the rebellious elder is not killed in a local or Yavnean court but only in the high court in Jerusalem on a festival so that the punishment will be more public and serve as an example to deter others from doing the same. This is the opinion of R. Akiba, while R. Yehudah, who says one kills him immediately, would presumably also dispense with the need to bring him to the Jerusalem court. *Pene Moshe* interprets that R. Zeira seeks to reconcile the Midrash that includes Yavneh with the opinion of R. Akiba.

38. *M. Sanhedrin* 1:8 lists many laws that can be decided only by the high court of seventy-one. A common denominator between these cases is that they all concern national interests. The law of the rebellious elder, however, is not listed here.

39. Perhaps this is part of a larger reluctance or inability to use the death penalty after losing national sovereignty. See texts cited by Hammer-Kossoy, “Divine Justice in Rabbinic Hands: Talmudic Reconstitution of the Penal System,” 14–19. The Romans did not authorize Jewish courts to mete out the death penalty. See Guttmann, *Rabbinic Judaism in the Making*, 19–21; and Aharon Oppenheimer, “Jewish Penal Authority in Roman Judaea,” in *Jews in a Graeco-Roman World*, ed. Martin Goodman (Oxford: Clarendon, 1998), 181–91.

40. See Finkelstein, *Sifra*, 5:57. Finkelstein argues that the redaction of Sifre Deuter-

We see in the *Sifre* and the Yerushalmi a move to extend the law of the rebellious elder, even if only a limited version, to the rabbinic court at Yavneh. There seems, however, to be an alternate view among the Tannaim. The Bavli version of the midrash, which is also included in *Midrash Tannaim*,⁴¹ focuses not on the word *ובאה*—“and come” (v 9) to include Yavneh, but rather on the words “to the place” (v 8), to exclude any place but the Temple. *B. Sanhedrin* 87a reads: *אל המקום מלמד שהמקום גורם*—“*To the place, this teaches that the place determines.*” Bavli *Sanhedrin* 14b elaborates further:

תניא כוותיה דרב יוסף: מצאן אבית פאגי והמרה עליהן, כגון שיצאו למדידת עגלה, ולהוסיף על העיר ועל העזרות, יכול שתהא המראתו המראה—תלמוד לומר וקמת ועלית אל המקום מלמד שהמקום גורם.

It was taught in accordance with Rav Yosef: **If one found them [the court] at Beth Page and rebelled against them, for example, if they went for the measurement for a heifer or to extend a city or the Temple courts, is it possible that his rebellion is considered a [formal act of] rebellion? The text therefore states, *You shall arise and go to the place, this teaches that the place determines.***⁴²

This *baraita* discusses a case when the high court of Jerusalem itself happens to meet at an alternate location for some reason. In such a case, an act of rebellion is not only unpunishable but is not considered an act of rebellion at all.⁴³ This *baraita* ties the power of the court to its location within the Temple. Therefore, even the same members at a different location, and cer-

omy began in Yavneh during the time of Yoḥanan ben Zakkai. This would explain the push in the *Sifre* to raise the status of the Yavneh court. The Mekhilta on Debarim may have had different origins and therefore reflected a different attitude towards Yavneh. This is impossible to prove, however, without a reliable edition of the Mekhilta. See next paragraph.

41. David Hoffmann, *Midrasch Tannaim zum Deuteronomium* (Berlin: H. Itzkowski, 1909), 102, on Deut 17:8.

42. See parallels in *b. Sanh.* 87a; *b. Soṭah* 45a; and *b. ʿAbod. Zar.* 8b.

43. This follows my translation above, which I think follows the Hebrew most literally. By contrast, Soncino (to *b. Soṭah* 45a) translates “... it is possible to think that his act of rebellion is punishable.... This teaches that the place determines [whether the act of rebellion is punishable].” According to this translation, one is prohibited from disobeying the court even when not at their location but one is not given the death penalty for such action. According to this explanation, one could reconcile this Midrash with the *Sifre*. However, this translation is not faithful to the Hebrew, adding more commentary than is warranted. In any case, even if one does interpret this *baraita* as addressing only the punishment aspect of the law, the rhetorical force of each statement is still significantly different. The *Sifre* goes out of its way to include Yavneh in a blanket statement and then adds a caveat about the limitation of the punishment, while the Bavli *baraita* simply limits the law to Jerusalem with no mention of Yavneh at all.

tainly a newly formed court at Yavneh, would not have the same authority to punish dissenters. By raising the central court to unique authority as if the location itself provides them with exclusive power, this *baraita* ironically ends up degrading every other court.

We thus find differences of opinion in the Tannaitic and Amoraic sources regarding the application of the law of the rebellious elder to the court at Yavneh, and perhaps later courts as well.⁴⁴ The original discussion, as reflected in the *Sifre* and Yerushalmi *baraita*, on the one hand, and *Midrash Tannaim* and the Bavli *baraita*, on the other, may reflect tensions by the Tannaim living after the destruction about the status of Yavneh itself. However, this issue would not have been relevant in Amoraic times. It therefore seems significant that the Yerushalmi quotes the *Sifre* version, which includes Yavneh, while the Bavli's *baraita* excludes any other court besides that in the chamber of hewn stone.

We do not know whether both interpretations were available to the redactors of the Talmuds or whether each Talmud already included different versions of the Tannaitic material in their proto-formats. One can conceive of at least three possibilities for the provenance of the Bavli *baraita*: (1) The Bavli redactors received a version of the *Sifre*, ignored it, and created an artificial "*baraita*" to counter it. (2) The Bavli redactors received two Tannaitic traditions and chose the more restrictive versions. (3) The Bavli redactors received only the *baraita* that was part of the *protosugya*. According to the first two possibilities, one can posit that the redactors of the Bavli, where multiple practices were tolerated, ignored the version of the *Sifre* and Yerushalmi in favor of a restrictive interpretation that relegated the entire law of the rebellious elder to an unrecoverable past and understood it as significant only for theoretical discussion. According to the third option, the presence of the restrictive *baraita* in the Bavli and not in the Yerushalmi may be based either on an accident of transmission history or on the decision (perhaps subconscious) of Amoraim to prefer this tradition over the *Sifre* version. Similarly, we do not know whether the Yerushalmi redactors had a choice of two alternate traditions or whether they only received the *Sifre* version. Thus, we cannot posit with certainty that the difference between the two Talmuds is a result of purposeful redactional choices based on differing attitudes toward diversity. However, having analyzed many examples in previous chapters of this study of the Talmuds making redactional choices based on their respective views toward diversity—evidence that relies on explicit statements and on readily evident redactional choices—we propose that this is yet another such

44. For the way the Talmudic discussion plays out in the writings of Maimonides, who extends the authority of the Sanhedrin, and Nahmanides, who limits it, see Yonason Sacks, "The Mizvah of 'Lo Tasur': Limits and Applications," *Tradition* 27, no. 4 (1993): 49–60, and other essays in that same volume.

example. Whatever the prehistory of each *sugya*, it seems significant that the interpretations found in each Talmud fit into the general pattern of the Yerushalmi furthering the cause of uniformity by extending the law of the rebellious elder and the Bavli tolerating diversity by limiting the same law.

Who Sits on the Court?

The next line of *pisqa* 153 in the *Sifre* continues to update the law of the rebellious elder to fit in with the rabbinic era. Deut 17:9 specifies that the *כהנים הלויים*—“the levitical priests”—are to be part of the tribunal. The Midrash, however, explains that it is preferable to have priests and Levites on the tribunal, but not necessary:

אל הכהנים הלויים, מצוה בבית דין שיהיו בו כהנים ולויים יכול מצוה ואם אין בו יהא פסול תלמוד לומר ואל השופט, אף על פי שאין בו כהנים ולויים כשר.

To the Levitical priests: It is a commandment that a court should include priests and Levites. Can it be a commandment and if there are no [priests and Levites] on it is it invalid? The verse teaches, *and to the judge:* even if there are no priests and Levites it is valid.⁴⁵

While priests had some important roles in the courts of the rabbinic era, their status was greatly diminished from that assumed in the Bible and Second Temple era.⁴⁶ It therefore became impractical or anachronistic

45. *Sifre Deut.*, *pisqa* 153 (ed. Finkelstein, 206). The phrase *הכהנים הלויים*, which occurs in several places in Deuteronomy (besides 17:9, it also occurs in 17:18; 18:1; 24:8; 27:9), does not mean the priests and the Levites but rather “the Levitical priests.” According to Deut 18:6–8, all sons of Levi were eligible to be priests. See Moshe Weinfeld, ed., *Debarim*, *Olam haTanakh* (Tel-Aviv, 1999), 142. The midrash, however, regards priests and Levites as separate categories.

46. The Damascus Document (CD X, 4–7) mentions a requirement that the courts have “four of the tribe of Levi and Aaron” in each court of ten members. The Temple Scroll (LVII, 11–14) similarly states, “Twelve princes of his people shall be with him [the king of Israel], and twelve priests and twelve Levites, who shall sit together with him for judgement and for the law.” A fragment of the *Aegyptiaca* of Hecataeus of Abdera describes the priests as “judges in all major disputes.” See Ginzberg, *An Unknown Jewish Sect*, 48–49; Daniel Tropper, “The Internal Administration of the Second Temple of Jerusalem” (Ph.D. diss., Yeshiva University, 1970), 123–47; idem, “Bet Din Shel Kohanim,” *JQR NS* 63, no. 3 (1973): 204–21; Lawrence Schiffman, *Sectarian Law in the Dead Sea Scrolls: Courts, Testimony and the Penal Code* (Chico, CA: Scholars Press, 1983), 26–27; and Reuven Kimelman, “Ha-’oligarkiah ha-kohanit ve-talmide ha-hakhamim bi-tqumat ha-Talmud,” *Zion* 48, no. 2 (1983): 135–48. *M. Ketub.* 1:5 and *t. Sanh.* 4:7 mention a court of priests, and *t. Sanh.* 7:1 assigns special authority to priests and Levites in matters of marriage law. *M. Sanh.* 4:2 also requires that judges in a capital case be “priests, Levites, or Israelites marriageable to priests.” Rava states in *b. Yoma* 26a, “You

to require priests and Levites on every court. The *Sifre* accordingly deems their presence optional.

