Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis

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Introduction

Bernard S. Jackson has rightly warned that while it is tempting to analyze Jewish law in terms of secular theories of jurisprudence, the success of such a project is not guaranteed. For while there are correspondences between Jewish law and positivism, Jewish law and natural law theory, Jewish law and social contract theory – there is no systematic correspondence and indeed, there are points of dissimilarity if not outright tension in each case.[1] In what follows I make no pretense of claiming a perfect correspondence between Jewish law and any particular secular legal theory. However, a comparison of Jewish law and secular legal theories on highly specific questions can be useful and reciprocally illuminating. In this paper I plan to examine the notion of "truth" in talmudic law[2] with particular attention to the "one right answer" thesis of Ronald Dworkin. Other theories of truth in law will be invoked where helpful.

1   B. S. Jackson, "Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature," *Jewish Law Annual* 6 (1987): 3-44; see p. 14. Jackson outlines the partial correspondence between Jewish law and various theories of secular jurisprudence, 3-14.

2   The textual basis for this study comprises the works of classical rabbinic Judaism (to the 7<superscript>th</superscript> c C.E.) – the halakhic midrashim, the Mishnah, the Tosefta, the aggadic midrashim, the Palestinian Talmud, the Babylonian

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A good deal of scholarly energy has been directed at the question of legal pluralism v. legal monism in talmudic law,[3] but I hope to bring something new to the discussion by arguing that rabbinic texts evince a complex attitude towards judicial "truth" − often assuming the existence of a single "correct" answer but according it rather less respect than might be expected.

In the preface to *Law's Empire*, Dworkin argues against the positivist's claim that there is no single right answer to hard legal questions − only different answers. He describes his position as follows:

> I have insisted that in most hard cases there are right answers to be hunted by reason and imagination. Some critics have thought that I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have

Talmud, and the minor or external tractates. When I use the terms talmudic law, rabbinic law, or classical rabbinic law I am referring to the legal material found in these many works. Translations are my own and are based on textual evidence from manuscripts and printed editions. Only significant variants are noted.

3   The terms appear, for example, in Norman Lamm and Aaron Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process," *Cardozo Law Review* 1 (1979): 99-133. Section 1 of the article is entitled "The Halakhic System: Monistic or Pluralistic?" (100). Hanina Ben-Menahem, "Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?" *Jewish Law Annual* 6 (1987): 164-75, retains these labels. More recent studies that discuss the phenomenon of pluralism (whether halakhic or hermeneutic) include Shaye J. D. Cohen, "The Significance of Yavneh: Pharisees, Rabbis and the End of Sectarianism," *Hebrew Union College Annual* 55 (1984): 27-53; Moshe Halbertal, *People of the Book: Canon, Meaning and Authority* (Cambridge, Mass.: Harvard University Press, 1997), esp. 53-72; Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (Philadelphia: University of Pennsylvania Press, 2004), esp. 151-201; and Steven Fraade, "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization," *AJS Review* 31:1 (2007): 1-40. See also Hanina Ben-Menahem, Neil S. Hecht and Shai Wosner, eds., *Controversy and Dialogue in the Jewish Tradition: A Reader* (New York: Routledge Press, 2005) for a collection of relevant sources.

> reason to think an answer right is different from the question whether it can be demonstrated to be right.[4]

As Michel Rosenfeld points out, Dworkin's view is somewhat counterintuitive given his insistence that adjudication is not mechanical or syllogistic but hermeneutical.[5] Nevertheless, while ordinary judges may not be able to arrive at the right answer, and may have to choose among competing possible answers, there is – generally speaking – a right answer to hard cases that a superhuman judge would be able to discern. Despite the surface phenomenon of legal pluralism (disagreement over and diverse answers to hard cases), Dworkin maintains a fundamental legal monism in most hard cases.

What do we mean when we speak of the "right" answer in a hard case, of a proposition's being true as a matter of law? What we mean is that the law, norm or decision is acceptable as law according to the legitimacy criteria of the legal system in question: it is legitimate.[6] And what are the criteria by which a norm or decision is said to be legitimate? Jackson (19) distinguishes two general types of legitimacy criteria. On some theories, legitimacy is a matter of *validity*, which is to say the production of a norm or decision according to authorized and recognized procedures of norm-creation or decision-making (e.g., act of the legislature) regardless of its character, quality or content. This is the view of legal positivism (Patterson 60, 63). This view maintains that while a system *may* also choose to incorporate some additional criterion of authenticity (e.g., conformity to principles of morality), the legitimacy

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4 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986), viii-ix.

5 Michel Rosenfeld, "Dworkin and the One Law Principle: A Pluralist Critique," *Revue Internationale du Philosophie,* 2004.

6 Thus, when Dennis Patterson, for example, asks what it means to say that a proposition of law is true, or that a norm or decision is true as a matter of law, he is asking about the legitimacy criteria of diverse legal systems and theories (Patterson, *Law and Truth* [New York: Oxford University Press, 1996], 1).

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of a norm or ruling turns only on its institutional validity.[7] By contrast, natural law theory maintains that legitimacy is a matter of *authenticity* (Jackson, 20) which may be understood as conformity with some criterion of character, quality or content. An unjust law would not, for example, be a true or legitimate law even if produced by authorized procedures because the legitimacy of a norm or ruling turns not on its institutional validity but on its authenticity.

Dworkin's version of natural law theory (not to be confused with classical natural law theory) would argue that a proposition of law may be said to be legitimate or "true" if "it is consistent with principles of morality that put the law in its best light."[8] Dworkin links the truth of

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7   H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 2nd ed., postscript, 269, writes that "the existence and content of law can be identified by reference to the social sources of the law (e.g., legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of the law." In other words, law may explicitly incorporate moral precepts but there is no necessary conceptual connection between law and morality in the positivist's view. This does not mean, of course, that all positivists are moral skeptics. A positivist may hold that there are mind-independent moral values but the validity of our legal propositions does not of necessity turn on their conformity to these values.

8   Patterson, 1, referring to contemporary natural law theorists, but likely with Dworkin in mind. Dworkin's theory of interpretation as a practice in which one makes of a text "the best possible example of the form or genre to which it is taken to belong" (*Law's Empire*, 52) is described at length by Patterson (79, 82-84). Jackson (*op. cit.*) points out that Dworkin falls short of a "full-blooded natural law stance" (22) for several reasons, including the fact that in his view "the community morality which generates the principles and rights which the judge is to apply ... is a dynamic one" (22-23). Michael Moore, a moral realist, holds that Dworkin is not a moral realist, but a deep conventionalist in Michael Moore, "A Natural Law Theory of Interpretation," *S. Cal. L. Review* 58 (1985): 299 n35, cited in Patterson, *op. cit.*, 8 n18. Nevertheless, insofar as Dworkin wants the truth of our propositions of law to be independent of our practices, his theory may be understood as a version of natural law.

legal propositions to "idealized constructions of moral convention"[9] (and in so doing falls short of a strong moral realism).[10] For Dworkin, justification of a judgment or proposition of law must be external to the law itself – its texts, precedents, institutions and legislative history – so that a law is true only insofar as it can be justified by recourse to "a political theory that identifies a principle that puts legal practice in its best light" (Patterson, 78-79). The truth conditions of law are the principles that best explain the purposes and structure of the system as a whole (75) and in general, one justification will stand above all others (79). By contrast, positivists hold that the truth conditions of a proposition of law are certain social facts (an act of the legislature, for example) whose existence makes the proposition true (63).

As Jackson points out, Dworkin's theory also differs from legal positivism over the related question of judicial discretion in the resolution of hard cases (21-22). For legal positivists, there are no *substantive* limits on a judge who seeks to fill a gap in the law. In the absence of criteria of authenticity, judges have "strong discretion" in deciding cases for which there is no existing norm. If a system has *chosen* to incorporate some criteria of authenticity the judge may be somewhat constrained and may exercise only "weak discretion" but in no case is it possible that the judge be deprived of all discretion. For the

9   Michael S. Moore, "Moral Reality Revisited," *Mich. L. Rev.* 90 (1992): 2424, 2426 as cited in Patterson, 75 n32.

10   Moral realists believe in the metaphysical or mind-independent reality of moral virtues and concepts (such as justice, kindness, wickedness and the like). Our moral claims are true if they correspond to these mind-independent moral principles. How we go about *ascertaining* such correspondence is not entirely clear. The moral realist Michael Moore argues that since we do not have direct access to moral reality we must construct theories (systems of belief) about it, and individual moral propositions may be deemed true to the degree that they cohere with the entire system of belief (a coherentist theory of epistemology). But such a view does not clearly explain how metaphysically real moral principles guide the production of our moral theories and so justify their authenticity. For an explication and discussion of Moore's position, see Patterson, *op. cit.,* 44-50.

most part, the judge will simply choose an answer from among several competing conceptions and interpretations.[11] For Dworkin, however, legitimacy always entails criteria of authenticity. Because the substance of a judge's decision will always be constrained by these criteria, the judge's discretion is weak, at best, and perhaps non-existent. In hard cases, judges apply the relevant principle(s) in order to arrive at the one "right" answer.[12] The ideal judge — superhuman though he may be — must do more than simply choose the right answer from among competing conceptions and interpretations. He is involved in "reconciling past, present and future and weaving them together into a coherent narrative giving its due to justice, fairness and due process and reconciling the unity of the legal system taken as a whole with its manifold diversity" (Rosenfeld, 32-33). In this process, the judge is guided by the principle of integrity which may be defined as consistent adherence to moral principle, or viewing the law as morally coherent rather than unprincipled, political or deceitful action (Rosenfeld, 33). In Dworkin's view, adjudication is best understood as an act of constrained "constructive interpretation"[13] rather than unfettered judicial discretion.

Can Jewish law be understood as accommodating a natural law theory with its concomitant monism and limited judicial discretion, or is talmudic law committed to legal pluralism?[14] Many studies that address

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11 As Lamm and Kirschenbaum point out (*op. cit.*, 105), legal positivists will thus tend towards a pluralistic view of law as different judges may legitimately exercise their discretion to arrive at different and even contradictory conclusions.

12 Again, individual human judges may not be up to the task, but in theory it is possible.

13 Dworkin uses this term in *Law's Empire*, 52ff. The *prima facie* tension between the "one right answer" thesis and the view of adjudication as a form of interpretation has been noted by Rosenfeld, *op. cit.*, 1. However, the tension is mitigated by the fact that Dworkin does not view interpretation as indeterminate, because a commitment to law as integrity guarantees that interpretation occurs within a framework of principles as well as with attention to the unity of the legal system (past, present and future) as a whole.

14 Lamm and Kirschenbaum ask the question this way: "Can Halakhah support

this question focus on programmatic declarations – so that phrases like "these and these are the words of the living God" are understood as pointing to two equally true answers, evidence of pluralism. However, programmatic rabbinic statements – which both praise and condemn halakhic pluralism – do not shed a definitive light on the issue.[15] A

a natural law theory? Does Judaism, especially Jewish law, lend itself to a belief in the ontological quality of laws? If the answer is affirmative, we have the philosophical underpinnings for a restrictive and highly literal view of the autonomy of the judge. If negative, we have room, at least theoretically, for a broader conception of the role of the judge and his freedom in the exercise of his judicial function" (109). Lamm and Kirschenbaum state outright that no simple answers to this question are available (109) and provide a comprehensive overview of monistic and pluralistic conceptions of the law held by halakhists and scholars from the early medieval to the modern period (109-20). Of course, in this paper I focus on texts of the talmudic period, rather than halakhah or Jewish law more broadly conceived.

