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Akhnai

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**Recommended Citation**

Daniel J.H. Greenwood, *Akhnai*, 1997 Utah L. Rev. 309 (1997)

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## I. THE OVEN OF AKHNAI

### A. *The Context*

In the tractate of the Babylonian Talmud<sup>1</sup> known as *Bava Metzia*, which is largely concerned with various aspects of commercial law, including lost property, bailments, credit, labor law, tenancy, and co-ownership, appears a discussion of wrongs (*onaah*) done by words. The Mishnah gives three examples:

Don't ask "what is the price of the article?" if you don't want to buy it; if he is a *baal tshuva* (repentant sinner), don't say "remember your previous actions;" if he is the child of a convert, don't say "remember the deeds of your ancestors."<sup>2</sup>

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1. Jewish law has been extensively discussed in the law reviews since Robert Cover's seminal *Nomos and Narrative*, Robert M. Cover, *The Supreme Court 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See, e.g., Suzanne Last Stone, *In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993). Stone also provides a concise introduction to the structure and sources of Jewish law. See *id.* at 816 n.13. The Babylonian Talmud, from which the central texts discussed in this Essay are taken, consists of two basic layers: first, the Mishnah, a more or less code-like compilation of legal traditions and rulings redacted by Yehuda Ha-Nasi, also known as Rabbi, in about 200 C.E.; and second, the Gemara, which is in form if not always substance a commentary organized around the Mishnah. Standard editions of the Talmud print a passage from the Mishnah followed by the (generally much longer) Gemara related to that Mishnah. The Gemara is thought to have been redacted sometime after 500 C.E., although, as in the case of the Mishnah, much of the material in it is far older than the redaction. The Jerusalem Talmud was redacted somewhat earlier than the Babylonian one, apparently independently but using many of the same underlying source materials.

2. BABYLONIAN TALMUD, *Bava Metzia* 58b, translated in 3 ADIN STEINSALTZ, *THE TALMUD: THE STEINSALTZ EDITION* 223 (Rabbi Israel V. Berman trans. & ed., 1990) [hereinafter STEINSALTZ]. Translations from the Babylonian Talmud reflect my understanding of the text and are indebted to but not necessarily the same as the standard Soncino and Steinsaltz translations. See STEINSALTZ, *supra*; *THE BABYLONIAN TALMUD* (Rabbi Dr. I. Epstein trans. & ed., 1961) [hereinafter SONCINO]. The terseness and plasticity of Talmudic language often allow varying interpretations; and the weakness of my own linguistic skills and contextual understanding no doubt creates others. I have been inconsistent in transliterations of names and technical terms, following the conventional English (King James) form for names that are common in English and a more phonetic transliteration (based on the modern Israeli

The Gemara discussing this passage begins by quoting a number of traditions teaching that verbal wrongs (*ona'ah*) are particularly terrible. For monetary wrongs, compensation is possible but not for verbal wrongs, states one rabbi. Another reports a tradition that "one who publicly shames his neighbor—it is as if he had spilled blood."<sup>3</sup> Shaming someone, then, is like murder. Perhaps it is even worse: another passage expounds one of King David's laments, Psalms 35:15: "King David said . . . even when they are studying [two difficult passages in the Talmud], they say to me, 'David, how is a man who comes to another man's wife executed?,' [taunting him; David, of course, did worse than this, since he killed the other man as well, 2 *Samuel* 11:4, 15-17] and I say to them, 'He is strangled, but he has a place in the world to come. But one who publicly shames his neighbor has no place in the world to come.'"<sup>4</sup>

Then come several traditions that Heaven responds more to the cries of those wronged—by verbal or other wrongs—than to others:

R. Eleazar<sup>5</sup> said, "Since the destruction of the Temple, the gates of prayer are locked . . . but the gates of tears are not." . . . R. Hisda said, "All gates are locked, except the gate of wrongs (*ona'ah*)." . . . R. Eleazar said, "Punishment is through an angel, except for wrongs (*ona'ah*) [which God punishes directly]." . . . R. Avahu said, "Three things before which the Curtain [of Heaven] is not closed:

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pronunciation) for less common words. Thus, Jeremiah rather than Yirmeyah, and Joshua rather than Yehoshua, but Yohanon rather than Johanan; Gabriel rather than Gavriel, but Yonadav not Jonadob, and Batsheva not Bathsheba. For texts outside of the Babylonian Talmud, I have relied primarily on 1 JACOB NEUSNER, *ELIEZER BEN HYRCANUS, THE TRADITION AND THE MAN* (1973). In this valuable resource, Neusner collects and reproduces (in English translation) hundreds of sayings of and about Eliezer from both Talmuds and other sources from the Mishnaic and Talmudic periods, attempts to establish criteria for differentiating sources referring to our Eliezer from several other rabbis of similar names, and then uses the methods of source criticism to sort the various traditions in order to differentiate between different periods and strands of Eliezer stories. Neusner also cites and discusses at length the more traditional collections and biographies of Eliezer, and so I have not, although I find several of them more interesting—if not better examples of source criticism—than does Neusner. Because the sources I am most interested in, including Akhnai, tend to be later and obviously legendary, the Eliezer I portray here is not necessarily the historical Eliezer as Neusner reconstructs him. The connection to Yohanon ben Zakkai, for example, does not appear in the earliest strata of materials. But it does seem to have been available by the time Akhnai appears.

For a more traditional collection of the Eliezer materials, see ISRAEL KONOVIĆ, *RABBI ELIEZER, RABBI JOSHUA* (1965) (Hebrew).

3. BABYLONIAN TALMUD, *Bava Metzia* 58b, translated in STEINSALTZ, *supra* note 2, at 226.

4. *Id.* 59a, at 229 (bracketed language added).

5. "R." is the standard abbreviation for "Rabbi."

wrongs (*ona'ah*), idolatry and robbery.”<sup>6</sup>

After a homily concerning the need to adequately provide for one's family in order to prevent strife at home, the topic suddenly switches to the powerful story that motivates this paper:

We learned elsewhere: They cut it into pieces and put sand between the pieces. Rabbi Eliezer<sup>7</sup> declared it pure and the sages declared it impure and this is the Oven of Akhnai.<sup>8</sup>

The story of the Oven of Akhnai is given with no context, no introduction, no explanation of the background or origins of the dispute. No date or location is given, although other traditions indicate that Rabbi Eliezer ben Hyrcanus, sometimes called “the Great,” was active in the first generation after the destruction of the Temple in 70 C.E., and so we may surmise that the story is set at the end of the first century in Roman-occupied Judea, perhaps in Yavneh, where R. Eliezer's teacher, Rabban Yohanon ben Zakkai, is said to have fled and set up an academy after escaping from besieged Jerusalem in a coffin carried by R. Eliezer and his fellow student R. Joshua.<sup>9</sup> But this is hardly certain; the Talmud's redactors—and the authors of the traditions on which they relied—were more concerned with the law than with history.<sup>10</sup>

The issue seems to have been the ritual purity of an oven. It appears that the oven was made of broken pieces cemented together around an inner core of sand to form an entirely new object.<sup>11</sup> The disputants agreed that if the rule for broken or incomplete things applied, the oven could not convey impurity to its contents resulting from contact with a dead animal. On the other hand, if the rule for whole or repaired objects applied, the oven was (or rather, its contents were) impure. The disagreement, then, centered on which rule

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6. BABYLONIAN TALMUD, *Bava Metzia* 59a, translated in STEINSALTZ, *supra* note 2, at 231–33.

7. Not to be confused with the R. Eleazar quoted in the passage above.

8. BABYLONIAN TALMUD, *Bava Metzia* 59a–b, translated in STEINSALTZ, *supra* note 2, at 234–35. The origin and meaning of the word “Akhnai” are uncertain. Although the texts discussed are most entirely in Hebrew, “Akhnai” does not appear to be a Hebrew word. Some commentators understand it as a proper name and thus would translate “Akhnai's oven” as “the oven belonging to, or designed by, Mr. Akhnai.” Others understand the word as having something to do with a snake and would translate as “the snake oven.” Steinsaltz, thus, understands the oven to have been coiled like a snake, while others assume that the impurity discussed in the legal dispute arose because the oven came into contact with a dead snake.

9. See BABYLONIAN TALMUD, *Gittin* 56a, translated in SONCINO, *supra* note 2.

10. See generally 1 NEUSNER, *supra* note 2.

11. See Steinsaltz's commentary to BABYLONIAN TALMUD, *Bava Metzia* 59a, translated in STEINSALTZ, *supra* note 2, at 235.

applied in the circumstances of the case.