Pisqa 153 then continues by addressing the quality of the judges themselves:

אשר יהיה בימים ההם, אמר רבי יוסי הגלילי וכי עלת על דעתך שתלך אצל שופט שאינו
בימיך אלא שופט שהוא כשר ומוחזק באותם הימים.

Who will be in those days (Deut 17:9): R. Yose the Galilean said: Would it occur to you to go before a judge who is not in your own days! Rather, [this refers to] a judge who is qualified and reputable in those days.⁴⁷

This Midrash predicts that people in later times will look back with nostalgia to the great judges of old and will consequently not hold their contemporary courts in high esteem. The Midrash therefore grants the courts of each generation the same high status and encourages the masses to submit to their authority. This is yet another way in which the Midrash seeks to have some semblance of the biblical court system continue into its own days.⁴⁸

To What Types of Cases Does the Law Apply?

Another step in the transformation of the biblical law from the context of a national judicial system to rabbinic controversies involves expanding it from the realm of civil law to encompass all aspects of halakha. This is seen most clearly in *Sifre* 152:

ממך, זו עצה. דבר, זו הלכה. למשפט, זה הדין. בין דם לדם, בין דם נדה לדם יולדת לדם
זיבה. בין דין לדין, בין דיני ממונות לדיני נפשות לדיני מכות. בין נגע לנגע, בין נגעי אדם
לנגעי בגדים לנגעי בתים. דברי, אלו ערכים וחרמים והקדשות. ריבות, זו השקית סוטה
ועריפת עגלה וטהרת מצורע. בשעריך, זה לקט שכחה ופיאה.

“From you”: This refers to counsel.⁴⁹ *“A case”*: This refers to a

will not find any rabbinical scholar giving decisions who is not a descendant from the tribe of Levi or Issachar.” However, even though a remnant of the ancient requirement for priests to be part of the judicial system still lingers in these rabbinic texts, it remains only a vestige and never an obligation. See Urbach, *The Halakhah*, 55–57.

47. Ed. Finkelstein, 206. Cf. *b. Roš. Haš.* 25b.

48. See similarly in Michael S. Berger, *Rabbinic Authority* (New York: Oxford University Press, 1998), 35–37 and 43–49.

49. Fraade, *From Tradition to Commentary*, 237 n. 52, takes this to mean another person, an advisor. He is influenced by the Bavli reading, which is discussed below. But the reading

matter of halakha. “*To decide*”: This refers to logical inference. “*Between blood and blood*”: Between menstrual blood, the blood of birthing, and the blood of a flux. “*Between plea and plea*”: Between cases requiring material punishment, cases requiring capital punishment, and cases requiring corporal punishment. “*Between stroke and stroke*”: Between plagues [of “leprosy”] that affect humans, and plagues that affect houses, and plagues that affect clothing. “*Matters of*”: These refer to valuations, and devotions, and consecrations. “*Disputes*”: This refers to the bitter waters that the suspected wife is made to drink, the breaking of the heifer’s neck, and the purification of the leper. “*In your courts (lit., gates)*”: This refers to gleanings, the forgotten sheaf, and the corner of the field.⁵⁰

Each word of this verse is atomized to include another subject of Jewish law. This Midrash is also quoted with minor variations as a *baraita* at the opening of both the Yerushalmi’s and the Bavli’s discussions on the law of the rebellious elder.⁵¹ *Sifre* and Yerushalmi say that ממך—“from you” refers to “counsel” so that even nonlegal matters such as advice are also enforceable by the court. In the Bavli version, the same words refer to a type of person, יועץ—“advisor,” who, as is explained later in the Bavli, is an expert on matters of the calendar.⁵² If this is not a quotation from an alternative Tannaitic Midrash,⁵³ then it may be part of a larger Bavli strategy to limit the scope of the rebellious elder. Perhaps the Bavli redactors were too uncomfortable applying capital punishment to the rejection of

here means that one must listen to the court’s advice on any matter, contrasting with matters of strict halakha, which are inferred in the next term. For עצה in a similar usage see *m. Yebam.* 12:6, where the court suggests to a *yabbam* whether it is proper for him to perform *yibbum* or *ḥaliṣa*. See also Albeck, *Mishnah, Nezikin*, 504.

50. Finkelstein, *Sifre*, 205–6. Translation based on Fraade, *From Tradition to Commentary*, 84. This section continues the line quoted above, p. 303. At the same time that the Tannaim limit those who can be given the death penalty for disobeying the high court, i.e., only senior rabbis, they also expand the jurisdiction of this high court beyond civil cases.

51. *Y. Sanh.* 11:3 (30a) and *b. Sanh.* 87a. See comparison in chart 6.2, p. 335. Cf. *Sifre Deut.*, *pisqa* 351 (ed. Finkelstein, 408).

52. This is backed up in *b. Sanh.* 87a by a verse from Nah 1:11, which, besides containing the words ממך and יועץ, sheds no light on the connection between these words. The meaning of יועץ as “a calendar expert” derives from a similar explanation in *b. Hag.* 14a.

53. This same version does appear in *Midrash Hag-gadol* (ed. Fisch, 5:386) and *Midrash Tannaim* (ed. Hoffman, 102), however those Midrashim may themselves be citations from the Bavli and cannot reliably be assumed to represent the original Mekhilta to Deuteronomy. Another possibility is that originally, even the Bavli read the *baraita* with עצה. However, after this was reinterpreted by Rav Papa (*b. Sanh.* 87a) to mean יועץ, later copyists inserted that Amoraic interpretation back into the Bavli *baraita*.

mere advice from the great court and so interpreted it to refer to calendrical matters.

The *Sifre* and Bavli versions continue to include “halakha,” presumably ritual laws, and “*din*,” civil laws. The Yerushalmi version instead adds “*aggada*,” which may include all of the stories, parables, and moral sayings of the rabbis.⁵⁴ *Aggada* as well as advice are clearly not the usual grist of the high court. All of these interpretations serve to transform the original law from the context of the national judiciary to the context of the *beth midrash*.⁵⁵ Courts typically adjudicate matters of civil, criminal, and family law. In the *Sifre*’s rereading, however, this institution becomes a legislative body whose jurisdiction encompasses all of Jewish law. Included are laws from each Seder of Mishnah: *Zeraim* (*Pe’ah*), *Mo’ed* (calendar in Bavli version), *Nashim* (*Soṭah*), *Nezikin* (monetary, capital, and corporeal punishments),⁵⁶ *Qodashim* (*Arakin*, *Temurah*), and *Ṭeharot* (*Niddah*, *Zabim*, *Nega’im*). There is testimony that the Temple court in the decades before 70 C.E. already dealt with various ritual cases,⁵⁷ but it is unlikely that the court envisioned by the Bible fulfilled this role. Fraade once again summarizes the effect of the *Sifre*:

The overall effect of this dissection and deictic specification is to transform the supreme tribunal from one that adjudicates difficult cases of intra-Israelite conflict, to one whose primary purpose is to decide between the conflicting views of the sages in matters of specialized legal exegesis and differentiation, especially with regard to proximate legal categories. We have here what might be thought of as the intellectualization (or rabbinization) of the functions of the central judiciary of Deuteronomy.⁵⁸

Sifre 154, however, defines the jurisdiction of the court in different terms:

[A] על פי התורה אשר יורוך, על דברי תורה חייבים מיתה ואין חייבים מיתה על דברי סופרים.
 [B] ועל המשפט אשר יאמרו לך תעשה, מצות עשה.
 לא תסור מן התורה אשר יגידו לך, מצות לא תעשה.
 [C] ימין ושמאל, אפילו מראים בעיניך על ימין שהוא שמאל ועל שמאל שהוא ימין שמע להם.

54. Finkelstein, *Sifra*, 5:61–83, attempts to explain other divergences between the *Sifre* and Yerushalmi versions. He argues that the Yerushalmi version derives from a Midrash from the school of R. Ishmael.

55. Sassoon, *Destination Torah*, 294, comments, “The baraita’s inclusion of ritual should not be attributed to the mention of priests in the passage that it is engaged in elucidating, but rather to the ecclesiastical character of the rabbinic *beth din*.”

56. To this category should be added the last line of *Sifre Deut.*, *pisqa* 153, “ודרשת והגידו” (ed. Finkelstein, 207). “לך את דבר המשפט—אלו דקדוקי משפט”

57. See the statement of R. Šadoq, who lived during the Second Temple period concerning laws of *Miqva’ot* in *m. Ed.* 7:4. See also *m. Pe’ah* 2:6, *m. Mid.* 5:4, and *t. Soṭah* 9:1.

58. Fraade, *From Tradition to Commentary*, 84.

[A] *In accordance with the instruction given to you* (Deut 17:11): One is liable to the death penalty for [disobeying the court regarding] biblical laws but one is not liable for [disobeying the court regarding] laws of the scribes.

[B] *And the ruling handed down to you, you shall act*: A positive commandment. *You must not deviate from the verdict that they announce to you*: A negative commandment.

[C] *To the right or to the left*: even if they show you that right is left and that left is right you must obey them.⁵⁹

Line A excludes all of rabbinic law from the death penalty. A rebellious elder presumably still may not rebel against a ruling of the court regarding a rabbinic law, but such a violation would not warrant the death penalty.⁶⁰ This creates two levels of possible violation of the law of the rebellious elder and, by doing so, somewhat weakens its force. The biblical verse makes no distinction as to whether the court's ruling is based on a Pentateuchal code or simply a matter of the court's discretion. All cases, even those based only on the court's reasoning and without scriptural proof, carry the threat of the death penalty in the original law in order to deter others from disobeying the court, thus upholding its authority. Limiting the penalty to only biblical laws changes the nature of the entire law of the rebellious elder. It now takes on a retributive character as an especially harsh penalty for disobeying biblical laws, which are more serious than rabbinic laws. The importance of maintaining the authority of the court for its own sake, no matter what happens to be the substance of their ruling, is diminished.