15   As evidenced by the fact that the same passages are adduced in support of diametrically opposed claims. For example, the famous passage in b. Eruv 13b in which the contradictory views of Bet Hillel and Bet Shammai are both declared by a heavenly voice to be "the words of the living God" has been widely held up as a rejection of legal monism. So Bernard S. Jackson, *op. cit.*, 33f; Daniel Boyarin, *Border Lines*, 157-60 (albeit, assuming anachronism), and Shlomo Naeh, "Make Yourself Many Rooms: Another Look at the Utterances of the Sages About Controversy" (Hebrew), in *Renewing Jewish Commitment: The Work and Thought of David Hartman*, Avi Sagi and Zvi Zohar, eds. (Jerusalem: Shalom Hartman Institute and Hakkibutz Hameuchad, 2001), 862. By contrast, Ben-Menahem argues that the text is not a rejection of monism (*op. cit.*, 168). In his view, the text seeks only to assert that the will of God will be done by following either of the two opinions because both are legitimate, which is not to say that both are equally valid solutions to the legal question/problem. See also D. Kraemer, *The Mind of the Talmud: An Intellectual History of the Bavli* (New York: Oxford University Press, 1990), who sees b. Eruv 13b and similar texts as asserting that no opinion contains the truth fully and that alternate views contain aspects of the whole truth (121-29, 139-48, esp. 145). Certainly, in b. Gittin 6b, the context of the phrase "these and these are the words of the living God" makes it quite clear that in that passage at least each of the two views mentioned is partially correct, and in combination give the full

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more reliable way to approach the question of whether rabbinic law is committed *in practice* to the notion of one right answer is to examine cases and rulings rather than (or at least in conversation with) programmatic declarations. But which cases and rulings are we to examine?

We have seen that pluralism is conceptually linked with judicial discretion. If classical rabbinic texts contain cases in which judges are afforded discretion to rule in one or another direction in a given situation, then we may have strong evidence of legal pluralism as against the notion of a "single right answer." This is indeed the approach adopted by Hanina Ben-Menahem, in a 1987 essay entitled "Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?"[16] Ben-Menahem argues that for the pluralistic view to be supported there must be *some* instances in which incompatible norms or rulings are deemed to be equally correct, even if rare and exceptional. He concludes that on occasion, talmudic law "grants judges full autonomy to make a choice between conflicting and incompatible norms and that consequently in those instances no one uniquely correct answer exists" (165).

A second approach is to look at cases and rulings that signal a rabbinic engagement with questions of truth in the context of legal discussion or adjudication. This is the approach of David Kraemer in *The Mind of the Talmud: An Intellectual History of the Bavli*.[17] Kraemer argues that although the rabbis of the Babylonian Talmud are engaged in the pursuit of truth, they hold that a single confident truth is ultimately indeterminable.

truth. Finally, see Yaakov Elman, "World of the 'Saboraim': Cultural Aspects of Post-Redactional Additions to the Bavli," in *Creation and Composition: The Contribution of the Bavli Redactors (Stammaim) to the Aggada*, J. L. Rubenstein, ed. (Tübingen: Mohr Siebeck, 2005), 383-415, who interprets b. Eruv 13b as indicating that disputes between rabbis appear as disputes only to the human mind (383-95).

16 *Op. cit.* The article was originally presented as a paper at the first International Conference of the Jewish Law Association in Jerusalem, August, 1980.

17 New York: Oxford University Press, 1990.

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In the immediately following section of this paper I will demonstrate that (1) Ben-Menahem's argument based on apparent instances of judicial discretion and (2) David Kraemer's argument based on an analysis of rabbinic conceptions of truth, are flawed. Because these approaches do not illuminate the monism-pluralism debate we will be forced to turn to other strategies in the remainder of the paper.

Judicial Discretion in Rabbinic Texts?

Ben-Menahem suggests that the only way to establish the pluralism of talmudic law is to uncover actual judgments in which a single ruling advances two incompatible norms without any hierarchical ordering between them thereby leaving the final outcome to judicial discretion. He claims that such cases, though rare, do exist in the Talmud. In these few instances, the addressee of the legislation or ruling "is given full autonomy to follow either of the two conflicting modes of behavior" (168).

The cases cited by Ben-Menahem as evidence for the view that on occasion there is more than one uniquely correct answer in the law, all involve the use of a particular phrase (with some variation) in either Aramaic or Hebrew: *de-avad keX/[or/haki] avad, de-avad keY/[or/haki] avad* (Aramaic) = *asah keX asah, she-asah keY asah* (Hebrew) = "he who has acted in accordance with Rabbi X [or thus], has acted; he who has acted in accordance with Rabbi Y [or thus], has acted." The phrase appears in the Babylonian Talmud five times[18] in contexts of controversy for which no clear resolution can be found. In each case, a stalemate is reached, neither side managing to persuade the other to its opinion. A declaration is then made: since it has not been said that the law is in accordance with Rabbi X or Rabbi Y, then anyone who has acted in accordance with Rabbi X, has acted; and anyone who has acted in accordance with Rabbi Y, has acted.

18 B. Ber 11a, 27a, b. BB 124a, b. Shab 61a, and b. Shev 48b.

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Ben-Menahem translates the phrase somewhat differently and in so doing interprets it as support for his claim that both answers are endorsed as correct answers to the legal question at issue. I refer to the following two translations by Ben-Menahem:

> He who acts (*asah*) in accordance with the opinion of Rabbi *is acting correctly* (*asah*); he who acts (*asah*) in accordance with the view of the sages *is acting correctly* (*asah*) [emphasis mine].[19]

> R. Hama said: Now since the law has not been stated either in accordance with the view of Rab and Samuel or in accordance with the view of R. Elazar, if a judge decides (*avad*) as Rab and Samuel *it is legal* (*avad*); if he decides (*avad*) as R. Elazar *it is legal* (*avad*) [emphasis mine].[20]

The English words "legal" and "correctly" in Ben-Menahem's translation have no corresponding Hebrew or Aramaic term in the original. Ben-Menahem chooses to translate the repeated verbs *asah* (first passage) and *avad* (second passage) as "if he decides ... it is legal" and "he who acts... is acting correctly." A more literal translation would simply repeat the verb (he who decides ... decides; he who acts ... acts). Moreover, Ben-Menahem translates the verbs in the present tense. This is questionable, since the Hebrew phrase in the first passage employs a perfect verb (*asah*) and is better translated "[he who] has acted ... has acted"). The Aramaic is less certain. The form *avad* could be vocalized as a participle or a perfect verb. However, on analogy with the Hebrew, it is likely that the Aramaic also employs a perfect form. The difference is important. A participle can more easily be construed as *prescribing* the disposition of present and future cases and as signaling the acceptability of either ruling. A perfect verb indicates only that rulings already rendered will be respected with no reference to their correctness or desirability: if the decision has already been rendered, it is a done deed and will not be struck down. Thus, the first passage is more accurately

19 Ben-Menahem's translation of b. BB 124a (171).
20 Ben-Menahem's translation of b. Shev 48b (170).

translated "one who has acted in accordance with the opinion of Rabbi, has acted; one who has acted in accordance with the opinion of the sages, has acted" (the second passage would be translated similarly, *mutatis mutandis*).[21] The correctness or even the desirability of the decision is not the subject here; the decision's *ex post facto* legitimacy is.[22]

These observations suggest that the five examples cited by Ben-Menahem are not best understood as endorsing incompatible norms as equally correct answers to a legal question. On the contrary, these passages address a situation in which the mechanisms for determining the halakhah or validating one view as the correct halakhah in cases of conflicting teachings have failed.[23] This is not to say that there are two valid answers (pace Ben-Menahem), but rather that there are two

21 Our argument is not voided even if we suppose that the Aramaic verb is a participle. Context suggests that even with a participle, the phrase in question may be understood as a conditional in which a future perfect action is indicated: "if [in the future] a judge acts in accordance with Rab and Samuel, he *will have* acted; if he acts in accordance with R. Elazar he *will have* acted." Here again the purpose of the phrase is not to endorse both views as correct, but to indicate that rulings following either view will be respected after the fact, since it is unknown which of the two is correct.

22 We should note here two similar cases in the Palestinian Talmud that are not mentioned by Ben-Menahem. In p. Eruv 1, 19a and p. Yoma 8, 42d, an unresolved dispute is followed by the conclusion that those who act/have acted in accordance with either opinion need not be concerned (*man de-avad haken la ḥashash, uman de-avad haken la ḥashash*). The same ambiguity attends the Aramaic verb *avad* in these cases as attended it in the Bavli. But context supports the reading proposed here: the text does not declare the rulings equally correct. It simply acknowledges an inability to adjudicate between them and reassures (*la ḥashash*) those who act on either view that there is no cause for concern that their action will be reversed, or deemed illegitimate.

23 For example, even the mechanism of majority rule does not apply in these cases, either because the views are the views of individuals, or they are the views of an anonymous group against an extremely authoritative individual – Rabbi Judah ha-Nasi. Indeed in b. BB 124a-b there is a dispute over who prevails in a debate between R. Judah ha-Nasi and a group of anonymous sages and no resolution is reached.

candidates for the title of "right answer" between whom we lack the means to choose. The implication is that there is indeed a single right answer (precisely what that means will be explored below) but we have no means available to determine which view should prevail as the halakhah. Without prescribing one view or the other as the halakhah to be followed, amoraic authorities declare that actions taken in accordance with either view are — *ex post facto* — allowed to stand without challenge. This should not be construed as a declaration that both views are correct and carry an equal endorsement as the course of action to be taken.[24] Thus the "*de-avad keX/haki avad*" cases are not evidence for a pluralistic view of law in the Talmud.

The Pursuit of Truth?

In a chapter entitled "The Bavli on 'Truth,'" David Kraemer argues that the Bavli's penchant for argumentation, justification and clarification of competing views is evidence that the Bavli is not a legal document at all but a work of religious philosophy, and is thus best compared with other works of religious philosophy that are dedicated to the pursuit of truth. Kraemer adopts a metaphysical understanding of "truth" as found in the classic western philosophical tradition: truth is "the way things really are" (171), the structure of reality or that which is eternal and unchanging. He concludes that the Bavli's characteristic features embody the view that a single confident truth (in the metaphysical sense) is ultimately indeterminable.

First, I address Kraemer's assertion that it is "incorrect to equate the Bavli's concern with law as generally conceived" (173) and that the

24 In this light we may understand the principle attributed to R. Sheshet in the name of R. Assi (b. San 33a) that if a judge errs in weighing (presumably conflicting) opinions, his decision is not reversed (in contrast to an error regarding a law of the Mishnah, which *is* reversed). The difference is due to the fact that in the former case the correct opinion cannot be determined while in the latter case it can. See Lamm and Kirschenbaum, *op. cit.*, 122-23.

concern of the Bavli is the pursuit of (metaphysical) "truth." Kraemer reasons that law is either conventional or natural; for the rabbis, however, law is an expression of the divine will and thus does not fall neatly into either category. Since "its subject is God's will we may more properly characterize the Bavli's concern as truth in the broadest sense" (173) and thus compare it with "metaphysics and other such subjects" (177). To this we may respond that the mere fact that contemporary categories of law (and Kraemer has hardly produced an exhaustive list) do not entirely or perfectly capture biblical or rabbinic conceptions of law does not mean that one is justified in simply abandoning the legal for the metaphysical matrix. As I have argued elsewhere,[25] the concern of the Talmuds is clearly law, which may be seen as conventional insofar as its details are formulated and articulated in the context of an interpreting community, and natural insofar as it relies on the analytical application of reason, but neither conventional nor natural in that it is predicated on an initial revelation of a sovereign divine will (thus resembling positive law).[26] The Bavli (like other systems of divine law) may force us to rethink our definitions of law; nevertheless, it is still best understood as a form of law. This claim is not undermined by the belief that the law originates in a divine revelation because this revelation is understood to be a revelation of God's will *for the conduct of human society in justice and sanctity*, rather than a revelation of philosophical or metaphysical "truth." In other words, while this revelation is believed to be a true revelation, it is not a revelation of "truth" in Kraemer's terms.

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25 See my "Book Review of Kraemer: 'The Mind of the Talmud'," *Journal for the Association of Graduates in Near Eastern Studies* 2:2 (1991): 44-48.