The form of the dispute, in short, is of a type familiar enough to modern lawyers: the underlying regulations assume that the world has neat divisions, while the world, unfortunately, refuses to fit into the categories. One might call it the collapse of the broken/whole distinction, or the problem of the mixed, or intermediate, oven form. But if the jurisprudential issues are familiar, the debate itself is quite foreign.

### B. *The Story*

The rabbis are split, with an unnamed majority on one side and Rabbi Eliezer on the other. R. Eliezer, contending that the rebuilt oven unlike a whole one cannot convey impurity, "made all the arguments in the world" for his position.<sup>12</sup> They are rejected—and the redactor is insufficiently interested in what those arguments might have been to report any of them or the responses. Rather, the story centers on what happens after "all the arguments in the world" fail to persuade R. Eliezer's fellow rabbis.

Logic having failed, R. Eliezer appeals—directly to the Legislator. First, R. Eliezer performs three miracles, and then, at his request, a voice from Heaven proclaims that the ultimate Source of the Law, the Austinian sovereign, the Author Himself, agrees with R. Eliezer.

But the word of Heaven comes later. First, R. Eliezer begins, "If I am right let the carob tree prove it." The tree flies "100, or some say 400 cubits" through the air. The majority says, we don't accept halakhic (legal) rulings from trees. Then he makes the stream flow backwards. This too is rejected, on the same ground.<sup>13</sup>

None of the participants challenge the validity of the miracles. There is no claim that R. Eliezer is a false prophet or a magician, like the prophets of Baal vanquished by Elijah or Pharaoh's magicians made fools of by Moses.<sup>14</sup> Instead, the rabbis seem to be making an odd theological argument: somehow, miracles involving a tree and a stream should be seen as reflecting only the understanding of the tree and the stream. R. Eliezer doesn't point out the implicit polytheism of this position; rather he seeks a more acceptable miracle:

Then, he [R. Eliezer] said to them, "If the Halakhah is as I claim,<sup>15</sup> let the walls of the *Beit Midrash* [study hall] prove it."

12. *Id.* 59a-b, at 235.

13. *See id.* 59a-b, at 235-36.

14. *See I Kings* 18:19-39; *Exodus* 7:11-12, 7:22.

15. ך ם ן ן ן : literally, "like me" or "as I [with an implied verb omitted]." *See infra*

The walls inclined to fall. But R. Joshua rebuked them, saying, "If scholars are arguing [literally: besting or defeating one another] about Halakhah, what are you to intervene?" They did not fall, in honor of R. Joshua, but they did not straighten up, in honor of R. Eliezer, and they are still leaning.<sup>16</sup>

The walls, which might have learned some Halakhah listening to all these disputes, if walls do such things, are not rejected as authorities in the way the tree and the stream are. But after being reminded of their proper status in the order of things, they decide to stay neutral: they accept both R. Eliezer's ruling on the law and R. Joshua's ruling on their (lack of) competence.<sup>17</sup>

Heaven, on the other hand, appears perfectly willing to intervene in the debate, and the *Bat Kol's* position could not be clearer. To quote:

The *Bat Kol* [a Heavenly voice] went forth, saying, "Why are you disputing with R. Eliezer, for the Halakhah is as he claims<sup>18</sup> everywhere."<sup>19</sup>

In a world of sovereign centered positivism, surely that would be the end of the issue. Like judges, the rabbis accepted the authority of the law before them; they viewed their role as the application of the law, not as legislation. The law in question is one given at Sinai; the Author and the sole Source of legitimate law has now spoken and clarified how the law is to be applied to the facts at hand.

This is, then, the ultimate fantasy of original intent theory: the Founding Father has told us what He meant. Indeed, since the Interpreter in question is not merely a Greek demigod, but God Himself—unitary, timeless and, by hypothesis, internally consistent—we know not only what He intended at the time of promulgation but what He intends now, on both the specific issue and on the general level. All the difficult interpretive issues have been resolved.

What is left? Nothing, except that the rabbis reject the ruling of Hercules or Heaven. In the name of the sacred law given at Sinai,

note 18.

16. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 236.

17. *See id.*

18. ל כהן ד כ : literally, "like him" or "as he [with an implied verb omitted]." The text is ambiguous, thus, as to whether the *Bat Kol* and the other miracles are certifying as to R. Eliezer's authority or as to the accuracy of his ruling.

19. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 236.

they refuse to listen to the Legislator's own interpretation of that law:

Rabbi Joshua stood up and said: "it is not in Heaven." [quoting part of Deuteronomy 30:12]. What does "it is not in Heaven" mean? R. Jeremiah said, "since Torah was already given at Sinai, we do not pay attention to a *Bat Kol*, because it was already written at Mt. Sinai in the Torah, 'incline'<sup>20</sup> after the majority [or many].' [quoting part of Exodus 23:2]" . . . They said, "that day they brought all the objects that R. Eliezer had declared pure and burned them in a fire and they voted about him and excommunicated him."<sup>21</sup>

That is, the rabbis read the Torah—fairly freely, it should be noted—as containing within it a principle for resolving interpretive disputes. R. Joshua's point is that the Torah was given at Sinai and is not, as the rest of Deuteronomy 30:12-14 makes clear, "in Heaven that you should say, who shall go up for us to heaven and bring it to us that we may hear it and do it? . . . But the word is very near to you, in your mouth and in your heart, so that you may do it." Thus, heavenly voices are unnecessary; miracles are no substitute for legal reasoning.<sup>22</sup> R. Jeremiah adds to this, that in the event disputes do arise, the proper dispute resolution technique is not appeals to heaven but rather majority vote.<sup>23</sup> Indeed, not only is R. Eliezer's voice from Heaven rejected, but the later authorities make clear that all voices from Heaven and other forms of prophecy are to

20. In the original, "incline" here is the same verb as is used with respect to the falling *Beit Midrash* walls. Just as the walls inclined (or were inclined) to follow R. Eliezer, the Torah is understood to direct R. Eliezer to incline to follow the majority.

21. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 236-37.

22. Cf. DEUTERONOMY RABBA viii, § 6 ("Moses warned them [i.e., Israel]: Say not another Moses will arise and bring us another Torah from Heaven. I declare to you now 'It is not in Heaven'—nothing thereof was left in Heaven."), translated and discussed in E.E. URBACH, *THE SAGES—THEIR CONCEPTS AND BELIEFS* 308 (1979); see also Stone, *supra* note 1, at 841 (discussing other possible meanings of "it is not in Heaven").

23. See MIDRASH ON PSALMS, *Mizmor* 12, with variants in PISKTA RABATTAI (Ish Shalom) *parasha* 21 and JERUSALEM TALMUD, *Sanhedrin*, part 4, 22a, translated and discussed in Suzanne Last Stone, *Judaism and Postmodernism*, 14 CARDOZO L. REV. 1681, 1699 n.82.

R. Yanni said: The words of the Torah were not given as clear-cut decisions. For every word which the Holy One, blessed be He, spoke to Moses, He offered him forty-nine arguments by which a thing may be proved clean and forty-nine arguments by which it may be proved unclean. When Moses asked, "Master of the Universe, in what way shall we know the sense of the law?" God replied, "Incline after the majority." When a majority says it is unclean, it is unclean; when a majority says it is clean, it is clean.



be rejected if they contradict the existing understanding of the Law.<sup>24</sup>

Furthermore, the text assures us that Heaven seemingly endorses Its own rejection:

Rabbi Natan met Elijah [the Biblical prophet who was taken up to Heaven alive<sup>25</sup> and frequently appears as an intermediary between Heaven and earth in Jewish tradition] and asked him, "What did the Holy-One-Blessed-Be-He do at that time?" He said to him, "He smiled and said, 'My children have defeated'<sup>26</sup> Me, My children have defeated Me."<sup>27</sup>

Does this paradox not have some application to our modern struggles to understand our own less sacred law? Akhnai presents the issue of legislative intent in its purest form, stripped of the problems of collective intent, past versus present, majoritarian process versus individual rights, and so on. And yet the rabbis—known for creating perhaps the longest existing system of law (outside possibly China), and surely the only one to survive two millennia without executive, legislature, supreme court, or (most of the time) police force—refuse to accept the authority of the sole legitimate legislator in their system to also interpret the law. This is a stronger and different notion of separation of powers than we usually encounter.