It is not clear how this Midrash relates to the earlier one in *pisqa* 152, which expanded the law of the rebellious elder to include all of civil, criminal, and ritual law. Do these two sections of Midrash represent opposing Tannaim or are we to assume in reading *pisqa* 152 that only the portion of those laws based in the Pentateuch are punishable by death while the rabbinic amendments are not?⁶¹ It is furthermore not clear how lines A and B relate to line C of *pisqa* 154. Line B simply reinforces the strength of

59. Ed. Finkelstein, 207.

60. This line comes immediately after the line quoted above, p. 308, that one is only liable for the death penalty for disobeying the high court in Jerusalem. Since these two lines share the same structure, "על...חייב מיתה ואין חייבין מיתה על..." both should be interpreted the same way as dealing specifically with the application of the death penalty and not the prohibition itself. Contrast this with two lines in *Sifre Deut.*, *pisqa* 145, which share a different structure, "על...חייב ואינו חייב על..." That section limits not only the punishment but the entire prohibition.

61. Shemesh, "Halakha u-nevu'ah," 925, notes the tension between the two statements and takes them both as part of the struggle the Tannaim had to uphold their contemporary courts with authority and at that same time allow for individual intellectual freedom.

the verse by pointing out that it includes both a positive and a negative commandment and seems to simply clarify the view in line A. Line C says even if they say something that is obviously wrong—that right is left—you must obey. Lines A and B, which limit the law to biblical ordinances, seem to contradict line C, which expands the law to any teaching of the court, even an illogical one.⁶²

If lines A and B seem incompatible with line C and *pisqa* 152, they outright contradict *m. Sanh.* 11:3:

חומר בדברי סופרים מבדברי תורה האומר אין תפילין כדי לעבור על דברי תורה פטור
חמשה טוטפות להוסיף על דברי סופרים חייב.

There is a greater stringency regarding teachings of the scribes than regarding teachings of the Torah. If one says, there is no precept of *tefillin*, such that a biblical law would be transgressed, he is exempt. [But, if he rules that the *tefillin* must contain] five compartments, thus adding to the words of the scribes, he is liable.

Line A of *Sifre* 154 says that one is liable only regarding biblical laws and not rabbinic laws while Mishnah says the opposite. The Mishnah interprets the law as directed specifically toward upholding rabbinic laws, which lack the same intrinsic authority that Torah laws do and require this added cautionary measure.⁶³ The Tannaitic texts leave us confused about whether and how to reconcile these various statements. Fortunately, a *baraita* that is found only in the Bavli can help us reconstruct the Tannaitic scene. *B. Sanhedrin* 87a reads:

תנו רבנן: זקן ממרא אינו חייב אלא על דבר שזדונו כרת ושגגתו חטאת, דברי רבי מאיר.
רבי יהודה אומר: על דבר שעיקרו מדברי תורה ופירושו מדברי סופרים.
רבי שמעון אומר: אפילו דקדוק אחד מדקדוקי סופרים.

62. For further discussion on the meaning of line C, see below p. 342f.

63. *Y. Sanhedrin* 11:4 (30a) (= *y. Ber.* 1:4, 3b) elaborates on this point by citing a number of Amoraic teachings echoing the promotion of rabbinic law; among them is the following:

רבי בא בר כהן בשם ר' יודה בר פזי תדע לך שבדברי סופרים הביבין מדברי תורה שהרי רבי טרפון אילו לא
קרא לא היה עובר אלא בעשה ועל ידי שעבר על דברי בית הלל נתחייב מיתה על שם ופורץ גדר ישכנו נחש.

R. Ba bar Kohen [said] in the name of R. Yehudah bar Pazzi: Know that the words of the scribes are more beloved than the words of the Torah for behold had R. Tarfon not recited [the *shema*] at all he would have only transgressed a positive commandment, but because he transgressed the words of Beth Hillel he was liable to death as per the verse, “*He who breaches a fence will be bitten by a snake*” (Eccl 10:8).

The rabbis consider R. Tarfon (*m. Ber.* 1:3) liable to death because of Eccl 10:8. This verse is used in a similar sense of threatening those who disobey the rabbis in *t. Hul.* 2:23, *Abot de-Rabbi Natan* B:3 (ed. Schechter, 14), *y. Ber.* 1:1 (3a) (above, p. 247); *b. Šabb.* 110a, et al. The goal of such death threats is to uphold rabbinic law as defined by the majority or mainstream group of rabbis. This curse acts as a substitute for the judicial process of the rebellious elder in the absence of legal authority to punish. See further discussion below, p. 326.

Our rabbis taught: A rebellious elder is liable only for a matter for which one is liable to *karet* for purposeful transgression and a sin-offering for accidental transgression. This is R. Meir's view. R. Yehudah said: For a matter whose root is biblical, but whose interpretation is from the scribes. R. Shimon said: Even for a single detail from the detailed interpretations of the rabbis.

This *baraita* should warn us from trying to reconcile all of the various Tannaitic sources because it presents views of Tannaim ranging from one extreme to the other. Even though this *baraita* is found only in the Bavli and not in any Tannaitic source, the first opinion of R. Meir is also found in *Midrash Hag-gadol* in the name of Rabbi:⁶⁴

רבי אומר כי יפלא ממך דבר למשפט כלל בין דם לבין דין ובין נגע לבין פרת דברי ריבות חזר וכלל כלל ופרט וכלל ואין אתה דן אלא כעין הפרט מה הפרט מפורש דבר שחייבין על זדונו כרת ועל שגגתו חטאת אף כל דבר שחייבין על זדונו כרת ועל שגגתו חטאת.

Rabbi says, "If a matter of judgment is too baffling" — a generality, "between blood and blood, between claim and claim, between wound and wound" — specifics, "matters of dispute" — another generality. Whenever one finds a generality, specifics, and a generality one interprets the generalities to be similar to the specifics. Just as the specifics list matters for which one is liable to *karet* for purposeful transgression and a sin-offering for accidental transgression, so too [this law applies to] all cases for which one is liable to *karet* for purposeful transgression and a sin-offering for accidental transgression.⁶⁵

This quotation from *Midrash Hag-gadol*, which Hoffman includes in *Midrash Tannaim*,⁶⁶ likely derives from a Tannaitic Midrash. That R. Meir's opinion is found in this Midrash argues for the authenticity of the Bavli *baraita*.⁶⁷ R. Meir is even more limiting than line A of *Sifre* 154. Not only

64. Finkelstein, *Sifra*, 5:70, suggests that R. Meir is the correct reading in *Midrash Tannaim* as well since copyists often confused R. Meir with Rabbi. Alternatively, the text may originally have read דבר אחר, was abbreviated to ד"א, and then the *dalet* was mistaken for a *resh* and then expanded to "Rabbi says."

65. Shlomo Fisch, *Midrash hag-gadol* (Jerusalem: Mosad Harav Kook, 1975), 5:389. It is not clear why the Midrash assumes that the פרת section in the middle contains only laws whose violation deserves *karet/haṭṭat*. See Finkelstein, *Sifra*, 5:70–71, who explains that this *derasha* is working off of an original Midrash from the school of R. Ishmael where only *karet* violations are listed.

66. Hoffmann, *Midrasch Tannaim*, 102.

67. None of the opinions in the *baraita*, except the second (see below, p. 322), are found

does R. Meir exclude rabbinic laws, he even excludes most biblical laws. He limits the cases in which the rebellious elder would warrant capital punishment to some of the most severe biblical laws. These laws number thirty-six and are listed in *m. Ker.* 1:1.⁶⁸ Many of these laws warrant death by stoning, the most severe form of capital punishment, when performed on purpose and in the presence of witnesses.⁶⁹ Thus, if an elder disobeyed the court and performed work on Shabbat, his punishment for that violation itself (stoning) would be greater than his violation by the law of the rebellious elder whose punishment is only strangulation. The punishment of the rebellious elder would apply only when the elder taught others a permissive law that he did not perform himself.⁷⁰ R. Meir's opinion is therefore the most retributive. An elder is liable to death only for performing (or teaching) a law whose penalty is often death in any case.

elsewhere as Amoraic sayings. Since the *baraita* quotes such far-ranging opinions, it has no obvious agenda that could indicate that some Amora or Stam composed it and then ascribed to it Tannaïtic authority. The *baraita* therefore seems to be an authentic remnant from a Tannaïtic Midrash such as *Mekhila* to Deuteronomy.

68. This category is also used as a limitation in the context of *Horayot*: "A court is not liable until they rule in a matter that is punishable by *karet* if done on purpose and requires a sin-offering if by mistake" (*m. Hor.* 2:3). The connection to *Horayot* is made explicit in *b. Sanh.* 87a:

מאי טעמא דרבי מאיר? גמר, דבר דבר, כתיב הכא: כי יפלא ממך דבר למשפט, וכתיב התם ונעלם דבר מעיני הקהל. מה להלן דבר שהיית על זדונו כרת ועל שגגתו חטאת, אף כאן דבר שהיית על זדונו כרת ועל שגגתו חטאת.

What is the derivation of R. Meir? He learns *dabar dabar*. It is written here, "If a case (*dabar*) is too baffling for you to decide" (Deut 17:8), and it is written there, "And the matter (*dabar*) escapes the notice of the congregation" (Lev 4:13). Just as there [the law applies to] a matter for which one is liable to *karet* for purposeful transgression and a sin-offering for accidental transgression, so too here [the law applies to] a matter for which one is liable to *karet* for purposeful transgression and a sin-offering for accidental transgression.

In fact, a similar *gezerah shavah* is used in *t. Hor.* 1:7 and *b. Hor.* 4a where דבר in both paragraphs teaches that just as in the rebellious elder, one is only liable for transgressing part of a law but not the whole of it (which is never mentioned in context of rebellious elder), so too in cases of a mistaken court. It is interesting that these cases are viewed as being similar even though they are actually on opposite sides of the table; in *Horayot* the court is mistaken while the rebellious elder wrongly disobeys a court's valid decision. While *b. Sanh.* 87a derives the category for the rebellious elder from *Horayot*, *Midrash Hag-gadol* (ed. Fisch, 5:389) derives it within the context of the rebellious elder and without reference to *Horayot*. *Sifra, Hoba, parasha 1, parshata 1:7* (ed. Finkelstein, 2:120), on the other hand, derives the category for *Horayot* from within its own context without reference to the rebellious elder. For more on the relationship between the two sets of laws see the next chapter, esp. p. 364 n. 66.