26 All divine legal systems are riddled with the same ambiguity and difficulty of classification, as evidenced by the fact that divine law has been variously categorized as positive, natural, or simply sui generis. For a survey of medieval and modern views on positivism and natural law theory in relation to Jewish law, see Lamm and Kirschenbaum, 105-20.

But more important, the metaphysical notion of truth so central to Kraemer's argument is not found in the talmudic texts he cites. None of the texts he cites makes claims about "truth" in the sense of ultimate reality. Indeed, not one of the texts cited by Kraemer employs truth language (Hebrew "*emet*" and derivative forms) at all.[27] On occasion, Kraemer imposes the concept of truth on terms that have quite different connotations. As an example, b. Yev 14a seeks to justify those Shammaites who follow Shammaite teachings even though the halakhah is in accordance with the Hillelites, by declaring that the Shammaites (and by extension, their views) were sharper. Kraemer makes the unwarranted leap from "sharper" to "more correct" or true, and concludes that by declaring the halakhah in accordance with the view that is not sharper, the rabbis exhibit an indifference to truth. But the text says nothing about truth at all, and the continuation of the passage makes it very clear that "sharpness" is not a synonym for or guarantor of "truth." Indeed, it is the sharp scholar who is able to argue that the impure is pure — a clearly *false* assertion. "Sharpness" in talmudic texts refers to skill in argumentation only, not to metaphysical truth or even legal correctness.[28]

27 As I have argued in Hayes, "Review of Kraemer," *op. cit.*, 48, the Bavli's proximate concern is not truth and there is no textual indication that the rabbis perceived themselves as persons in pursuit of truth in the sense of the eternal and unchanging structure of ultimate reality. Such language is almost entirely foreign to the Talmud. Rabbinic literature reflects a desire to discern what is just, equitable, pious and obedient to God's will in the realm of human behavior and to do so through interpretation and debate, rather than ratiocination from first principles. What we have is a massive project of legal hermeneutics which is not fruitfully compared with philosophy, which in its primary classic formulation aims at a description of a uniform and eternal truth as distinct from the shifting conditions of human existence.

28 Similarly, Kraemer often construes a declaration that X is the halakhah as a declaration that X is the truth. But this is an equally unwarranted conclusion that reveals the primary problem with Kraemer's analysis: he does not distinguish adequately between truth in the simple sense of correctness (by whatever measure) and in the metaphysical sense of ultimate reality. When the rabbis assert that a given rule or ruling is the "halakhah" they simply

Looking for Truth in All the Wrong Places

We turn now to a third approach that has been adopted to illuminate the question of monism v. pluralism (or the right answer v. many answers) in talmudic law. I refer to the reliance on the occurrence of Hebrew *emet* ("truth") and related forms in halakhic formulations as signaling a single correct and authoritative ruling.[29] In the following section I will demonstrate that this approach too is flawed, less because its conclusions are entirely wrong (they are only partially wrong) and more because it looks for truth in the wrong place. As a result it uses the wrong body of evidence to arrive at an assessment of the place of monism in Talmudic legal thought.

My argument will run as follows: Despite some programmatic pronouncements that celebrate pluralism, talmudic texts that deal directly with norm-creation and adjudication are generally committed to the notion of a single "correct" or right answer (legal monism). However, the concept of a correct answer is not typically signaled by the word *emet* and its derivatives. These terms usually point to procedural correctness or lack of corruption, rather than "authenticity." Because *emet* in judicial and legislative contexts[30] has been misconstrued as a

mean that it is the operative law; they do not mean that it expresses an "ultimate reality." Texts like the famous Akhnai story in which the rabbis ignore a heavenly voice as to the halakhah and concern themselves only with the halakhah as determined by majority rule are strong evidence that the rabbis perceived themselves to be concerned precisely not with metaphysical truth (the single representation of the way things "really are"), as Kraemer claims, nor even with the strictly correct answer, but with halakhah – the articulation of norms and laws, ever provisional, in accordance with their best perception of God's will and accepted legitimating procedures.

29 This approach is found throughout traditional and modern scholarship. See notes 40, 46, and 50 for those who adopt this approach in connection with the phrase *be-emet* and related terms.

30 I use the term "legislative," despite its poor fit to the reality of the rabbinic

marker of authenticity, I devote the first part of the following section to the negative thesis that the vast majority of instances of *emet* in these Talmudic contexts do not signal a "right answer" view.

In the final section of the paper I will look at one of the primary terms employed in legislative and judicial contexts to designate a legal teaching or judicial ruling that is strictly or formally "correct."[31] Having properly identified one central site of rabbinic monism we will finally be in a position to assess the idea's place in talmudic legal thought, in a way that we were not able to do as long as we had the wrong set of data as our basis for analysis. To anticipate my conclusions: it is often the case that the formally correct norm or ruling is not recommended or followed. We will see that it takes more than theoretical correctness or legitimacy for a teaching or ruling to be declared the operative halakhah. That is because in rabbinic legal thought, the right answer is not always the best answer. And this is where the rabbis diverge from Dworkin. For Dworkin, the best answer — achieved through the process of constructive interpretation — becomes the correct answer *by virtue of being the best answer.* By contrast, rabbinic texts preserve a conceptual distinction between the strictly or formally correct answer and the best answer. This distinction lends rabbinic texts a certain transparency of motive and method that is sometimes lacking on a Dworkinian account.

period, simply to indicate contexts in which the law is represented as being debated and decided in a theoretical or academic, rather than judicial, context.

31 This is a good place to clarify the use of the term "strict" in this paper. I use strict law to refer to a law that is logically and theoretically correct, with no suggestion of stringency (in contrast to leniency).

Truth Language in Legal and Judicial Contexts in Classical Rabbinic Sources: What it Does and Does Not Signify

The following text analysis is divided into three sections. The first considers the phrase "*be-emet (amru)*" which is popularly translated "in truth (they said)" and often understood to introduce an absolutely true and certain law that may not be challenged (in a manner strongly suggestive of authenticity). I will argue that this is not what the phrase connotes. The second section considers phrases in which *emet* modifies a noun or verb of judging (*dayyan emet* [true judge], *din emet* [true judgment] and *din emet la-amitto* [a judgment true to its very truth]. The third section considers the term "*emet*" (truth) as an abstract virtue — both its connotation and its value — in law and judgment.

1. *Be-emet (amru)*

A small number of rulings in rabbinic literature introduce a norm with the phrase *be-emet amru* (often rendered, "in truth they said") though manuscripts and early printed editions attest to an original reading of *be-emet* ("in truth"). Some commentators have read the term as an indication of incontrovertible authenticity. For example, the classic medieval talmudic commentator Rashi remarks that a rule introduced by *be-emet (amru)* was accepted as truth and could not be disputed.[32] Others have understood the term simply to signal a binding ruling.[33] But in its original rabbinic contexts, does the term signal validity, authenticity or something else entirely?

The introductory term *be-emet* occurs eleven times in all of tannaitic literature — seven times in the Mishnah, three times in the Tosefta and

32 Rashi to b. BM 60a, s.v. *be-emet halakhah*.
33 See, for example, Ovadyah Bertinoro's comment to m. Ter 2:1. Other examples are provided below.

once in the Mekhilta.[34] In none of these instances does the phrase refer to the truth-value of the *content* of the ruling or law in question (i.e., its authenticity). On the contrary, in the mishnaic and toseftan cases, the adverb *be-emet* ("in truth") seems to qualify an implied verb of presentation (*amru*) rather than the content of the ruling and may be translated "but in fact [they said]...," or "actually, [they did say]..."[35] As these translations suggest, the phrase is used to introduce rulings that run contrary to what might be expected.[36] Indeed, it is precisely the exceptional and counterintuitive nature of the ruling that necessitates the assertion that it *really* (*be-emet*) is the law.[37]

34 Mishnah BB 2:3, BM 4:11, Kil 2:2, Naz 7:3, Shab 1:3, Shab 10:4, Ter 2:1; Tosefta BB 1:4, Ber 5:17, Kil 1:16; Mekhilta de Rabbi Yishmael Nezikin 4 (Lauterbach, 380). (As we shall see, the term has a slightly different function in the Mekhilta.) See Saul Lieberman, *Tosefta Kifshutah* (New York: Jewish Theological Seminary of America, 1992), II:605 for text critical comments. Mishnah MSS read "*be-emet*" without "*amru*" in each case, as does the Vienna MS of the Tosefta.

35 For a thorough linguistic analysis see Abraham Goldberg "*Letiv niv leshon haMishnah: Bittuyim shel Hiyyuv, sheyesh lahem gam Mashma'ut shel Niggud: Millat veken hamehabberet halakhah lehalakhah*" in *Qovets Ma'amarim bilshon Hazal,* part 2, Moshe Bernstein, ed. (Jerusalem, 2000) (Hebrew), 172-85. Goldberg places *be-emet* within the class of positive terms the meaning of which is to emphasize opposition (like *veken*, which in addition to establishing the similarity of analogous cases is sometimes used in Mishnaic Hebrew to connect two full sentences that contrast with one another). He argues that these terms are best translated as "but" and Louis Ginzberg notes that *be-emet* (*amru*) is interchangeable with *aval amru* (see Ginzberg, *A Commentary on the Palestinian Talmud,* Berakhot 2 (New York: Jewish Theological Seminary of America, 1941-61), 183-84.

36 Goldberg's translation of *be-emet* as "but" is certainly reasonable, but fails to capture some of the rhetorical force of the term. The translations I have suggested come closer to conveying the counterintuitive or truly exceptional nature of the rulings introduced by *be-emet* as will be seen.

37 See the brief discussion of *be-emet* cases in Hayes, "*Halakhah le-Moshe mi-Sinai* in Rabbinic Sources: A Methodological Case Study" in *The Synoptic Problem in Rabbinic Literature,* Shaye J. D. Cohen, ed. (Providence, RI: Brown University Press, 2000; henceforth *HLMM*), 61-119, esp. 80 and 93-94. A similar conclusion is reached by Leo Landman in his article "'In Truth They

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A clear example appears in m. Shab 1:3 which prohibits certain activities as the Sabbath approaches, lest one inadvertently violate the Sabbath laws. Thus, a tailor may not go out with his needle and a scribe may not go out with his quill. In addition,

> "one may not search his clothing for vermin nor may one read by lamplight. Actually (*be-emet*),[38] the *hazzan* may look where the children are reading, but he himself must not read."

Here, *be-emet* signals an exception to a prohibition. Reading by lamplight is prohibited as the Sabbath approaches lest one tilt the lamp to see better. But the prohibition is not categorical because in fact (*be-emet*) we do allow a schoolteacher to keep an eye on his pupils' reading. Similarly, in m. Ter 2:1 an exception to a general prohibition against giving *terumah* (heave offering) from pure produce for impure produce is introduced by the term *be-emet*.

> "Actually (*be-emet*), if a cake of pressed figs becomes impure in part, one may separate heave offering from the pure part for the impure part."

Somewhat unexpectedly, the general rule for *terumah* does not apply to pressed figs.[39]

Said*:' be-emet amru*," in *Joshua Finkel Festschrift* (New York: Yeshiva University Press, 1974), 123-37, esp. 133; by Goldberg (*op. cit.*, 183-84) echoing the brief observations of H. Albeck, *Shisha Sidre Mishnah* (Tel Aviv: Devir, 1952-58) in his comment to Kil 2:2; and Saul Lieberman, *TK*, II:605. Despite our broad agreement, some specific differences between my conclusions and those of Landman and Goldberg will become apparent in the course of this discussion.

38 As per manuscripts and early printed editions.

39 More precisely, m. Ter 2:1 rules against giving pure heave offering for impure produce *ab initio*. However, if the deed is done it is valid. Exceptionally, however, in the case of a partly impure cake of pressed figs, it is valid *ab initio*.

In addition to marking exceptions to prohibitions, *be-emet* can also signal an exception to a permissive ruling. An example may be found in m. Shab 10:4. One is not culpable if one intended to carry out on the Sabbath an object in front of one's body and it worked its way around to the back, though culpability does apply in the reverse situation. To this ruling the mishnah then adds,

> "But in fact, they did say (*be-emet*): a woman who wraps an apron around herself, whether [the article is carried] in front or behind, is culpable because it has a natural tendency to reverse itself."

Unlike our first two examples, the counterintuitive ruling in this case is more stringent than the general ruling to which it is appended. This suggests that the overriding function of *be-emet* in the Mishnah is not to introduce a stringency or a leniency but simply to signal a ruling that is unexpected or surprising, regardless of its content.[40] This point is made explicitly in m. Kil 2:2 where R. Shimeon points out that a single ruling introduced by *be-emet* has the effect of creating a stringency or a leniency depending on the fact situation to which it is applied.

Be-emet introduces an exceptional or counterintuitive ruling in a further three cases in the Mishnah: m. BM 4:11, m. BB 2:3 and m. Nazir 7:3. The first case contains a lenient exception to a general prohibition against mixing produce ("actually (*be-emet*), strong wine may be mixed with mild wine because it improves it") while the second contains a lenient exception to a general prohibition against opening certain types of business under another person's storehouse ("in fact (*be-emet*), they permitted [opening these businesses if it is a storehouse] for wine.").

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40 Goldberg is explicit on this point – while *veken* in the Mishnah indicates contrast, *be-emet* indicates a contrast that is an exception to the general law with which it is connected (184). Landman notes that the phrase is used when a general regulation accepted as law is contradicted by a particular statement or regulation authored by an individual sage (133 n42a), but he does not emphasize the exceptional or counterintuitive nature of the contradiction.

[92]*

The final instance, m. Nazir 7:3, marks an exception to the rules that apply to a Nazirite who has become ritually impure, the phrase *be-emet* introducing a rule for genital discharge or scale-disease impurity that differs from the rules for other types of impurity.

The Tosefta contains two relevant instances of *be-emet* and one instance of *be-emet amru*.[41] The two cases of *be-emet* (t. BB 1:4 and t. Kil 1:16) parallel mishnaic cases (m. BB 2:3 and m. Kil 2:2 respectively) and conform to the pattern we have limned above. The passage featuring *be-emet amru* is of particular interest to us because the mishnaic parallel lacks both the exceptional ruling and the *be-emet amru* that introduces it. T. Ber 5:17 reads:

> Women, slaves and minors cannot recite [the Shema] on behalf of others who are so obligated [lit. do not acquit others of their obligation to recite].[42] But in fact, they did say (*be-emet amru*) that a woman may recite a blessing for her husband, a son for his father and a slave for his master.

Despite a general prohibition against women, slaves and minors reciting the Shema on behalf of persons who are obligated to recite it (free adult males), t. Ber 5:17 states that "they did in fact say" (*be-emet amru*) that women, children and slaves may recite the Shema on behalf of a free male who stands in a particular legal relationship with them

41 *Be-emet* also appears in t. BM 1:17 but not to introduce a ruling. There it is used to assert a somewhat counterintuitive recommendation for resolving conflict. If one of the parties to a quarrel states that his claim should be deemed forfeited if he does not return by a particular date, then should he not return by the stated date, he does indeed (*be-emet*) forfeit his claim. Thus even where it does not serve as a technical term to introduce an exceptional ruling, *be-emet* retains the same rhetorical force – asserting something that is surprising.

42 Following Lieberman, who prefers the reading of the Erfurt MS, as supported by the testimony of medieval commentators and against the printed edition's reading: "women, slaves and minors are exempt [from the obligation to recite the Shema] and cannot recite it on behalf of others..." etc. See Lieberman, *TK*, I:83.

(that of husband, father, master respectively). Interestingly, while the mishnaic parallel contains the prohibition (m. Ber 3:3), it does not contain the exception allowing women, children or slaves to recite the Shema on behalf of a husband, son or master. This would suggest that the Toseftan tradition is exceptional not only in its substance (i.e., it constitutes an exception to the general rule) but also marginal in its authority (it is a minority view that requires bolstering through a rhetorical device).

To summarize: while it may be tempting to view the introductory term *be-emet* (*amru*) "in truth" as an assertion of the truth-value or authenticity of a law, the term is best understood in its tannaitic contexts as introducing a surprising or counterintuitive exception to a generally accepted rule. It reports on the validity of a provision one might otherwise have thought was certainly not legitimate.[43]

43   There is one exception to this description of the tannaitic sources. Mekhilta Nezikin 4 uses *be-emet amru* dialectically in order to reject a false thesis and introduce an alternative thesis, a function that will be expanded in the Bavli. In Mekhilta Nezikin 4 (Lauterbach, 380) *be-emet amru* follows a rhetorical question and serves both to negate the absurd view implied by the rhetorical question and to introduce the resolution to a logical dilemma. It is important to note the larger dialectical context. Thus we read:

   Before the giving of the Torah, we were warned against the shedding of human blood [categorically]. After the giving of the Torah, when laws [in general] were made stricter, should some [acts of homicide, such as unintentional homicide] be considered as less grave? [Of course not!] In fact, they said, (*be-emet amru*): 'He is free [in cases of inadvertent homicide] from judgment by the human court, but he is subject to judgment by the heavenly court.'

   This is the only instance in tannaitic literature in which *be-emet amru* serves as a dialectical term (like many other dialectical terms) advancing the stages of an argument: (1) A thesis is proposed, (2) an absurd implication of that thesis is articulated, (3) the absurd implication and, by extension, the initial thesis are rejected and a sounder alternative is introduced. *Be-emet amru* is the term that introduces and effects step (3). The Mekhilta thus anticipates the dialectical use of *be-emet* (*amru*) in later talmudic sources.

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Turning now to the Talmuds: two of the seven mishnaic instances of *be-emet* draw no comment in the Yerushalmi. However, the Yerushalmi cites the following tradition (with slight variations) in connection with five of the seven mishnayot that contain *be-emet*.[44]

> R. Elazar[45] said: 'Every place in which the term "*be-emet*" is said we are dealing with a *halakhah le-Moshe mi-Sinai* (a law to Moses at Sinai).

Traditional and modern commentators have understood R. Elazar (3rd century Palestinian amora) as saying that a rule introduced by *be-emet* represents a true and incontrovertible law, "the right answer" direct from Moses' mouth.[46] However, the term *halakhah le-Moshe mi-Sinai*

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44 The tradition is found in connection with m. Kil 2:2, m. Ter 2:1, m. Shab 1:3, m. Shab 10:4, and m. Nazir 7:3 (all manuscripts and early editions attest to *be-emet*). The Yerushalmi does not comment on the phrase *be-emet* in m. BM 4:11, and m. BB 2:3. *Be-emet (amru)* appears nowhere else in the gemara of the Yerushalmi. The word "*emet*" without the prefixed *bet* appears in p. Nazir 8:1 where it is part of the dialogic give and take between amoraim. In the context of a dispute, R. Hoshaiah the Great expresses the view that a case should be handled a particular way. R. Yohanan rejects this view and introduces a contrary view with the word "*emet*," which may be translated, "[No,] in fact..." the case should be handled in a different way. This dialectical usage of "*emet*" language to reject an opponent's view and present an alternative view resembles the single use of *be-emet amru* in the Mekhilta (see above) and is not directly relevant to our discussion. Finally, on three occasions the Yerushalmi uses *aval amru* rather than *be-emet amru*, suggesting the interchangeability of these terms (see Ginzberg, *op. cit.*, 183-4) and further supporting the claim that *be-emet* should not be taken as a special signal of authenticity. It has the rhetorical function of *aval* ("but"), which is to establish contrast.

45 The correct reading is R. Elazar (b. Pedat), since several traditions that begin "every place in which X" are attributed to R. Elazar b. Pedat (see p. San 18a, p. Ber 14b, Num Rab 3:12, Ex Rab 12, Tanh B 34, as cited by Landman, *op. cit.*, 123 n1a).

46 For a literal understanding of R. Elazar's teaching see the Arukh, which describes *emet* as denoting a *halakhah le-Moshe mi-Sinai*. Also R. Hananel (11th c.) and Maimonides (12th c.) both accept the connection between *be-emet amru* and *halakhah le-Moshe mi-Sinai* (see R. Hananel's comment to b.

(henceforth *HLMM*) only connotes an incontrovertibly true and authoritative law in post-talmudic and medieval usage. As I have argued elsewhere,[47] the term does not function this way in classical talmudic sources. We know this because it is applied to rules that are explicitly rabbinic in origin, that are overruled or modified, that are decided leniently in cases of doubt like rabbinic law rather than stringently like Torah law. What is most striking is that the phrase *HLMM* is used in reference to a law, belief or practice whose legitimacy is unstable because that law, belief or practice is exceptional (m. Peah 2:6) or disputed by other rabbis (m. Yad 4:3//t. Yad 2:7; m. Eduy 8:7) or by sectarians (t. Sukk 3:2).[48]

As we have seen, *be-emet* introduces surprising or exceptional rulings. Therefore, R. Elazar's teaching in the Yerushalmi would appear to employ the term *HLMM* as it is generally employed in earlier rabbinic sources – to assert the legitimacy of a surprising and counterintuitive ruling, without further claims as to the nature of the ruling as incontrovertibly "true."[49]

Nevertheless, post-talmudic commentators anachronistically interpret *HLMM* as signaling a true and incontrovertible law, and propose to understand *be-emet* rulings in the same vein, on the strength of R.

BM 93b and Maimonides' comment to Ter 2:1 and 5:7). Other commentators understand the phrase *halakhah le-Moshe mi-Sinai* figuratively. Thus, both Samson of Sens (14th c.) and Ovadyah di Bertinoro (15th c.), in their Mishnah commentaries to Ter 2:1, note that since the laws in question are clearly rabbinic in origin the term must mean that they are to be considered as binding as if they were *halakhot le-Moshe mi-Sinai*.

47 Hayes, "*HLMM*," 61-117.

48 For details, see ibid., 67-77.

49 Eight of the Yerushalmi's eleven sugyot featuring the term *HLMM* follow tannaitic practice – the term legitimizes an exceptional mishnaic ruling or disputed practice (Yerushalmi Kil 2:2, 27d; Meg 4:9, 75c; Nazir 7:3, 56c; Orlah 3:8, 63b; Shab 1:6, 3b; 10:4, 12c; Shev 1:7, 33b//Suk 4:1, 54b; Ter 2:1, 41b). Arguably even the three remaining cases may be described this way since they legitimize rabbinic rulings that lack a Scriptural base: p. Ber 5:1, 8d; Hag 1:2, 76b; Meg 1:11, 71d. See Hayes, *HLMM*, esp. 95.

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Elazar's association of the two terms. This interpretation of *be-emet* should be rejected as a late development.[50] R. Elazar's teaching is best understood as an attempt simply to assert the legitimacy of a surprising and counterintuitive exception, without further claims as to the nature of the ruling as incontrovertibly "true."

Turning to the Bavli, *be-emet amru* appears in three beraitot (b. MQ 20b//b. Ket 4b, b. Yoma 11a, and b. Betsah 17a) and functions in a manner that is generally consistent with its usage elsewhere in Mishnah and Tosefta, as described above. Evidence that the phrase is employed by the Bavli to introduce a counterintuitive ruling is clear from the case in b. Betsah 17a. First, a beraita is cited that prohibits baking on a festival day for use after the festival.[51] To this is appended the following statement:

50 Indeed, post-talmudic conceptions of *HLMM* lead to interpretive problems as may be seen in Landman's article. Landman (*op. cit.*, 137) assumes anachronistically that a *halakhah le-Moshe mi-Sinai* is a law for which there is no biblical derivation and no logical justification even though laws identified in tannaitic sources as *HLMM* may be seen to have both. Because several of the rules introduced by *be-emet* include logical justifications, Landman concludes that they cannot be *HLMM* and the tradition attributed to R. Elazar must be corrupt. He argues that originally R. Elazar must have declared *be-emet* rulings to be "*halakhah*" but his statement was later expanded to *halakhah le-Moshe mi-Sinai* because it was wondered by what authority the ruling was said to be *halakhah*. In other words, the expansion of the phrase was an attempt to establish the validity (provide a pedigree) for the rule under discussion. On Landman's view, R. Elazar's tradition in its original form was intended merely to emphasize that a particular law (that was in fact logically derived) "was to be accepted as a final decision even though it contradicted an otherwise generally accepted regulation" (137). However, it seems equally, if not more likely, that the original form of the tradition was *HLMM* and that the phrase was later altered to read *halakhah* because a new conception of *HLMM* had taken hold. According to this new conception, R. Elazar's assertion made little sense. For additional examples of modern scholars' dismissive treatment of the *HLMM* label based on a retrojection of later conceptions of the term, see Franz Rosenthal, "*Al Be-emet amru*," in *Festschrift für David Hoffman* (Berlin, 1914), 34-42 and the discussion in Hayes, "*HLMM*," 75.
51 There are numerous textual problems that do not pertain to the term we

> Actually, they did say (*be-emet amru*)[52] that a woman may fill the whole pot with meat although she needs only one portion; a baker may fill a barrel with water although he needs only one handful... (etc.).