69. See *m. Sanh.* 7:4.

70. *B. Sanhedrin* 88b similarly asks, "if he acts according to his ruling he is already liable to death and now he is [again] liable to death?" This question assumes the opinion of R. Meir, even though that is not stated.

B. *Sanhedrin* 87a-88a already questions the relationship between R. Meir and the Midrash found in *Sifre* 152. While the solution is a feat of “stupendous effort and virtuosity,”⁷¹ it is patently not the plain meaning of the Midrash. By forcing *Sifre* 152 into R. Meir’s definition, the Bavli greatly limits the number of cases included in the law of the rebellious elder and muffles the rhetorical force of *Sifre* 152, which is to expand the law into all cases. As we will see below, this is only one of several ways in which the Bavli limits the applicability of the rebellious elder.⁷²

At the other extreme of R. Meir is the view of R. Shimon that every jot and tittle of rabbinic law is included: אפילו דקדוק אחד מדקדוקי סופרים.⁷³ In this view, the law of the rebellious elder is not retributive, for why should one be liable to death for violating a minor rabbinic decree. Rather, the purpose of the law is to uphold the authority of the court/rabbis no matter what they say. Punishment of even, and especially, the most minor of misdemeanors sends a strong signal to deter any other disobedience of the rabbis’ decision. R. Shimon is rhetorically closest to line C of *Sifre* 154, which even adds cases where the rabbis teach something that seems illogical.

R. Yehudah adopts a middle opinion, which explains that the purpose of the law of the rebellious elder is to uphold the rabbis’ authority to interpret Scripture. The second example given in *m. Sanh.* 11:3, of five *totafot* in the *tefillin*, fits into this category of a rabbinic interpretation of something based in Scripture.⁷⁴ The first example, “one who says there is no precept of *tefillin*” could refer to those who, like Rashbam, interpret the biblical verses figuratively, that we should keep these words in mind, and not that we physically bind them on our body.⁷⁵ The literal interpretation, which requires physical *tefillin*, is not unique to the rabbis since it was so

71. Sassoon, *Destination Torah*, 294.

72. One could argue that the Bavli’s extended exercise to explain *Sifre* 152 according to R. Meir does not reveal any ideological agenda but is rather an attempt to reconcile differing opinions or simply a mechanical exercise to display virtuosity. However, as mentioned above in n. 70, a *sugya* found later in the Bavli still assumes the position of R. Meir, which suggests that the Bavli’s redactors accept his opinion, at least to some degree. If so, the attempt to explain *Sifre* 152 according to R. Meir indicates support for his opinion rather than simply an exercise in reconciliation. See also below, p. 333 n. 117. The term תרגומה/תרגומא/תרגום is found dozens of times in the Bavli to reconcile contradictory sources by “translating” or reinterpreting one of the sources to fit with the other. See Wilhelm Bacher, *Erkhe midrash* (Jerusalem: Karmi’el, 1969), 2:320–22. The choice of which source to reinterpret and how extensively this explanation changes the prior understanding of the law must surely reflect some vision as to which is deemed preferable, rather than simply a mechanical reconciliation. However, the usage of this term requires further study.

73. A similar phrase is found in *t. Demai* 2:5 in the context of a convert who, according to one opinion, must accept every jot and tittle of halakha.

74. See *b. Sanh.* 88b.

75. R. Shmuel ben Meir (ca. 1085–ca. 1174) on Exod 13:9.

interpreted by such prerabbinic groups as the Samaritans and the Dead Sea sect as well as the *Letter of Aristeas* (line 159), Philo, and Josephus (*Ant.* 4.8.13).⁷⁶ In *b. Sanh.* 33b and *b. Hor.* 4a, the Talmud uses Sadducean interpretation as the barometer for what is explicit in the biblical text.⁷⁷ Assuming that the Sadducees did wear *tefillin*, one who denies this precept does not violate rabbinic law but the literal meaning of a biblical verse.⁷⁸

The view that *tefillin* must contain five *toṭafot* may simply be a theoretical example, or it may refer to an actual sectarian view. Although the *tefillin* found among the Dead Sea scrolls contain either one or four compartments, like the rabbinic *tefillin*, it is interesting that the sect included more biblical passages than are prescribed by the rabbis.⁷⁹ Maintaining five *toṭafot* may refer to this or similar practices.⁸⁰ If so, the aim of the law of the rebellious elder in the view of some Tannaim may be to reign in sectarian deviations among the rabbis. Explicit biblical laws have intrinsic authority accepted by all on account of their presence in Scripture. It is the rabbinic interpretation of Scripture, however, which was hotly contested by various detractors. The category set out by R. Yehudah lends itself to issues subject to controversy between the rabbis and other sects. The Mishnah has a similar polemical tone. The Mishnah, therefore, may very well represent the opinion of R. Yehudah.

Furthermore, if we assume that the entire pericope of *Sifre* concerning the rebellious elder (*pisqa'ot* 152–155) is an integrated unit from the hand of one author or school, then we can reconcile both *pisqa'ot* 152 and 154 lines A and C with the opinion of R. Yehudah. Line A does not deal with explicit laws in the Torah, which the rabbis would not have the power to contradict, but rather with rabbinic definitions of the biblically based law.⁸¹ If line C is not merely exaggerated rhetoric, it seems to contend that even if the rabbis teach an illogical or nonliteral explanation of a biblical commandment, one must still follow their ruling.⁸² Similarly, *pisqa* 152 only means to spell out the range of topics included within the law of the rebel-

76. See Albeck, *Mishnah, Nezikin*, 459; Naomi Cohen, "Philo's Tefillin," *World Congress for Jewish Studies* 9A (1986): 199–206; and John Bowman, "An Arabic Hijab Manuscript and Jewish and Samaritan Phylacteries," *Abr-Nahrain* 32 (1994): 53–56.

77. See below, p. 341.

78. See Hirsh Mendel Pineles, *Darkah shel Torah* (Vienna, 1861), 20.

79. There are also one or two tefillin with three compartments but none with five. See Yigal Yadin, "Tefillin shel rosh me-Qumran," *Erez Israel* 9 (1969): 76, and Yehudah Cohn, *Tangled Up in Text: Tefillin and the Ancient World* (Providence, RI: Brown Judaic Studies, 2008), 56.

80. See further in Jacob Mann, "Changes in the Divine Service of the Synagogue Due to Religious Persecutions," *Hebrew Union College Annual* 4, nos. 241–310 (1927): 289–99; however, Cohn, *Tangled*, 130, disagrees.

81. Shemesh, "Halakha u-nevu'ah," 928, suggests that R. Yehudah's opinion, as quoted in the Talmuds, is meant to reconcile the Mishnah with the Sifre.

82. *Y. Horayot* 1:1 (45d) has a version of line C that states the reverse. We will analyze the laws of *Horayot* and their relationship to the rebellious elder in the next chapter.

lions elder, even though only the rabbinic interpretations of those biblical laws would be punishable.⁸³ However, even if we can reconcile some of the various texts in terms of their practical implications, it is clear that they each serve a different rhetorical purpose.

To sum up the Tannaitic opinions, R. Meir and *Midrash Tannaim* are at one extreme, putting the greatest limitations on the law of the rebellious elder, who is punished only for teaching against the court in very serious cases. At the other extreme is R. Shimon, who puts no limitations on the type of case for which the rebellious elder can be punished. Even a detail of rabbinic law must be defended in order to uphold the authority of the central court. In the middle is the opinion of R. Yehudah, who sets forth two conditions: a case must be based in the Torah so that it meets a minimum threshold of severity, but it also must depend on rabbinic interpretation. Other statements seem to agree, more or less, with R. Yehudah. The examples presented in *m. Sanh.* 11:3 fit into the conditions of R. Yehudah. *Sifre* 154 line A emphasizes the first condition while line C and the Mishnah stress the second. All opinions except R. Meir seem to agree with *Sifre* 152 that the court is not limited only to civil and criminal cases but has authority to decide all matters of Jewish praxis.

The opinions of R. Yehudah and R. Shimon reflect another example of how the original biblical law has undergone a rabbinic transformation. If the original law upheld the court's authority to interpret biblical laws, R. Yehudah reinterprets it to apply to the authority of the rabbis to interpret biblical law — ופירושו מדברי סופרים. R. Shimon expands the law to all rabbinic enactments and uses a similar phrase: דקדוקי סופרים. The Mishnah focuses the rabbinic aspect of the law with even greater emphasis than the other formulations by specifically excluding דברי תורה and including, once again, דברי סופרים. These formulations suggest a polemical antisectarian motive.

Extending the law into the realm of rabbinic law bolsters the authority of the rabbinic majority while at the same time suppressing minority opinion. The law no longer applies to a defiant litigant, but to a learned elder who disagrees with the mainstream rabbinic opinion. This might be a fellow rabbi with a minority position, a member of a nonrabbinic sect, or perhaps someone on the border of the two camps. In any case, the Tannaitic sources show a certain discomfort with allowing any rabbi or wise elder to decide halakha against the majority. It is improbable that there

83. The medieval commentators suggest various strategies to reconcile or choose between the Mishnah, *Sifre* 152, R. Meir, and R. Yehudah. See Tosafot *b. Sanh.* 88b, s.v. וראין; Nissim Gerondi, *Hidushe ha-Ran: masekhet Sanhedrin* (Jerusalem: Mosad ha-Rav Kook, 2003), 570–77; Rambam, *Mishneh Torah, hilkhot mamrim*, 4:2, and commentators ad loc.; and the heated correspondence between R. Meir Abulafia and the rabbi of Lunel reprinted in Shalom Yungerman, *Qobeš shiṭot qama'e: masekhet Sanhedrin* (Zikhron Ya'akov: ha-Makhon le-Hosa'at Sefarim ve-Kitve Yad she-leyad ha-Merkaz le-Hinukh Torani: 2007), 1,466–68.

existed a Sanhedrin with the power to inflict capital punishment at any time during the Tannaitic period,⁸⁴ and so this law was not meant to be practical. Nevertheless, this reinterpretation of the law, even if only theoretical, reflects a desire on the part of the Tannaim to allow for freedom of debate but limit diversity of practice.