The parallels to this beraita in t. Yom Tov 2:5 and p. Betsah 2, 61b introduce the exception clause with *aval* ("but") and *veha'* (a term that introduces a contradictory tradition) respectively. Based on these variants, Landman surmises that the Bavli's *be-emet amru* is a late addition (131-2), but even so, its use here is entirely consistent with its use in tannaitic sources generally − it introduces a surprising exception.[53]

Moving from beraitot to amoraic and stammaitic strata in the Bavli, we see that *be-emet* statements in earlier sources are accorded no special status as true and incontrovertible.[54] Frequently, the rules introduced by

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are studying and need not detain us. See Landman, *op. cit.*, 130 n. 32, and Lieberman, *TK* IV:947-48.

52 The full phrase appears in all manuscripts.

53 The beraita on b. Yoma 11b is a little unusual since the ruling introduced by *be-emet amru* ("Actually, they did say that the privy, the tannery, the private bathhouse and the public bathhouse are exempt from the requirement of mezuzah") is an unexpected exception on the view of only one of the disputants rather than an exception to a general, established rule. That this beraita may be a Babylonian construction that uses the term *be-emet amru* somewhat imperfectly is suggested by the tannaitic parallel that appears in Midrash Tannaim Deut 6:9. Here similar information is presented, but not as an exception to a general rule. In the midrash, the same four structures are said to be exempt from the *mezuzah*. However, the exception is not introduced with the phrase *be-emet amru* because the midrash presents its conclusions in an exegetical format ("should I include these structures? No, because Scripture says "house" which means structures made for honorable activities only) rather than the format featured in the Bavli ("the rule is X, though in fact there is exception Y") which employs *be-emet amru* in order to highlight the contrary nature of the rule. The imperfect use of the phrase in b. Yoma 11a leads Landman, *op. cit.*, 132, to assert that this beraita is of Babylonian origin (i.e., is not authentically tannaitic).

54 Interestingly, the tradition attributed to R. Elazar in the Yerushalmi appears once in the Bavli but in an altered form. We read in the gemara to b. BM

be-emet in the Mishnah or Tosefta are subject to the same processes of debate, objection and qualification to which any halakhic rule is subject. Thus, in b. BM 60a, after citing the tradition of R. Elazar to the effect that anything prefaced by *be-emet* is the halakhah, the sugya immediately presents amoraic teachings (attributed to the 5th generation amoraim R. Nahman, R. Papa and R. Aha) that qualify a rule introduced by *be-emet* in some way. Similarly, in b. BB 20b a mishnaic ruling introduced by *be-emet* is rejected for contemporary practice. Finally, in b. Ber 20b (paralleled in b. Suk 38a), the gemara comments on the beraita found in t. Ber 5:17 according to which "they did in fact say (*be-emet amru*) that a woman may recite a blessing for her husband, a son for his father and a slave for his master" despite the fact that these individuals

4:11 (b. BM 60a) "R. Elazar said: From this it may be concluded that every 'in truth' (*be-emet*) is the halakhah." All manuscripts read "*kol be-emet halakhah hi*" while the Venice p.e., reads *kol be-emet amru...* The printed editions of the Bavli contain a second instance of this teaching minus the attribution to R. Elazar in b. Shab 92a (the gemara to m. Shab 10:4). However, as noted already by Rosenthal, *op. cit.*, 34, this line is missing from manuscripts and early printed editions with the exception of the Cracow edition. The Munich manuscript of the Bavli has a marginal gloss that corresponds to R. Elazar's teaching in b. BM 60a. See R. Rabbinovicz's *Diqduqe Soferim* (Munich, 1975; reprint Jerusalem: Or haHokhmah, 2002), 2:201. While the Yerushalmi's version of R. Elazar's tradition was in all likelihood an attempt to shore up the authority of the exceptional *be-emet* rulings by putting them in the same class as *HLMM* – traditions whose authority is asserted precisely because of their minority or controverted status – it is not immediately clear what the Bavli's version of R. Elazar's teaching accomplishes. Surely every rule issued by the sages is a halakhah, whether prefaced by *be-emet* or not. Does the Bavli preserve the original version of the tradition (as Landman would have it, p. 137)? Or have the editors of the Bavli modified R. Elazar's teaching in such as way as to obscure his claim of Mosaic/Sinaitic pedigree because the term *HLMM* has begun to take on new meaning in the late Babylonian period and can no longer be applied to the Mishnah's *be-emet* rulings (see Hayes, "*HLMM*," 109-10, 117)? There is no definitive answer to this question, though the latter possibility seems more likely given what we know about the shifting conception of *HLMM*.

cannot normally recite the *Shema* on behalf of others. To this tradition a further statement is appended in the Bavli (paralleled in Sukkah 3:10):

> But the sages said, "A curse upon the man whose wife or children have to say grace for him!"

This addendum clearly expresses disapproval of the exception introduced by the phrase *be-emet amru*. These three examples reinforce the claim that *be-emet* (*amru*) was not understood by Babylonian amoraim or stammaim as signaling a ruling's special status as true, incontrovertible or especially authoritative.[55]

From this examination of every instance in which *be-emet* (*amru*) appears in rabbinic literature we may conclude that the term introduces surprising and counterintuitive exceptions to generally accepted rules.[56] In tannaitic usage *be-emet* is a contrastive term roughly equivalent to *aval* and does not convey any information about the authenticity (substantive "truth") of the rule in question. On the contrary it seeks to assert the validity of a rule whose legitimacy may be weak. The amoraic tradition attributed to R. Elazar that understands *be-emet* (*amru*) to be introducing a *halakhah le-Moshe mi-Sinai* (Yerushalmi) is consistent with this usage given that the term *HLMM* is applied to statements without

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55 Indeed, the beraita appears in the Yerushalmi (p. Ber 3:3, 6b) with *aval amru* rather than *be-emet amru* and the Yerushalmi also contains a curse tradition. This only strengthens our impression that *be-emet amru* and *aval amru* are functionally equivalent and do little more than assert a rule whose legitimacy is questionable for one reason or another.

56 There are two sugyot in the Bavli in which *be-emet amru* serves a corrective function, in line with the single appearance of the phrase in the Mekhilta and its use in p. Nazir 8:1 (see above). In both of these sugyot (b. BB 145a and b. Qidd 48b//b. BQ 99b), a beraita reports a dispute between an anonymous tanna and R. Nathan. After presenting the two conflicting views, the beraita continues "R. Judah ha-Nasi said, 'In fact, it was said (*be-emet amru*)...'" R. Judah's statement in both instances presents a third alternative that negotiates the two conflicting positions. Thus, *be-emet amru* in these instances simply settles a dispute by presenting a third compromise position.

serious reference to their status as incontrovertibly true.[57] Finally, the amoraic and stammaitic treatment of some of the rules introduced by *be-emet* (*amru*) in the Bavli suggests that these sages did not understand *be-emet* (*amru*) to introduce a ruling that is incontrovertibly true.

2. *Emet* in contexts of judgment

We turn now to consider how truth language is employed in the context of rendering judgment. When rabbinic sources speak of "true judgments" are they referring to a kind of Dworkinian "right answer" (true in the sense of authentic and not merely valid)? This section pursues a contextual analysis of phrases like *din emet* ("true judgment"), *dayyan emet* ("true judge") and *din emet la-amitto* ("a judgment true to its [very] truth") in an attempt to answer these questions. This analysis reveals that, in classical rabbinic literature, the truth language that appears in contexts of judgment most often refers not to authenticity but to procedural honesty and integrity, with one important exception.

The phrase *din emet* occurs twice in the Mishnah, where it signifies a judgment produced in a procedurally "true" − which is to say non-corrupt − manner. In m. Avot 3:16 a *din emet* is a judgment made on reliable evidence. Of greater interest, however, is m. Sanh 6:6. According to this mishnah, the relatives of a person executed by the court must greet the judges and witnesses (extending greetings is an act normally prohibited to mourners) as if to say that they do not bear a grudge because the judgment was a true judgment. They may not engage in public mourning for the executed, even while they continue to grieve in their hearts. In this text, the relatives of the executed are expected to play an important role in affirming the legitimacy of the court's ruling and in deflecting the judges' anxiety over the inherent uncertainty and terrible finality of a capital conviction by acknowledging, through their greeting, that the judges "have judged a true judgment." The relatives are not in an epistemologically privileged

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57 This is so even if the full phrase *HLMM* is original, as argued above.

position vis-à-vis the judgment of the judges. They are not in possession of information that would confirm or deny the substantive veracity (or authenticity) of the judgment. Their statement "for you have judged a true judgment" simply affirms the honesty of the judges and is intended to offer psychological comfort, not genuine justification of the judgment. It assures the judges that those most deeply hurt or harmed by the death of the convicted do not bear a grudge and will not seek vengeance because they believe that the judges *acted* honestly in giving their judgment. Their judgment was true in a procedural, though not necessarily a substantive, sense.[58]

The same idea is found in the single occurrence of *din emet* in the Tosefta. T. San 14:3 deals with the case of the apostate city, all of whose inhabitants are condemned to death after due process of law.

> Perhaps the judges will say, "Behold, if we condemn the town as an apostate town, tomorrow their brothers and relatives will hate us in their hearts."
>
> For that reason God has said, "Behold, I will cause them to have mercy and love in their hearts for you" (Deut 13:17) so as to say, "We have nothing in our hearts against you because you judged a true judgment (*din emet*)."
>
> And they do not mourn, but they grieve, for grief is expressed only in the heart.

The anxiety of the judges is explicit in this passage: they fear that those deeply hurt by the death of the convicted parties will hate them. The declaration by the relatives that the judges have judged a true judgment signals the relatives' acceptance of the process. It does not confirm the substance of the verdict as true; rather, it affirms the personal and procedural integrity of the judges in reaching the verdict. Because the judges' judgment was not perverse or corrupt, the relatives can hold no

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58 For an insightful analysis of this passage, see Beth Berkowitz, *Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Culture* (New York: Oxford University Press, 2006), chapter 6.

grudge, despite the fact that the judgment causes them intense personal pain.

The distinction between confirming the truth of the verdict and accepting the verdict as procedurally honest and valid may be seen if we compare the two texts just cited with a passage from the tannaitic midrash Sifra Shemini 1:23 (Horowitz, 132). In this passage, Aaron is deeply grieved by the sudden death of his sons, killed by God after attempting to offer a "strange fire" in the sanctuary. Moses' compassion for his brother prompts him to interpret the deaths positively: God chose to sanctify his sanctuary through the two sons of Aaron. Viewed as a reward for greatness, God's "verdict" now appears "just" to Aaron, a fact indicated by the phrase *tsadaq alav ha-din* — "the verdict was justified in his eyes." Because he accepts the justice of the judgment, Aaron is comforted and his grief is assuaged. The Sifra's phrase *tsadaq alav ha-din* — "the verdict was justified in his eyes" — thus functions quite differently from the m./t. Sanhedrin phrase *dantem din emet* — "you have judged a true judgment." The former confirms the *substance* of the verdict as just and correct (authentic) and brings an end to the grieving process. The latter confirms the procedural integrity of the judges but does not assess the justice or correctness of the verdict, and private grieving continues. Indeed, the phrase *din emet* almost seems to mask a deep anxiety about the justice of the verdict.

This last point finds support in the phrase *dayyan ha-emet* ("the judge of truth" or the "true judge") which is recommended as an epithet for God precisely when his judgment appears cruel or unjust. M. Ber 9:2 and t. Ber 6:3 are explicit on this point. One recites the blessing "Blessed is the True Judge" upon hearing bad tidings (both texts) or upon seeing some forms of human suffering (such as an amputee, a lame man, a blind man, a man afflicted with boils — t. Ber 6:3). The requirement that one assert in the face of evil and suffering that God is a true judge should not be understood as a robust metaphysical claim that the evil and suffering witnessed are "just deserts" for (possibly unknown) sin. Such confidence is absent from these texts. Rather, the assertion serves a

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psychological and spiritual purpose, shoring up faith in God at a time when that faith is most severely tested and despair threatens. Thus, even when God's judgment seems harsh, cruel, or unjust one must avoid the blasphemous conclusion that God is a negligent or corrupt judge and assert the contrary.

In Sifre Devarim 304 (commenting on Deut 31:14), the term *dayyan ha-emet* as applied to God is explained in procedural rather than substantive terms. God is a true judge, not because his verdict is (ontologically) correct (though that may well be the case) but because he does not indulge in corruption or favoritism (considering personal status in judgment). Similarly, Midrash Tannaim to Deut 1:13 (Hoffman, 8) lists the qualities of a good judge. A good judge loves truth, a quality which is explained as pursuing justice for its own sake and fleeing from all forms of corruption. In these tannaitic texts, the good judge, the true judge (*dayyan ha-emet*), is one whose decision is not influenced by extraneous considerations (favoritism) or corrupt practices (for example, bribe-taking).

The Bavli's understanding of the epithet *dayyan ha-emet* as applied to God is consistent with tannaitic trends we have traced above, as may be seen in the Bavli's two sustained discussions of the blessing "Blessed be the True Judge."[59] In b. Ber 60b, the 4th generation Babylonian amora Rava says that the obligation to bless on account of evil just as one blesses on account of the good does not mean that one says literally the same words in blessing but that "one must receive evil with gladness" just as one receives the good. R. Aha (4th generation Palestinian amora) says in the name of R. Levi (3rd generation Palestinian amora):

> Where do we find this in Scripture? '*I will sing of mercy and justice; unto You O Lord, will I sing praises*' (Ps 101:1) [This means that] whether it is 'mercy' I will sing, or whether it is 'justice' I will sing.

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59 Although several sugyot refer to the blessing, and indicate when it is to be pronounced (e.g., b. Ber 54a, 54b, 58b, 59b, b. San 49b), the only sugyot that discuss the blessing's import at any length are b. Ber 60b and b. Pes 50a.

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Justice and mercy are counterposed here (and in many other rabbinic texts) and while both are an occasion for blessing and praise of God, there are important differences between the two. God's mercy is praised from a posture of genuine joy. God's justice is praised *despite* the pain and suffering it generates. One may be required to assert of God's justice that it is "true" – meaning that it is *not* the result of corruption or favoritism – but that doesn't mean that one *likes* God's just judgment. On the contrary, God's just judgments can stick in the craw and, according to an amoraic teaching in b. Pes 50a, they will be entirely absent in the world to come. "Not like this world is the world-to-come. In this world, for good tidings one says '[Blessed are You...] who is good and does good' while for evil tidings one says, 'Blessed be the true judge;' but in the world-to-come there shall only be '[Blessed are You...] who is good and does good.'"

A related term – *din emet la-amitto* ("a judgment true to its very truth") – might appear at first blush, to signal a judgment that is substantively true in the sense of an authentic and thus correct answer, but an analysis of the few contexts in which the phrase appears does not support this view. The phrase occurs once in the Mishnah in a passage that describes various types of dishonest or deceptive behavior. The passage (m. Peah 8:9) contrasts the person who takes charity when he does not need it with a judge who renders judgment true to its very truth. Such a judge is also implicitly contrasted with a man who pretends to be lame or blind to derive some benefit, and with a judge who accepts bribes or (knowingly) perverts justice. In short, the phrase *din emet la-amitto* (a judgment true to its very truth) refers to a judgment that is made without deception or corruption. "True to its very truth" is a procedural rather than a substantive declaration.

There is only one other occurrence of the term in talmudic literature that sheds light on the usage of the phrase.[60] In b. San 7a, the term *din*

60 The phrase does not appear in the Tosefta and its two occurrences in tannaitic midrash (Mekhilta Amalek 2 [Lauterbach, 2:281] and the parallel in

emet la-amitto appears in a series of three traditions attributed to R. Yonatan and refers to a judgment made without deception or corruption.

That truth language is employed in rabbinic literature to signal laws and judgments that are procedurally lawful, equitable, fair and non-corrupt is well-illustrated by a tannaitic text in which Roman officials study the Torah and declare it entirely "true" with the exception of a certain ruling (or rulings) which treat Israelites and non-Israelites differently.[61] These rulings fail to be "true" because they are inequitable — treating different people differently — and thus unjust. Similarly, an amoraic teaching in b. Shab 63a states that a judgment is not true if it is "not for its own sake." In other words, judgments rendered in service of some goal other than justice (e.g., favoring one party over another as a matter of simple partiality) are not true judgments.

We must consider one final appearance of the phrase *din emet la-amitto*, in Avot deRabbi Natan A, Hosafah B, 8. The passage asks why *all* of Israel mourned for Aaron (Num 20:29) but not for Moses (Deut 34:8). The answer is that Aaron rendered judgment true to its very

Mekhilta deRabbi Shimeon bar Yohai 18) simply praise the judge who renders judgment true to its very truth without shedding light on the import of the phrase. As for the Talmuds, there is no occurrence of *din emet la-amitto* in the Yerushalmi, and only seven occurrences in the Bavli (b. Shab 10a, Eruv 54b, Meg 15b, Hag 14a, BB 8b, San 7a, San 111b). Of these seven, six offer no assistance in determining the import of the phrase. B. Shab 10a and Eruv 54b simply contrast the act of rendering judgment that is true to its very truth with the activity of study (the Shabbat text is a parallel to the Mekhilta text cited infra). B. Meg 15b refers to the glory conferred upon one who renders judgment true to its very truth. B. BB 8b also contains praise for such a judge and b. Hag 14a also represents this as ideal behavior, but again, without clarifying the nature of the behavior. B. San 111b is similarly unhelpful, simply decoding a biblical term as a reference to a judge who renders judgment true to its very truth.

61 Sifre Deut 344. Parallel versions of this beraita appear in p. BQ 4:3, 4b and b. BQ 38a. For a full discussion of these texts and their interrelations see Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah* (New York: Oxford University Press, 1997), 148-52.

truth (*din emet la-amitto*), never attributing sin to any man or woman, while Moses upbraided the people.[62] Presumably, Moses' judgments were true – procedurally fair and honest and thus we may propose, in some sense *correct* – yet Aaron was more beloved by the nation than Moses for his gentle manner towards wrongdoers. Here is a first hint that correct or true judgment – such as that of Moses in the story – is not unambiguously valorized.

The Avot deRabbi Natan text anticipates the argument that I will advance in the remainder of the paper. That argument is that there is after all good textual evidence for the rabbinic belief in a *theoretically correct answer* – if we know where to find it. When we look at texts that *actually* refer to a correct or right answer instead of the texts mistakenly taken as evidence for rabbinic monism, we see that they simultaneously provide excellent evidence for the conviction that the theoretically correct answer is not always a highly prized or unmitigated good. On the scale of judicial values, adherence to strictly correct rulings is not a top scorer. Indeed, on occasion certain other values demand that true – in the sense of theoretically correct – judgments can and should be moderated and improved upon if the circumstances warrant it.

We turn first to sources in which a clear monism is indicated.

3. *Emet*: the right answer vs. the best answer

Although few in number, there are some passages in rabbinic literature that do employ truth language to connote the strictly and "theoretically" correct answer.[63] This usage emerges from the juxtaposition of "true" judgment with other processes or behaviors that are explicitly NOT concerned with the "correct" answer. Thus, section (i) below

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62 Compare Avot deRabbi Natan A, 12.
63 Only five tannaitic texts (m. Avot 1:18, 6:6, Sifre Devarim 17, t. San 1:3, Sifre Num 134) and two texts from the Bavli (b. AZ 4b and b. San 6b) use truth language in a manner that points towards a correct answer in this sense. This is not to say that the concept does not appear elsewhere – it certainly does, but using different language, as will be discussed below.

discusses passages in which "true" judgment is contrasted with compromise or arbitration (which seeks to settle a case without regard for the true merits of the claims advanced). Section (ii) below discusses passages in which true judgment is contrasted with judgments that stop short of the "line of the law" (*shurat ha-din*). As we shall see, while these texts contain somewhat conflicted reflections on truth as an abstract value in law and judgment there is an overall tendency to "devalue" the "true" or strictly correct answer in the face of specific pragmatic and moral considerations. Having identified sources that clearly articulate a monistic view of law, we will be in a position to assess the rabbinic valuation of legal truth, in section (iii) below.

i) True judgment vs. arbitration

A verse from Zech 8:16 ("*Execute the judgment of truth and peace in your gates*")[64] provides an occasion for reflecting on truth in the act of judging. Two traditions in Mishnah Avot (m. Avot 1:18 and 6:6) seem to suggest that in the context of judging, truth and peace point to standards of professional behavior and imply that truth must be balanced by peace.[65]

This idea is more fully developed in other texts. Two other tannaitic passages subject the idea of balancing truth and peace in judgment to radically divergent interpretations. We turn first to Sifre Devarim 17 (Finkelstein, 28-9).[66] The passage opens by citing Zech 8:16 ("*Execute the judgment of truth and peace in your gates*") and then asks:

> What kind of peace includes a judgment of truth? Arbitration.
> R. Shimeon b. Gamliel, however, says "Arbitration raises the humble

64 Literally, "judge truth and judgment and peace."
65 In a tradition attributed to R. Shimeon b. Gamliel in m. Avot 1:18 the world is said to stand on judgment, truth and peace while according to m. Avot 6:6 judges should influence one another towards leniency and keep one another grounded in truth and in peace. These traditions receive no further elaboration.
66 See Finkelstein's comments, 28 n9, regarding the interpolated nature of this text.

to the place of the mighty and lowers the mighty to the place of the humble."

Therefore the sages say, 'He who practices arbitration [as opposed to judgment] is a sinner as it is said: "*The one who praises an arbitrator [botse'a] condemns the Lord*" (Ps 10:3).[67] The result [of arbitration] is that one party praises the judge while the other condemns his Creator.'

Arbitration is a non-judicial process whereby parties agree to a compromise rather than pursuing a judicial ruling that would decide in favor of one party against the other. Zechariah's reference to peace and truth in judgment is interpreted as referring to the non-judicial process of arbitration. This apparently positive assessment of arbitration is immediately disabled, however, by the introduction of a tannaitic tradition that criticizes arbitration as fundamentally unjust because it ignores the *reality* of the particular case. Presumably a judicial ruling would ensure that the claims of the individuals in question are investigated and a "correct" answer given. A further tradition attributed to the sages condemns those who prescribe arbitration, drawing support from a punning interpretation of Ps 10:3 (reading *botse'a* [lit. "one greedy for gain"] as "an arbitrator").

The balancing of truth with peace in the form of arbitration is thus discredited in this midrash. However, a radically different conclusion is reached in t. San 1:2-3. Chapter 1 of t. San opens with a discussion of arbitration. Arbitration is understood to be an alternative to the regular court process, but once a court process has been completed, one loses the right to arbitration. A negative view of arbitration is then presented (t. San 1:2).