Turning to the Amoraic treatment of this issue, the Yerushalmi (*Sanh.* 11:4, 30b) cites the words of R. Yehudah⁸⁵ but in the name of R. Hoshaiiah and elaborates on them:

רבי בא רבי יוחנן בשם רבי הושעיה אינו חייב עד שיורה בדבר שעיקרן מדברי תורה
ופירושו מדברי סופרים כגון הנבילה כגון השרץ שעיקרן מדברי תורה ופירושו מדברי
סופרין

אמר רבי זעירא לעולם אינו חייב עד שיכפור ויורה בדבר שעיקרו מדברי תורה ופירושו
מדברי סופרין כגון נבילה וכגון שרץ שעיקרן מדברי תורה ופירושו מדברי סופרים והוא
שיגרע ויוסיף בדבר שהוא מגרע והוא מוסיף

R. Ba [said in the name of] R. Yoḥanan in the name of R. Hoshaiiah:
“One is not liable until he rules in a matter whose root is biblical
and whose interpretation is from the scribes such as carrion and
such as reptiles whose root is biblical and whose interpretation is
from the scribes.”

R. Zeira said: “He will never be held liable until he denies and
rules on a matter whose root is biblical and whose interpretation
is from the scribes such as carrion and such as reptiles whose root
is biblical and whose interpretation is from the scribes provided
that he diminishes or adds in a matter that he will diminish and
he will add.”

R. Zeira adds another requirement on top of that of R. Hoshaiiah, that the rebellious elder should add to or diminish from the law in a way that will cause the law to be both augmented and reduced. R. Zeira seemingly wishes to exclude a case where the rebellious elder adds a requirement that does not impinge on any previous definition of the law. Such a rul-

84. See references above, p. 7 n. 21.

85. Significantly, besides this statement based on the view of R. Yehudah (who is not cited by name in the Yerushalmi), the Yerushalmi only cites the expansive views presented by Sifre 152. The Yerushalmi also adds a whole section here praising the value of rabbinic law as more beloved than biblical law in order to bolster *m. Sanh.* 11:3, and thereby R. Yehudah’s opinion as well. The Yerushalmi, however, does not include the limiting opinions of R. Meir and those found in Sifre 154 and Midrash Tannaim. While one cannot prove that the Yerushalmi knew of these sources and purposely omitted them, it is nevertheless noteworthy that all of the most limiting opinions are not found in the Yerushalmi. Perhaps these traditions were unwittingly repressed over time in the Yerushalmi’s environment that demanded halakhic uniformity and sought an expansive view of the law of the rebellious elder. See, however, R. Zeira in the next paragraph who limits the law of rebellious elder in a different way.

ing would not threaten the authority of the majority. Only if the elder's addition in some way conflicts with and diminishes the majority opinion is he liable. The Talmud continues to discuss which specific cases would fall into this category and ends up with instances within the laws of impurity of carrion and creeping things, the size of a leporous spot, *tefillin*, and *mezuzah*.⁸⁶ Presumably other cases can also be found to fit the criteria. While the Yerushalmi thus greatly limits the law of the rebellious elder, the Bavli contains a parallel *sugya* that almost eliminates the law altogether. *B. Sanhedrin* 88b states:

אמר רבי אלעזר אמר רבי אושעיא: אינו חייב אלא על דבר שעיקרו מדברי תורה ופירושו מדברי סופרים, ויש בו להוסיף, ואם הוסיף גורע. ואין לנו אלא תפילין אליבא דרבי יהודה.

R. Eleazar said in R. Oshaia's name: He is liable only for a matter whose root is biblical and whose interpretation is from the scribes and one can add to it in such a way that the addition will be a subtraction. The only precept we have [that fulfills these conditions] is *tefillin*. This follows R. Yehudah.

R. Eleazar's wording is obviously a variation of R. Zeira but is not identical.⁸⁷ R. Eleazar requires that the rebellious elder argues with a rabbinic interpretation of a biblical law that is quantifiable such that by adding to it one nullifies it. An anonymous gloss adds that this follows the opinion of R. Yehudah and that *tefillin* is the only possible case that fits these requirements.⁸⁸ The *sugya* continues to suggest other possible cases such as *lulav* and fringes, but they are all rejected. R. Eleazar's requirement seems almost arbitrary. He seems to require that the elder does not simply offer an alternate to the court's explanation, but that he actually undermines them by changing a quantity that they have specified and that is an intrinsic part of the commandment. Whatever the reasoning is, it is significant that the Bavli limits the entire law of the rebellious elder to the one case that it *must* include since it is the example given in the Mishnah. This *sugya* effectively writes the law out of existence and curbs the possibility for Babylonian Amoraim to use the law against their cantankerous colleagues.

86. Disagreement about the distribution of oil in a thanksgiving offering and the length of fringes do not qualify.

87. In the Bavli, R. Eleazar quotes in the name of R. Oshaia, who is the same as R. Hoshaiah in the Yerushalmi, the author of the statement before R. Zeira.

88. This gloss does not seem to be a continuation of R. Eleazar's statement since it is not found in R. Zeira's words in the parallel Yerushalmi. Also, R. Eleazar's statement is entirely in Hebrew and the gloss contains Aramaic (אליבא).

Rav Kahana, in another Bavli *sugya*, limits the law of the rebellious elder in yet another way. *B. Sanhedrin* 88a relates a dispute:

אמר רב כהנא: הוא אומר מפי השמועה והן אומרים מפי השמועה אינו נהרג, הוא אומר כך הוא בעיני והן אומרים כך הוא בעינינו אינו נהרג. וכל שכן הוא אומר מפי השמועה והן אומרים כך הוא בעינינו אינו נהרג, עד שיאמר כך הוא בעיני והן אומרים מפי השמועה. תדע, שהרי לא הרגו את עקביא בן מהללאל.⁸⁹ ורבי אלעזר אומר: אפילו הוא אומר מפי השמועה, והן אומרים כך הוא בעינינו נהרג, כדי שלא ירבו מחלוקות בישראל. ואם תאמר: מפני מה לא הרגו את עקביא בן מהללאל? מפני שלא הורה הלכה למעשה.

Rav Kahana said: If he says, “[I base my ruling] on tradition,” and they [the judges of the court] say “[We base our ruling] on tradition,” he is not executed. If he says, “Thus it appears to me,” and they say, “Thus it appears to us,” he is not executed. All the more so, if he says, “[I base it] on tradition,” and they say, “Thus it appears to us,” he is not executed. He is executed only when he says, “Thus it appears to me,” and they say, “[We base our ruling] on tradition.” The proof is that they did not execute Akavia ben Mahalalel.

R. Eleazar said: Even if he says. “[I base my ruling] on tradition,” and they say, “Thus it appears to us,” he is executed, so that division should not spread in Israel. And if you should argue, “Why did they not execute Akavia ben Mahalalel?”, [I would answer] because he did not issue a law to be put into practice.

Rav Kahana says that the rebellious elder is not killed as long as he argues his case from equal footing, be it from tradition or his own reasoning. Even if the elder bases his opinion on his own subjective rationale, but the court also has no received tradition, he is not killed since they are both on equal ground. This limitation completely undermines the nature of the original law. If the biblical law is meant to uphold the authoritative status of the court, then it should make no difference on what their or the elder’s opinion is based. It is illogical to think that the court could allow anyone to disobey it as long as the dissenter claims to have a received tradition. This would lead to anarchy in a national judicial system. Rather, Rav Kahana clearly has in mind the world of the *beth midrash*. When the rabbis are disputing an issue, various kinds of arguments hold different weight. A received tradition about an issue holds more validity than an individual rabbi’s subjective outlook. If both sides of an argument have a received tradition, then no matter how many rabbis heard one side or the other, as long as the minority knows that its position is based on a reliable tradition,

89. See the discussion of Akavia above, pp. 274–76.

they need not cede. No majority can disqualify an authentic tradition. Similarly, if both sides use their own logic, then the majority cannot claim to have better logic than the minority. Even if a national court attempts to recover the traditional halakha, its ultimate purpose is to issue a law that it can impose on the nation regardless of the law's "truth." The goal of the *beth midrash*, on the other hand, at least according Rav Kahana, is to arrive at truth. Truth cannot be decided by a vote but is rather determined by the best sources and arguments. Therefore, only if the majority has the force of tradition behind it can they force an individual's subjective rationale to bend to their will.⁹⁰

R. Eleazar takes the opposite extreme, arguing that the basis for each position makes no difference. The minority must always bow to the majority "in order that dissention should not proliferate in Israel." R. Eleazar maintains uniformity of practice as the highest value above arriving at truth or preserving tradition. The final conclusion of the Stam (perhaps based on a majority vote) is that uniformity wins out, lest sectarianism begin to spread. This leads into the next *sugya*, which, quoting *t. Sanh.* 7:1, contrasts the glory days before Beth Shammai and Beth Hillel when there was uniformity with later times when the Torah has become two.⁹¹ However, even though Rav Kahana's extreme position is rejected in practice, his view may still represent an important theoretical basis for the Bavli's more tolerant agenda. Rav Kahana does not simply limit the cases in which the law of the rebellious elder applies; he undermines its theoretical basis, namely that the high court has ultimate authority. He argues instead that the court, or the majority, holds authority only to the extent that it can achieve the truth based on received tradition.

Rebellious Elder in Talmudic Narratives

Based on the extensive discussion of the rebellious elder in the eleventh chapter of *Sanhedrin*, we might expect it to come up again in various discussions throughout the Talmud in relation to the many controversies between majority and minority practices found therein. Surprisingly, however, the term *מרד* occurs in only a handful of halakhic discussions,⁹² and there is no recorded case of anyone killed as a rebellious elder even though there were surely many people who did not listen to the ruling

90. According to Rav Kahana, the weight of the majority also must be factored in since an individual with a tradition cannot subdue the logic of the majority. Perhaps a tradition remembered by only one person loses some of its reliability and therefore is on the same footing as the majority's rationale.

91. See above, pp. 303–4.

92. *Y. Soṭah* 4:2 (19c) (and parallels in *y. Sanh.* 8:6 [26b]; *b. Soṭah* 25a and *b. Sanh.* 88b); *b. Sanh.* 14b (quoted above, p. 309, and see parallels there in n. 42); *b. Sanh.* 16a; and *b. Hor.* 4a.

of the rabbinic majority. There are, to be sure, stories of dissident rabbis being excommunicated⁹³ or cursed;⁹⁴ excommunication in rabbinic times replaces the death penalty.⁹⁵ The term זקן ממרא itself, however, is used in a narrative only twice in the Yerushalmi and never in the Bavli.⁹⁶ In both Yerushalmi stories, one rabbi threatens to brand a colleague as a rebellious elder. One narrative concerns the laws of *yibbum* and is found in *y. Yebam.* 10:4 (11a):

יבמה שנישאת בלא חליצה
 רבי ירמיה אמר זה חולץ וזה מקיים
 רבי יודה בר פזי בשם רבי יוחנן תצא
 רבי יוסי בשם רבי הילא תצא
 רבי יוסי שאיל לרבי פינחס היך סבר רבי אמר ליה כרבי ירמיה אמר ליה חזור בך דלא
 כן אני כותב עליך זקן ממרא

If a widow without children [who is obligated to perform levirate marriage] marries without *ḥaliṣa*:

R. Yirmiah says, this one [the surviving brother] performs *ḥaliṣa* and this one [her husband] remains.

R. Yehudah bar Pazzi [says] in the name of R. Yoḥanan, she must divorce [her husband].

R. Yose [says] in the name of R. Hila, she must divorce.

R. Yose asked R. Pinḥas, "What does the master think?" He told him, "In accordance with R. Yirmiah." He said to him, "Retract, for if not, I will write that you are a rebellious elder."⁹⁷

In a discussion on one detail of the laws of *yibbum*, R. Yirmiah takes a lenient position regarding a widow who believed she was free to marry another man but after remarrying found out that she was obligated to perform *yibbum*. R. Yirmiah allows her to perform *ḥaliṣa* whenever she finds out her *yibbum* obligation and remain married to her second hus-

93. *B. Sanhedrin* 88a does ask why Akavia ben Mahalalel was not killed (presumably as a rebellious elder). See above, p. 324.

94. See above, p. 316 n. 63.

95. See Hammer-Kossoy, "Divine Justice in Rabbinic Hands," 434; and Steinmetz, "Distancing and Bringing Near," 53 n. 14. *Y. Sanhedrin* 8:6 (26b) distinguishes between two stages of punishment for the rebellious elder, "זקן ממרא הדא דתימר שלא להורגו אבל להחזירו לא היו מחזירין אותו" — [The statement that] the rebellious elder [can be forgiven] is only stated to mean that we do not execute him, but we still do not return him to his position." Before the elder is killed, he is first removed from his place. This likely refers to some type of excommunication.

96. Gray, *Talmud in Exile*, 114, makes the same observation: "Of seven occurrences of the term זקן ממרא in the Bavli, none involves one sage using the term against another, while of six occurrences of the phrase in the Yerushalmi there are four occurrences (two stories and their parallels) in which one sage uses the term against another."

97. The *sugya* is copied in *y. Git.* 8:6 (49c) but is original here. See Lieberman, *Tosefta ki-fshutah*, 6:112, to *t. Yebam.* 11:7

band, while his colleagues state that the second husband must divorce her. The stringent colleagues are R. Yoḥanan and R. Hila, second- and third-generation Palestinian Amoraim, who are quoted by their students R. Yehudah bar Pazzi and R. Yose, third- and fourth-generation Amoraim. R. Yirmiah himself is contemporary with these students. R. Yose, who just reported the stringent view in the name of R. Hila, then turns to his contemporary, R. Pinḥas, to inquire concerning his opinion. When R. Pinḥas agrees with R. Yirmiah, R. Yose commands him to retract under the threat of being named a rebellious elder.⁹⁸ We are not informed what the consequences of this would be, perhaps excommunication, perhaps less formal social ostracism. We are also not told whether or not R. Pinḥas retracted his opinion. However, a similar story is reported in *y. 'Abod. Zar.* 2:8 (41d) (= *y. Sabb.* 1:4, 3d) in which the threat is reported to have worked:

מי אסר את השמן
 רב יהודה אמר דניאל אסרו וישם דניאל על לבו וגו'
 ומי התירו ר' התירו ובית דינו...
 רבי אחא רבי תנחום בר חייה בשם רבי חנינה ואמרי לה בשם ר' יהושע בן לוי שהיו עולין
 להר המלך ונהרגין עליו⁹⁹
 יצחק בר שמואל בר מרתא נחת לנציבין אשכח שמלאי הדרומי יתיב דרש רבי ובית דינו
 התירו בשמן¹⁰⁰
 שמואל אכל¹⁰¹ רב לא קביל עליה מיכול
 אמר ליה שמואל אכול דלא כן אנא כתב עליך זקן ממרא
 אמר ליה עד דאנא תמן אנא ידע מאן ערר עליה שמלאי הדרומי
 אמר ליה מר בשם גרמיה לא בשם רבי יודן נשייא אטרה עלוי ואכל

Who forbade the oil [of Gentiles]?

Rav Yehudah said, Daniel forbade it: *Daniel resolved [not to defile himself with the king's food or the wine he drank]* (Dan 1:8).

98. The opinion of R. Yirmiah is rejected not because he opposed *m. Yebam.* 10:3. That Mishnah follows the opinion of R. Akiba while the sages disagree (see *t. Yebam.* 11:7, quoted in the continuation of the Yerushalmi *sugya*). Rather, R. Yirmiah interprets the opinion of the sages differently from his colleagues. The sages say that the children from the second marriage are not *mamzerim*. R. Yirmiah interprets this liberally to mean that the marriage is legitimate and she may remain married. His colleagues say that the children are not *mamzerim* because the prohibition of marrying another while under the obligation of *yibbum* is less severe (only a negative prohibition), but her second marriage is still illegal and she must be divorced. See *Pene Moshe; b. Yebam.* 92a; Maimonides, *Mishneh Torah, Nashim, Hilkhoh Yibbum* 3:19; and Lieberman, *ibid.*

99. *Pene Moshe* explains that Rabbi permitted the oil of gentiles because Jews would risk their lives to gather olives from the king's mountain in order to make their own oil and were sometimes killed there.

100. *T. 'Abod. Zar.* 4:11. See further below, n. 106.

101. Ms. Leiden reads אכל, which must be a simple scribal error. See Sussman, *Talmud Yerushalmi*, 1391, line 44. Cf. Gray, *Talmud in Exile*, 108 n. 27, who also suggests emending this phrase based on the parallel in *y. Sabb.* 1:4 (3d). Ms. Leiden also adds אמר at the beginning of this line, but Sussman, *ibid.*, suggests that it be omitted.

And who permitted it? Rabbi and his court permitted it....

R. Aḥa, R. Tanḥum bar Ḥiyya [said] in the name of R. Ḥaninah, and some say in the name of R. Yehoshua b. Levi, they were ascending to the king's mountain and were being killed on it.⁹⁹

Isaac bar Shmuel bar Marta went down to Nisibis. He found Simlai the Southerner sitting and expounding: **Rabbi and his court permitted oil [of Gentiles].**¹⁰⁰

Shmuel ate [oil of Gentiles]; Rav did not accept upon himself [permission] to eat.

Shmuel said to him [Rav], "Eat, for if you do not do so, I shall write that you are a rebellious elder."

He [Rav] said to him, "When I was there [in Palestine], I learned that Simlai the Southerner rejected it [the prohibition against oil of Gentiles]."

He [Shmuel] said to him, "Did the master [Simlai] say this in his own name? Did he not cite it in the name of R. Yehudah the Patriarch?" He [Shmuel] badgered him about it until he [Rav] ate.

R. Yehudah says that the origin of a prohibition against using the oil of Gentiles goes back to Daniel. However, Rabbi and his court subsequently allowed it.¹⁰² Rav wanted to stick with the stringency. Rav, it seems, was generally stringent in this area as seen in the continuation of the *sugya*, אמר רבי יוסי בי רבי בון והדא מן חמירתא דרב רב נחת לתמן חמתון מקללין והמר עליהון — "R. Yose b. R. Bon said: This is one of the stringencies of Rav. Rav went down [to Babylonia], saw they were lenient, and issued stringencies on them." Apparently, Palestinians were generally stricter in laws regarding separation from Gentiles than were the Babylonians. In fact, Isaac bar Shmuel bar Marta learns that Rabbi's court permitted it only when he traveled to Nisibis in Babylonia. This could explain why Shmuel, the Babylonian, permitted while Rav, though also a Babylonian, seems to have taken on certain stringencies during his studies in Palestine, which he then imported to Babylonia.