R. Elazar (4th generation tanna) the son of R. Yosi the Galilean says: "Whoever arbitrates a case is a sinner and whoever praises the

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67 Literally, "the one greedy for gain (*botse'a*) curses (*b.r.kh* used euphemistically to connote cursing) and renounces the Lord."

arbitrator curses the Lord, as it is said (Ps. 10:3) *'He who praises an arbitrator condemns the Lord.'* But let justice (*ha-din*) cut through the mountain. Moses used to say "Let justice cut through the mountain" but Aaron would make peace between one person and another, as it is said (Mal 2:6) *'he walked with me in peace and uprightness'*."[68]

Despite the opening blast against arbitration and an exhortation to apply the law uncompromisingly (even if to do so one must "cut through a mountain") an important shift occurs in the last line. The last line contrasts the uncompromising justice (*ha-din*) of Moses and the peaceful arbitration of Aaron and serves as a segue to the following passage in praise of arbitration (t. San 1:3 continued):

R. Joshua b. Qorha says: It is a religious duty (*mitsvah*) to arbitrate as it is said *'Execute the judgment of truth and peace in your gates'* (Zech 8:16).

Is it not the case that where there is a judgment of truth (*mishpat emet*) there is no peace, and where there is peace there is no judgment of truth? If so, then what is the judgment of truth that also contains peace? Say: it is arbitration.

Likewise it is said in the case of David, *'David acted with judgment and charity to all his people'* (2 Sam 8:15). Is it not the case that where there is judgment there is no charity, and where there is charity there is no judgment? If so, then what is the judgment in which there is also charity? Say: it is arbitration.

When one has judged a case, declaring the innocent to be innocent and the guilty to be guilty — if one declared a poor man guilty, he takes from his own [funds] and gives it to him [to meet his financial obligation]. That is how he can do charity for one and judgment (*din*) for the other.[69]

68 The first part of the verse mentions the "Torah of truth" — so here too true law is counterbalanced by the concepts of peace and uprightness.

69 This toseftan passage, beginning with the teaching of R. Elazar the son of R. Yosi the Galilean appears in its entirety in b. San 6b. Interestingly, in the very next passage of the Bavli, Rabbi Judah ha-Nasi objects to David's

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In this passage, arbitration is deemed a religious duty and the prime example of the biblical notion of a judgment that combines both truth and peace. Indeed, a "judgment of truth" alone is deemed deficient — "where there is a judgment of truth there is no peace." We may assume that a judgment of truth refers to a decision that doles out distributive justice in a mechanical (strictly theoretical) or uncompromising way, albeit "correctly," as is strongly implied in the passage's final example that speaks of the simple assignment of innocence and liability without reference to circumstances. The claim appears to be that justice that is not contextualized or balanced by other considerations (in this case religious obligations such as charity, compassion, the promotion of peace) is less than ideal.[70] "Truth" in judgment is thus a highly fraught concept and the object of some ambivalence.

ii) True judgment v. *lifnim mishurat ha-din*

The ambivalence just described is captured in a stammaitic passage from the Bavli (b. AZ 4b). The context of the passage is a discussion of God's judgment and more particularly, the time of day that prayer is most likely to be accepted rather than rejected. R. Joseph holds that the first three hours of the day are inauspicious times to pray since God is engaged in judgment at that time and may scrutinize the person praying more than is desirable! An objection is raised: is there not an amoraic tradition that states that for the first three hours of the day God is engaged in Torah study and in the second three hours God sits in

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behavior, arguing that David's judgment was in itself both just *and* charitable: it was just to the one because it awarded him his due, and it was charitable to the other because it freed him of his ill-gotten gain. Presumably, any further deed of supplying the defendant with funds would be redundant at best and a perversion of justice at worst.

70 Similarly, in t. Yev 1:10 Bet Hillel and Bet Shammai are praised because despite their many disagreements over the marital status of various kinds of women, they nevertheless overlooked these halakhic differences and intermarried — an indication that they loved both truth and peace as advocated by Zech 8:19, *'They loved truth and peace.'*

judgment over the world? The stammaitic response to the contradiction between these amoraic traditions is revealing:

> [While engaged with] Torah study, which Scripture designates as "truth" (as it is written, *'Buy the truth and sell it not'* [Prov 23:23]),[71] the Holy One, Blessed be He, will not hold back from the full extent of the law (*eyn oseh lifnim mishurat ha-din*); but [when engaged in] judging which is not designated by Scripture as truth, he will hold back from the full extent of the law (*oseh lifnim mishurat ha-din*).

The passage establishes a dichotomy between a judgment of truth on the one hand and a judgment to which the designation "truth" is not applied – which is not to say that it is false. The former is a judgment that is uncompromising in its application of the full extent of the law while the latter does not insist on the full application of the law. In several rabbinic texts, it is the act of refraining from a full application of the law – referred to as acting *lifnim mishurat ha-din* – that is held up as the ideal behavior of pious individuals.[72] Thus, the most propitious time to come before God in judgment is not when he is occupied with truth (understood, we may suppose, as strict or theoretically "correct"

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71 This is the reading of two manuscripts (Paris 1337 and Munich 95) but JTS 15 and the Pisaro printed edition give Mal 2:6 ("The Torah of truth was in their mouth") as a prooftext.

72 See b. BM 24b, 30b, 83a, BQ 99b-100a, Ket 97a. God himself aspires to this ideal in b. Ber 7a. I am not convinced by Saul Berman, "Lifnim Mishurat Hadin," *Journal of Jewish Studies* 26 (1975): 86-104, and idem, "Lifnim Mishurat Hadin II," *Journal of Jewish Studies* 28 (1977): 181-93, who seeks to distinguish between *din* (the law), *shurat ha-din* (a limitation placed on the law that creates an exemption of some kind) and *lifnim mishurat ha-din* (an individual's choice to forego the *shurat ha-din* and revert to the general undifferentiated *din*). This is not the place for a full refutation of this claim. Suffice it to say that *shurat ha-din* and *din* do not occur together in any text as dichotomous terms, and in fact appear to be interchangeable. (See *MdRY* Amalek 4 [Lauterbach, 283] and the parallel in *MdRShbY* 17 where *shurat ha-din* and *din* are used interchangeably.) Berman is right in noting that *lifnim mishurat ha-din* involves the waiving of an exemption or right, but the exemption or right is correctly designated both *din* and *shurat ha-din.*

justice), but when he is occupied with judgment (an activity in which strict justice is balanced with other considerations).[73] The text implicitly contrasts theoretical study of the law and practical application of the law in the judging of particular cases. It is appropriate to speak of "truth" in connection with theoretical study, but in judging actual cases in all of their particularity, an uncompromising adherence to "truth" – the single correct answer that would emerge from abstract study or theorizing – is suspect.[74] Indeed, we may go so far as to say that judgment proper should not be unduly obsessed with the theoretically true or correct answer.

iii) The Value of "*din*" (the correct answer)

The passage just cited, (like several others we have considered and many more that we have not) employs the term "*din*" to refer to the strictly (i.e., logically and theoretically correct) legal answer. As indicated, a norm or ruling may represent "(*shurat*) *ha-din*" (lit., [the line of] the law), which refers to the theoretically correct position, or "*lifnim mishurat ha-din*" – within, or just short of the line of the law.[75] The metaphor of law's line strongly implies a "correct" answer – represented by the line. One who crosses over the line (*avar*) commits a transgression – a negative deviation from the correct law.[76] But one

73 It is worth mentioning again that I use the term "strict" to refer to a law that is logically and theoretically correct, with no suggestion of stringency (in contrast to leniency). Berman, *op. cit.*, 182 assumes that strict law means substantively stringent rather than simply logically or theoretically correct. As a result, he objects to the characterization of *shurat ha-din* as the strict law, since on many occasions *shurat ha-din* is perfectly equitable and lenient. I have tried to ensure this confusion does not arise by continually glossing "strict" with terms like "logically/theoretically correct."

74 On the difference between legal scholarship and the judicial context in Jewish law, see preliminarily Jackson, *op. cit.*, 34-35.

75 *Shurat ha-din* appears in m. Git 4:4, t. Pes 4:7, t. Ter 2:1-3, Mekhilta VaYassa 6, Amalek 2, and b. Git 54b. More commonly *din*, connoting "logically and theoretically correct justice," stands alone, but should be seen as equivalent. See n73 above.

76 See for example, Mekhilta Vayassa 6 (Lauterbach 7, 281) and Mekhilta de

who stops short of the line of the law — renouncing the full rights and entitlements due to him in law while remaining within the area bounded by the line of the law — is acting piously and mercifully.[77] Such behavior is idealized in rabbinic literature, so much so that on occasion, standing squarely on the strict line of the law is viewed negatively in comparison. We see this idea in b. BM 30b: "Jerusalem was destroyed because everyone insisted on the strict law of the Torah (*din ha-Torah*) rather than stopping short of the strict law (*lifnim mishurat ha-din*)." Here again, we see that theoretically correct law can be destructive when applied in practice. The pious individual, who prioritizes religious values such as humility, compassion, modesty, peace, or charity should at times forego his right to the theoretically correct norm or ruling (stop short of the strict law) for in so doing he upholds these other values. While not exercising the "correct" option, the pious individual who remains *lifnim mishurat ha-din* chooses what is in that particular situation a superior (though not more legally correct) option.

Medieval commentators mistakenly connect some of the terms we have examined and argue that the dichotomy between (*shurat*) *ha-din* and *lifnim mishurat ha-din* is equivalent to the dichotomy between *din emet* (a true judgment) and *din emet la-amitto* (a judgment true to its very

R. Shimeon bar Yohai, 17 where the phrase *avru al shurat ha-din* denotes the transgression of the Israelites in rebelling against Moses. In Ruth Rabbah 2 the phrase is used in connection with traveling on a festival day (a clear transgression).

77 In this, I differ from those who would translate "*lifnim mishurat ha-din*" as going "beyond the law." The spatial metaphor of *lifnim mishurat ha-din* is not one of crossing over the line of the law (to do so is to sin!) but of acting within the law in a more limited manner than is strictly allowed. Indeed, the five talmudic cases of *lifnim mishurat ha-din* (b. Ber 45b, BM 24b, 30b, BQ 99b, Ket 97a) all involve a pious individual's waiving of a legal right, privilege or exemption because to do so will benefit another. Thus, (*shurat ha-*)*din* and *lifnim mishurat ha-din* do not connote a contrast between the letter of the law and the spirit of the law (in this, Berman, *op. cit.*, I:86 and II:193 is correct). Both point to perfectly legal options. Unfortunately, this topic must await a full and separate treatment elsewhere.

truth). Thus, Isaac Arama (15th c author of *Aqedat Yitshaq*) contrasts those who give a judgment true to its very truth (*din emet la-amitto*) with those who judge according to the strict law of Torah (*din ha-Torah*). The latter decide according to general legal rules without consideration of the special circumstances of the particular case. Their motto is "Let the law cut through the mountain." By contrast, a perfectly true judgment − a judgment true to its very truth (*din emet la-amitto*) − is one that adjusts general rules to the individual "truth" of the specific case.[78] Modern commentators continue these connections with the result that *din emet la-amitto* and *lifnim mishurat hadin* are assumed to bear a rough equivalence even within the classical rabbinic sources.[79]

But this is a mistake. As we have seen, in its few appearances in the classical sources *din emet la-amitto* seems to refer to a judgment that is procedurally honest and non-corrupt (m. Peah 8:9, b San 7a) or kindly delivered (Avot deRabbi Natan B, Hosafah 8 and A, 12). *Din emet la-amitto* is, if anything, more readily identified with (*shurat*) *ha-din* in the classical sources.[80]

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78 Arama, *Aqedat Yitshaq*, Yitro gate 43, as cited in Menahem Elon, *Jewish Law: History, Sources, Principles*, 4 vols. (Philadelphia: Jewish Publication Society, 1994) I:248-51. See also the 16th century commentary of Joshua Falk (*Derishah* to *Tur* HM 1, subpar. 2) who writes "What is meant by 'a judgment that is completely and truly correct' [*din emet la-amito*, lit. "a true judgment to its very truth"...] is that one should judge in accordance with the particular place and time, so that the judgment is in full conformity with the truth, rather than always inflexibly apply the law precisely as it is set forth in the Torah. For sometimes a judge's decision must go *lifnim mishurat ha-din* and reflect what is called for by the particular time and circumstances. When the judge does not do this, then even if his judgment is correct, it is not "a true judgment to its very truth." This is the meaning of the statement of the Sages: "Jerusalem was destroyed because they based their judgments on the law of the Torah and did not go *lifnim mishurat ha-din*." Translation as found in Elon, *Jewish Law* I:159.