While there is no surprise that Rav and Shmuel should argue on a halakhic matter, what is striking in this *sugya* is the confrontation at the end of the *sugya*. Shmuel commands Rav to eat from the oil of Gentiles and threatens to "write" (an edict?) that Rav is a rebellious elder if he does not concede. Once again, this threat probably involves social ostracism rather than a formal indictment. Rav protests that the source of the

102. This *sugya* states twice that Rabbi's court allowed oil. The second is from Simlai in Nisibis. The first is at the beginning of the *sugya* but it is not clear if that is an anonymous statement or a continuation of Rav Yehudah's words after an interjection by an anonymous questioner. If the latter, then both this statement and that of Simlai have their provenance in Babylonia.

permissive law is Simlai himself, not Rabbi. Shmuel counters that Simlai only reported what Rabbi enacted. Perhaps Shmuel is so adamant in this case because Rabbi's authority itself is at stake. Although unstated, Rav may have held onto this stringency in order to send a message that Rabbi had no right to undo an ancient prohibition.¹⁰³ Unlike the story in *y. Yebam.* 10:4 (11a), this story provides us with a conclusion. Shmuel continued to insist and Rav finally gave in and ate.¹⁰⁴ Also unlike the story at *y. Yebam.* 10:4 (11a), this story has a revealing parallel at *b. Abod. Zar.* 35b-36a:¹⁰⁵

שמן: רב אמר: דניאל גזר עליו, ושמואל אמר: זליפתן של כלים טמאים אוסרתן. אטו כולי
עלמא אוכלי טהרות נינהו? אלא, זליפתן של כלים אסורין אוסרתן.
א"ל שמואל לרב: בשלמא לדידי דאמינא זליפתן של כלים אסורין אוסרתן, היינו דכי אתא
רב יצחק בר שמואל בר מרתא ואמר, דריש רבי שמלאי בנציבין: שמן ר' יהודה ובית
דינו נמנו עליו והתירוהו,¹⁰⁶ קסבר: נותן טעם לפגם מותר; אלא לדידך דאמרת דניאל
גזר עליו, דניאל גזר ואתא רבי יהודה הנשיא ומבטל ליה? והתנן: אין בית דין יכול לבטל
דברי בית דין חבירו אלא א"כ גדול הימנו בחכמה ובמנין?¹⁰⁷
א"ל: שמלאי לודאה קא אמרת? שאני לודאי דמזולו.
א"ל: אשלה ליה, איכסיף.

אמר רב: אם הם לא דרשו, אנן לא דרשינן? והכתיב: וישם דניאל על לבו אשר לא יתגאל
בפת בג המלך וביין משתיו.¹⁰⁸ בשתי משתאות הכתוב מדבר, אחד משתה יין ואחד משתה
שמן.

רב סבר: על לבו שם ולכל ישראל הורה, ושמואל סבר: על לבו שם ולכל ישראל לא
הורה.

Regarding oil [of gentiles], Rav said: Daniel decreed against it. But Shmuel said: The residue of impure vessels prohibits it. Does everyone eat only pure food? Rather, the residue of prohibited vessels prohibits it.

103. In fact, the next line of the *sugya* wonders how Rabbi could have permitted what a greater court prohibited.

104. It is interesting to compare Shmuel's insistence with Rav's tolerance in a similar case found a few lines after this one (*y. Abod. Zar.* 2:8, 42a): "Lupines of Gentiles, what is their status? Rabbi prohibits, Geniva permits. Rabbi said, 'I am an elder and he is an elder, I decided in my heart to prohibit and he decided in his mind to permit.'" Although ms. Leiden reads רבי, Rav is the more likely colleague of Geniva. In this case, Rav recognizes that his opponent is also of high rank (perhaps Rav is being humble here) and both parties have authority to rule as they deem proper. Perhaps, however, Rav's tolerance here is not so much a function of a more easy-going personality than Shmuel but rather due to the different circumstances. Shmuel needed to uphold the authority of Rabbi's court, while Rav was simply stringent on an unclear case.

105. For a thorough comparison between the Yerushalmi and Bavli versions of this story see Gray, *Talmud in Exile*, 112–16.

106. *T. Abod. Zar.* 4:11. Boldface indicates a Tannaitic source. See further below, n. 106.

107. *M. Eduyyot* 1:5.

108. Daniel 1:8.

Shmuel said to Rav: It is alright for me since I say that the residue of prohibited vessels prohibits it; that is why when R. Isaac bar Shmuel bar Marta came, he said: R. Simlai expounded in Nisbis, **“Oil [of Gentiles], R. Yehudah and his court voted on it and permitted it.”**¹⁰⁶ He reasoned, [a prohibited substance that] gives a foul taste is permitted. But for you who says that Daniel decreed against it, how could R. Yehudah the Patriarch come and nullify what Daniel decreed? Behold we have learned: **No court may nullify the ruling of another court unless it is greater than it in wisdom and number?**¹⁰⁷

He replied: Did you quote Simlai from Lyyda? Lyddians are different for they make light [of halakhic matters].

He said to him: Should I send a message [to R. Simlai about what you said]? Rav was embarrassed.

Rav said: If they have not expounded should we not expound? Behold Scripture states: *“Daniel resolved not to defile himself with the king’s food or the wine he drank.”*¹⁰⁸ The verse mentions two drinks: one is drink of wine the other is drink of oil.

Rav reasoned, he [Daniel] resolved for himself and ruled for all of Israel. Shmuel reasoned, he resolved for himself and did not rule for all of Israel.

In the Bavli, Rav says that the prohibition against the oil of Gentiles dates back to Daniel while Shmuel refutes this and argues that the original prohibition was just a matter of the oil being mixed with nonkosher residue, which Shmuel permits. The Bavli adds more detail about why Rav rejected the testimony of Simlai.¹⁰⁹ Simlai was from Lydda, a city with a reputation for disregarding some parts of halakha.¹¹⁰ Rav then continues

109. It is not clear whether Rav doubts the reliability of the report altogether or just does not think that Rabbi had the authority to permit. Rav evidently did not know of *t. ‘Abod. Zar.* 4:11. Most editions and manuscripts of *m. ‘Abod. Zar.* 2:6 also say that Rabbi permitted oil; however, these words are a late addition transferred from the Tosefta; see Epstein, *Mavo le-nusah ha-Mishnah*, 949. The continuation of the dialogue indicates that Rav had a problem on both accounts. Shmuel’s response, “Should I send a message to him”—even assuming that the pronoun refers to Simlai and not Rabbi himself—quells the first doubt since Simlai will make it clear that he did not permit oil himself but is only passing on a tradition. This first exchange between Rav and Shmuel is paralleled in the Yerushalmi. Rav’s counter that he will interpret the verse from Daniel even if Rabbi did not do so indicates that he also disagreed with Rabbi’s decision.

110. See Schwartz, “Tension Between Scholars,” 102–9; and Miller, *Sages and Commoners*, 126 n. 31, 249 n. 127, and 282. R. Simlai is also denigrated by R. Yonatan in *y. Pesah.* 5:3 (32a) (= *b. Pesah.* 62b), on which see Miller, *ibid.*, 130–34. Lydda in the Bavli is usually called “the South” in the Yerushalmi. Uzi Weingarten, personal communication, suggests that R. Simlai’s reputation here may be related to his antinomic midrash in *b. Mak.* 23b–24a. Evidently, however, this generalization by Rav and R. Yonatan was not true of all citizens of

to defend his position based on Scripture. Most significantly, only in the Yerushalmi does Shmuel threaten to call Rav a *zaken mamre*.¹¹¹ In both Talmuds, Shmuel rebukes Rav for making a snide remark about R. Simlai. Only in the Yerushalmi, however, does Shmuel continue to pressure Rav until he gives in and eats from the Gentile oil. To the contrary, in the Bavli, Rav goes on to give further arguments as to why he stands by his position.

It is difficult to assess which story, if any, better represents the historical reality. On the one hand, the story involves Babylonian rabbis, and so the Bavli does not suffer from transmission across locales. On the other hand, the Yerushalmi is still redacted much earlier than the Bavli and so suffers less from transmission across time.¹¹² But regardless of the history, it is still significant to compare the way the story was transmitted and recorded by the two Talmuds. In the Yerushalmi version, Shmuel forces Rav to accept his position, which is based on the authority of Rabbi, and Rav does so. In Bavli, they argue and continue to argue, but there is no threat and no indication that Rav gave in. If the Yerushalmi reflects the original version, then it is revealing that the Bavli removed the references to the *zaken mamre* and to Rav's "repentance." If the Bavli reflects a more original version of the story then it is also revealing that the Yerushalmi would insert the *zaken mamre* line.¹¹³ Either way, this example fits in with the trend we have seen in other cases of the Yerushalmi tending to push rabbis toward conformity to the position of the majority or, in this case, of the patriarch, while the Bavli is more tolerant of diverse practices. Alyssa Gray summarizes this difference between the Talmuds as follows:

Whereas *y. Avodah Zarah's* Rav yields to Shmuel and eats the Gentile oil, *b. Avodah Zarah's* Rav offers an interpretation of Dan 1:8 that justifies his continued avoidance of the oil. Rav's refusal to yield to Shmuel in *b. Avo-*

Lydda, which was a major Jewish center and was the home of many great rabbis, nor was it true of all times. See *b. Šabb. 29b*; Ze'ev Safrai, "Yiḥudo shel ha-yishuv be-'ezor Lod-Yafo bi-tqufat ha-Mishnah voha-Talmud," in *Ben Yarkon ve-Ilan* (Ramat Gan: Bar-Ilan University, 1983), 53–72; Aharon Oppenheimer, "Jewish Lydda in the Roman Era," *Hebrew Union College Annual* 59 (1988): 115–36; and Dov Herman, "The Different Approaches of the Rabbis in Yavneh, Lod, and Galilee regarding the Ninth of Av as Reflected in the Laws of the Day," *Hebrew Union College Annual* 73 (2002): 1–29 (Hebrew).

111. Gray, *Talmud in Exile*, 114, explains why the Bavli may have added a reference to Rav's embarrassment (איכסוף) based on the significance given to shame in the Bavli in general, as discussed by Rubenstein, *Culture*, 67–79. However, this still does not explain why the Bavli does not include the threat of Rav being labeled a rebellious elder.

112. In addition, the general tendency of the Bavli storytellers is to take great liberties in using their source material to create new narratives. More than the Yerushalmi, the Bavli redactors regularly rework their sources in order to fit into the literary and didactic context of the *sugya*. The Bavli is therefore generally less useful for reconstructing history than the Yerushalmi. See further above, p. 38.

113. This position is taken by Ben-Menahem, *Judicial Deviation*, 91.

dah Zarah certainly makes sense in light of the greater decentralization of the Babylonian amoraic movement and the differences between Babylonia and Palestine on the issue of the diversity of practice and/or opinion.¹¹⁴

Gray's explanation for the difference between the two stories in terms of the Bavli's greater decentralization and greater acceptance of "diversity of practice" matches my own conclusions here as well as at the end of chapter 3.¹¹⁵

Conclusion

In sum, the history of interpretation surrounding Deut 17:8–13 reveals some general patterns of thought by the rabbis concerning authority and dispute. The basic assumption throughout the laws of the rebellious elder, unlike the laws of *Horayot* discussed in the next chapter, is that every Jew must follow the decision of a court or else suffer the penalty associated with each individual law – which may be a fine, lashes, or something more severe. But beyond the punishment required for that individual transgression, some people in some circumstances are further punished with the death penalty for rebelling against the high court's decision as mandated by Deuteronomy 17. The extent to which the court can prosecute a fellow rabbi for disobeying their decision acts as a litmus test for their degree of intolerance or pluralism toward their detractors.

While various opinions existed among the rabbis of every generation concerning the details of the law of the rebellious elder, some generalizations about each era can be made based on the sources. The Tannaim modified every aspect of the biblical law in order to transfer it from a statute upholding the authority of the national judicial system to a mostly theoretical model of how to deal with halakhic disputes among the rabbis. Every detail of the law is reworked: who (the litigants of the Bible become the wise elder or high judge, the priests on the court are replaced with sages), where (the Temple court is expanded to include Yavneh), and what (from only civil laws in the Bible to all of halakha with emphasis on rabbinic interpretation of the law). In reality, the Tannaim tolerated hundreds of differences of opinion, as is evident throughout rabbinic literature, and they even lived with a good deal of multiplicity of practice, as evident in numerous narratives.¹¹⁶ Nevertheless, the extension of the law

114. Gray, *Talmud in Exile*, 115, based on Kalmin, *The Sage in Jewish Society*, 11, on which see above, p. 158.

115. See above, pp. 153–61.

116. See examples analyzed in chapters 4 and 5.

of the rebellious elder reveals the desire of the Tannaim for a high degree of uniformity. If only they had the political means and the intellectual courage, they would force that unity on their dissenters, especially those with sectarian attitudes.

The Yerushalmi, for the most part, continues the line of thinking found in Tannaitic literature but limits the type of case to quantitative changes in rabbinic interpretation of biblical laws. The Bavli, by contrast, almost completely writes the law out of existence by limiting it to the one example in the Mishnah, *tefillin*, and confining the applicability of the law to the Jerusalem court. This is not to say that the Bavli eschews any concept of authority. The overall picture of the Bavli must include a rhetorical reading of its entire commentary on *m. Sanh.* 11:2–4.

The Bavli on *m. Sanh.* 11:2 is not structured as a step-by-step logical argument. It is structured as a commentary on each phrase of the Mishnah rather than as an expository essay. Nevertheless, we can trace some rhetorical flow in the movement from one *sugya* to the next. The first *sugya* quotes *Sifre* 152. The next *sugya* introduces three Tannaitic opinions including that of R. Meir, the Tanna who limits the law of the rebellious elder to the greatest extent. The next *sugya* forces the expansive *Sifre* into the narrow definition of R. Meir. The rhetorical message is that *Sifre* 152 is rejected in favor of R. Meir.¹¹⁷ R. Meir relegates the authority of the court to a small corner of biblical laws already deserving severe punishment. Rav Kahana, in the next *sugya*, goes a step further and questions the very concept of authority itself. Rav Kahana's extreme position is rejected for fear of disunity, and ancient days of unity are remembered as an ideal. The Bavli on the next Mishnah then limits the law to the one case of *tefillin*.

The Bavli recognizes that a court must have authority in order for the community to hold together. However, the Bavli is not willing to uphold the model of the rebellious elder in which that authority is forced on the individual sage. This is clearly exemplified by comparing the two Yerushalmi narratives, which employ the threat of *zaken mamre*, with the total absence of a *zaken mamre* threat in the Bavli versions. Argumentation and reasoning are the only tools the Bavli will allow, which necessarily leads to a more tolerant outlook. Overall, the Bavli prefers persuasion over power.

117. One could argue that the Bavli's motivation is simply to reconcile two opposing Tannaitic views but does not mean to reject *Sifre* 152. However, considering that the continuation of the Bavli *sugya* finds two more ways to limit the types of cases to which the law of rebellious elder applies, I consider all of these interpretations as one unit with a single motivating force—to constrict the application of the law of the rebellious elder. See also above, p. 319 n. 72.

Chart 6.1 Comparison table for *m. Sanh. 11:2* and *t. Sanh. 7*

<i>m. Sanh. 11:2</i>	<i>t. Sanh. 7:1 (ms. Erfurt)</i>
זקן ממרא על פי בית דין שנאמר כי יפלא ממך דבר למשפט וגו'	
שלשה בתי דינין היו שם אחד יושב על פתח הר הבית ואחד יושב על פתח העזרה ואחד יושב בלשכת הגזית	א"ר יוסי בראשנה לא היו מחלוקות בישראל אלא בבית דין של שבעים בלשכת הגזית ושאר בתי דינין של עשרים ושלשה היו בעיירות של ארץ ישראל ושאר בתי דינין של שלשה שלשה היו בירושלם אחד בהר הבית ואחד בחיל
	נצרך אחד מהן הלכה הולך לבית דין שבעירו אין בית דין בעירו הולך לבית דין הסמוך לעירו אם שמעו אמרו לו
באים לזה שעל פתח הר הבית ואומר כך דרשתי וכך דרשו חבירי כך לימדתי וכך לימדו חבירי אם שמעו אומרים להם	אם לאו הוא ומופלא שבהם באין לבית דין שבהר הבית אם שמעו אמרו להן
ואם לאו באין להם לאותן שעל פתח העזרה ואומר כך דרשתי וכך דרשו חבירי כך לימדתי וכך לימדו חבירי אם שמעו אומרים להם	ואם לאו הן ומופלא שבהן באין לבית דין שבחיל אם שמעו אמרו להן
ואם לאו אלו ואלו באים לבית דין הגדול שבלשכת הגזית שממנו יוצאת תורה לכל ישראל שנאמר מן המקום ההוא אשר יבחר ה'	ואם לאו אילו ואילו הולכין לבית דין הגדול שבלשכת הגזית בית דין שבלשכת הגזית אף על פי שהו של שבעים ואחד אין פחות מעשרים ושלשה נצרך אחד מהן לצאת רואה אם יש שם עשרים ושלשה יוצא ואם לאו אין יוצא עד שיהו שם עשרים ושלשה היו יושבין מתמיד של שחר עד תמיד של בין הערבים ובשבתות ובימים טובים באין לבית המדרש שבהר הבית נשאלה שאילה אם שמעו אמרו להם ואם לאו עומדין למינין רבו המטמאין טימאו רבו המטהרין טהרו
חזר לעיר ושנה ולימד כדרך שהיה למד פטור ואם הורה לעשות חייב שנאמר והאיש אשר יעשה בזדון אינו חייב עד שיוורה לעשות תלמיד שהורה לעשות פטור נמצא חומרו קולו:	
	משם היה יוצאת הלכה ורווחת בישראל משרבו תלמידי שמאי והילל שלא שימשו כל צורכן הרבו מחלוקות בישראל.

8	ספרי ירושלמי בבלי	נגע	לגע	בין	מצורע	בין	לגע	בין	מוסגר	למצורע	מוחלט	בין	נגע	לגע
	9	ספרי ירושלמי בבלי	בין	נגעי	אדם	לנגעי	בגדים	לנגעי	בגדים	ולנגעי	בגדים	דברי	אלו	ערכים
			בין	ניגעי	אדם	לניגעי	בגדים	בגדים	בגדים	בגדים	בגדים	בגדים	דברי	אלו
10	ספרי ירושלמי בבלי	והרמים												
		והערכין												
		והקדשות.												
11	ספרי ירושלמי בבלי	וטהרת	מצורע.										והערכין	
		וטהרת	המצורע										ריבות	
		וטהרת	מצורע.										אילו	
12	ספרי ירושלמי בבלי	בשעריך, זה												
		לקט שכחה ופיאה.												
		זו												
13	ספרי ירושלמי בבלי	מיכן												
		אמרו												
		שלשה												
14	ספרי ירושלמי בבלי	פתח	הר	הבית	ואחד	על	פתח	העורה	ואחד	בלשכת	הגזית			
		על												
		שם												

15	ספרי ירושלמי בבלי	באים	לזה	של	שער	הר	הבית	ואומר	כך	דרשתי	וכך	15
16	ספרי ירושלמי בבלי	דרשו	חבריי	כך	לימדתי	וכך	לימדו	חבריי	אם	שמעו	אמרו	16
17	ספרי ירושלמי בבלי	להם	ואם	לאו	באים	לזה	שעל	פתח	העורה	ואומר	כך	17
18	ספרי ירושלמי בבלי	דרשתי	וכך	דרשו	חבריי	כך	לימדתי	וכך	לימדו	חבריי	אם	18
19	ספרי ירושלמי בבלי	שמעו	אמרו	להם	ואם	לאו	אלו	ואלו	באים	לבית	דין	19
20	ספרי ירושלמי בבלי	הגדול	שבשכח	הגזית	שמשם	תורה	יוצאה	לכל	ישראל	שנאמר	מן	20
21	ספרי ירושלמי בבלי	המקום	ההוא	אשר	יבחר	הא.	ועלית	זו	הענייה	דבר	אחר	21

22	ספרי ירושלמי בבלי	יקמת	ועלית, ועלית	מגיד	שארץ	ישראל	גבוהה	מכל	הארצות	ובית	המקדש
			ועלית	מזכן					לבית		הבחירה
			ועלית	מלמד					שבית		המקדש
23	ספרי ירושלמי בבלי	שלא	יבנה	אלא	גבוה	מכל	ארץ	ישראל	מה	טעמא	כי
					במוכחו		של	עולם			
					גבוה		מארץ	ישראל,			
24	ספרי ירושלמי בבלי	כהר	קדשי	בהר	מרום	ישראל	אשתלנו	ונשא	ענף	ועשה	פרי
25	ספרי ירושלמי בבלי	וגומא	וארץ	ישראל	גבוה	מכל	הארצות.	ובאת,	אל	המקום	מלמד
								ובאת			לרבות
											לרבות
26	ספרי ירושלמי בבלי	שהמקום	גורם.	בית	דין	שבכנה.	דין	שבכנה			
				בית	דין	שבכנה					