79 See for example, Elon's discussion of both phrases in *Jewish Law* I:155-67, 176-183, 242-261, as well as his discussion of *din emet la-amitto* in an article by the same name in *Sefer Shamgar*, Tova Olshteyn, ed. (Tel Aviv: The Bar Association Publishing House, 2003), 2.2:391-421.

80 We may also reject Elon's anachronistic understanding of *din emet la-amitto*

We may conclude that classical rabbinic texts that contrast "true" judgments with arbitration or judgments "true to their very truth" with the pious renunciation of one's full legal rights attest to a clear distinction between the theoretically correct law (the right answer), and the law as it is to be applied in practice or in actual judgment (the best answer). This distinction has been compared with the Aristotelian distinction between justice and equity but this comparison must be qualified (a claim that cannot be fully assessed in the present context).[81]

as an indication of legal pluralism. In "*Emet la-amitto*," *op. cit.*, 418-19, Elon suggests that we translate *din emet la-amitto* as "a judgment true to *his* [i.e., the judge's] truth." He then points to b. San 7a where the judge is charged with judging "according to what his eyes see." Elon takes this latter phrase to signal that the judge should judge according to the truth as he understands it. Elon argues that since judges will have different understandings of a case, the phrase "according to what his eyes see," which he takes to be equivalent to *din emet la-amitto*, implies legal pluralism. However, b. San 7a's reference to judging according to what the eyes see does not refer to judging according to one's own lights and understanding (even though this understanding of the phrase is widely repeated among talmudic commentators). The passage exhorts judges not to be intimidated by others and to stick to their guns in rendering their decision. The judge is to judge according to the evidence (= what his eyes see) and should not be swayed by the intimidating tactics of others. Moreover, there is no textual basis for connecting this passage with the phrase *din emet la-amitto*. Even if we suppose that there is some thematic connection, the connection is not that proposed by Elon. The thematic connection between the two passages is that each refers to procedural honesty and integrity when judging. There is no allusion here to legal pluralism.

81 See Boaz Cohen, *Jewish Law and Roman Law*, I:52. See also Elon, *Jewish Law*, I:247, and Isaac Arama's citation of Aristotle's dichotomy (Book of Ethics 5:13) of the just man and the equitable man (Arama's *Aqedat Yitshaq*, Yitro, gate 43 as cited in Elon, *Jewish Law*, I:248-51). According to Aristotle, the excellence of the just man resides in his adherence to the general prevailing law, while the excellence of the equitable man lies in his perfecting and refining the general laws through exceptions and modifications according to circumstance. A similar dichotomy was propounded by Don Isaac Abarbanel (15th c) who argued that divine law was formulated in objectively just and correct generalization, divorced from individual circumstances. The pious or devout judge will make adjustments in order to arrive

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The Aristotelian notion of equity refers to modifying a general legal principle where its mechanical operation would create an injustice. In many of the rabbinic cases no injustice would be done by the application of the strict law. However, a better — read: more pious, more charitable, more generous, etc. — outcome would be achieved by not applying the strictly correct law. It is, however, worth noting in this context that rabbinic texts (in many instances, already in the tannaitic period) do indeed employ a wide range of terms and locutions to designate and motivate rulings that "improve upon" the strict *din* (*mipne darkhe shalom, mipne tiqqun olam, middat hasidut*, etc.) in a manner more comparable to the Aristotelian conception of law and equity.[82]

Conclusions

In the immediately foregoing section, we saw that a few rabbinic references to truth and many references to *din* in legal and judicial contexts, connote the *formally* correct law or judgment. Implied in such usage is a formalist view of the law. Formalism is the idea that law has an internally coherent structure and order. A contemporary proponent of legal formalism, Ernest Weinrib, argues that because of its internal conceptual structure, law is "immanently intelligible," capable of being understood on its own terms (Patterson, 22). A proposition of law is true or correct if it is consistent with, coheres with, the overall legal structure. When the rabbis assert that according to strict law (*bedin/ kedin*) the "correct" answer is x, they appear to be stating the law in a

> at the decision that is just in the circumstances of the particular case before him (Abarbanel, *Perush al ha-Torah*, Deut 17:11). See the summary of Abarbanel's view in Lamm and Kirschenbaum, *op. cit.*, 124 and their connection of this view with Plato's distinction between the individualized rendering of judgment and the (inferior) generalized formulation of rules (n104).

82 In general, see Aaron Kirschenbaum's *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken, NJ: Ktav, 1991), chaps 1-4 and Appendix.

strictly formal and internally consistent sense, without factoring in specific circumstances that might arise in the real world.

The crucial difference between the rabbis' approach and Weinrib's formalism lies in this: for Weinrib, any external mode of understanding law is a distortion (Patterson, 25). One must penetrate to the structure of thought that law embodies and grasp it as it is. He objects to what he would call a functionalist approach (viewing law as an instrument that must serve some end). For the classical rabbis, however, the situation is reversed. As we have seen, on occasion, that which is – *formally* speaking – the law, is deemed to be inferior and undesirable and in need of refinement in light of the details of a particular case, the needs of the community or the demands of morality.[83] Such functionalism is entirely untenable to a strict formalist like Weinrib.

A distinction that may help in clarifying the rabbinic approach is Phillip Bobbitt's distinction between legitimacy and justification.[84] Bobbitt holds that attempts to find some normative foundation for law outside the conventions of its own argumentative practices are misguided (Patterson, 130). Legitimacy is not, he argues, a matter of validity (issuance from a recognized or authoritative source or institution, as in positivism) or authenticity (correspondence with moral principles

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83 Some external considerations are in fact a distortion, and those would be procedural irregularities that undermine the process of norm creation and decision making. As we have seen, the rabbis insist on procedural integrity in determining the law – judicial rulings, for example, must be based on the evidence, and judges must judge honestly, without partiality or ulterior motive, considering "only what their eyes see" and not being intimidated by others. But calls for judicial honesty are universally found in legal systems. What is of greater interest is that the rabbis valorize the moderation of "strict law" by pragmatic or other considerations. We see this already in mishnaic cases in which the strict law is modified in consideration of certain social goods (*mipne tiqqun olam* and *mipne darkhe shalom* in Gittin 4) or critiqued in light of moral ideals (*hayyav be-dinei shamayim*, m. BQ 6:4; *ruah hakhamim [eyn] nohah heimenno*, m. Shev 10:9, n. BB 8:5; *middat hasidut*, b. BM 52b).

84 For a detailed summary of Bobbitt's views, see Patterson, *op. cit.*, chapter 7.

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whether real or conventional, as in natural law theory or Dworkin's theory). A proposition of law or a judicial ruling is legitimate if it is rendered in accordance with any of the major modalities of argument regularly employed in the legal system (Bobbitt identifies six modalities employed in constitutional interpretation, for example). The modalities of argumentation legitimate a law or ruling but they do not *justify* it. A law or ruling is justified when it is (successfully) evaluated in accordance with some theory of justice, but this has nothing to do with the modalities of argument that first serve to establish the law or ruling as law.

Bobbitt's theory illuminates the rabbinic sources we have examined. A norm or ruling is declared to be correct (*emet* as used in section 3, or [*shurat ha-*]*din*) and therefore legitimate (valid) through modalities of argument employed regularly in the legal system to establish legitimacy. As a second step a norm or ruling may be evaluated according to (internally generated) criteria and, if found wanting, may be subsequently modified or adjusted.[85] These criteria include moral standards of fairness and justice, pragmatic considerations but also the cultivation of personal or religious virtues such as compassion, charity, humility, the preservation of peace, and so on, the pursuit of which it is the law's purpose to enable and encourage.[86]

Which brings us perhaps, full circle, to Dworkin and the one right answer thesis. Dworkin's theory of constructive interpretation is one in which judges are obligated to impose purpose on the law and to then construe the law in the best possible manner. Constructive interpretation

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85 In the case of rabbinic law, the evaluative criteria are identified by the system's practitioners as internal to the revealed law and are not understand as external or foreign to it. A full discussion of this point must await another venue.

86 For a summary list of such moral and pragmatic considerations in Jewish law that are believed to have their origin in the divine revelation, see Lamm and Kirschenbaum, *op. cit.*, 132-33. A fuller account appears in Kirschenbaum, *Equity*, chaps 1-4 and Appendix.

proceeds in three stages. In the first, preinterpretive stage the relevant rules are identified. In the second, interpretive stage, the judge comes to a general justification for the practice identified in the first stage. In the final, post-interpretive, or reforming, stage, the judge "adjusts his sense of what the practice 'really' requires so as better to serve the justification he accepts at the interpretive stage" (Dworkin, *Law's Empire*, 413). Dworkin writes: "Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past" (ibid., 413).

The shift from stage two to stage three resembles the talmudic shift from *din* to *lifnim mishurat ha-din*, or from the formally or strictly correct answer to the (morally or pragmatically) better answer. But there is an important difference between the rabbis' approach and Dworkin's at the level of self-presentation. On Dworkin's account, the judge weaves a narrative according to which past, present and future come together as an integrated and coherent whole. For Dworkin, the answer that emerges from the three-step process of constructive interpretation is the best answer and, by virtue of being the best answer, it *becomes* — and is ultimately to be identified as — the right answer. In the rabbinic examples we have seen, the two-step process of adjudication which weighs the formally or theoretically correct answer against pragmatic and moral considerations that are themselves integrated into and constitutive of the legal system, produces the best answer *as distinct from* the correct answer. In many instances the two are enshrined side by side for all to see, a refreshing preservation of procedural transparency.[87]

87 This is not to say that the rabbis never engage in the kind of integrated narrative described by Dworkin (in which the best answer becomes, by virtue of being best, the right answer). They most certainly do (though the only text to do so while employing truth language is an aggadic text [Sifre Numbers 134], where giving truth to Israel is understood as dealing with Israel mercifully rather than executing strict justice). For numerous examples of revisionist legal arguments that represent a better answer as the right answer, see Hayes, "The Abrogation of Torah Law: Rabbinic Taqqanah and

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What does the conceptual distinction between correct answers and best answers mean for one's theory of legitimacy? I submit that the rabbinic texts we have reviewed point to a double-barreled notion of legitimacy. These texts recognize a legitimacy that is grounded in validity *and* a legitimacy that is grounded in authenticity. *Din*, the strict law, is after all a valid and therefore legitimate articulation of the law. But by the same token, rulings that deviate from the *din* in accordance with pragmatic and moral considerations are equally legitimate, but on substantive (moral) grounds internal to the legal system; they are authentic.[88] That Jewish law should defy facile classification on this matter should occasion no surprise, given its lack of systematic correspondence to the primary theories of jurisprudence (natural law theory and positivism) that underwrite the conceptual opposition between valid and authentic.

Praetorian Edict," in *The Talmud Yerushalmi and Graeco-Roman Culture*, I, P. Schäfer, ed. (Tübingen: J. C. B. Mohr, 1998), 643-74. Here I mean simply to say that they do not *always* do this and in many instances are frank about the fact that they are consciously choosing a better answer over the correct answer.

88 This is not to be confused with the dichotomy between law and morality, since the authentic answer is generated from internal principles and is no less law than the "valid" answer.