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24. The strongest statement, perhaps, is in Yevamot, stating that even if Elijah himself were to come with a message from Heaven regarding the Halakhah, he would be disregarded. See BABYLONIAN TALMUD, *Yevamot* 102a, translated in SONCINO, *supra* note 2; see also BABYLONIAN TALMUD, *Avoda Zarah* 36a, translated in SONCINO, *supra* note 2; MAIMONIDES, *MISHNEH TORAH, Hilkhhot Yesodei HaTorah* 9:1. Maimonides specifically rules that Messiah himself may not change the law. See MAIMONIDES, COMMENTARY TO THE MISHNAH, *Sanhedrin* I, 3; MAIMONIDES, INTRODUCTION TO THE TALMUD, part 2; see also ROBERT COVER, *The Folktales of Justice: Tales of Jurisdiction*, in NARRATIVE, VIOLENCE AND THE LAW 173, 191 (Martha Minow et al. eds., 1992). This ruling raises an interesting paradox: if Elijah must be disregarded if he contradicts the Halakha, why should one give any weight at all to R. Natan's report that he endorsed Heaven's exclusion from the interpretive process?

25. 2 *Kings* 2:11.

26. פ י ך ך ך . This is the same word that R. Joshua uses to describe the activity of the scholars in his rebuke to the *Beit Midrash* walls. The use of the same word suggests that God and the scholars are engaged in the same activity, and thus, that law is not (merely?) a command from on-high or the distant past of Sinai, but an ongoing debate among all those inside the community. God may be the law-giver, but as a member of the community, He is merely one among all those who must debate the meaning of the law, and whose success or failure in that process is a consequence of the norms of the system, not authoritative power or position.

27. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 237.

### *C. The Sequels: Eliezer's Vindication*

The story does not end with Eliezer's excommunication, however. First, in case there is any doubt after R. Natan's message from Elijah, the normative tradition clearly accepts that Joshua was right and Eliezer was wrong: the oven does convey impurity, the Torah is not in Heaven, the *Bat Kol* is not authoritative.<sup>28</sup> The post-Talmudic sources agree: after Akhnai, miracles are simply disregarded as sources of law, and ovens built of broken pieces around a core of sand do convey impurity.<sup>29</sup> Furthermore, the traditional rule is that any time the sources describe a dispute between R. Eliezer and R. Joshua, or between R. Eliezer and unnamed Sages, the rule is as stated by R. Eliezer's opponent.<sup>30</sup>

Second, the Akhnai account itself contains several additional sequels after the R. Natan story. Just as Heaven responded to R. Eliezer's call before his excommunication, making the carob fly, the stream reverse direction, and so on, so It continues to do so afterwards. Indeed, the story continues by stating that after the vote to excommunicate Eliezer, the scholars hesitated to send someone to tell him. Finally R. Akiva offered to do it—tactfully, and using his relationship as Eliezer's student—lest, if it be done rudely, Eliezer "destroy the entire world." And, indeed, even with all of Akiva's tactfulness, on that day one-third of the olive crop, one-third of the wheat, and one-third of the barley crop were destroyed.<sup>31</sup> A differ-

28. BABYLONIAN TALMUD, *Yevamot* 102a, translated in SONCINO, *supra* note 2.

29. See, e.g., MAIMONIDES, *supra* note 24, at 9:1. How heavily litigated the latter issue has been, however, I am unable to say.

30. Neusner suggests that this rule was sufficiently early and sufficiently clear that instances can be identified in the Talmud and parallel sources where Eliezer's rulings were reported anonymously in order to have them accepted without the "taint" of Eliezer's connection, see 2 NEUSNER, *supra* note 2, at 82–86 (noting that some testimonies indicated that "it was not wise to cite Eliezer directly," or that Eliezer's view was sometimes switched with those of other masters in order to make Eliezer's view more acceptable "by supplying it with a better authority"), as well as parallel traditions reporting the same tradition once as Eliezer's and once as Joshua's, see 2 *id.* at 85, 372. When these suggestions that those in favor of a ruling might have attempted to report it without associating it with Eliezer, see, e.g., 2 *id.* at 207–08, 213, 216–17 (stating that Mishnah adopts rulings of Eliezer in exactly his words without attributing them to him), are combined with the specific rule against confusing the teachings of Eliezer and Joshua, see SIFRE DEUT. 188, translated in 1 NEUSNER, *supra* note 2, at 409, and with a specific complaint that Tannaim (the transmitters of the traditions) have confused Eliezer's teachings with Joshua's, see JERUSALEM TALMUD, *Moed Katan* 3:1, translated in 1 NEUSNER, *supra* note 2, at 425, it seems quite clear that the rule against accepting Eliezer's teachings was early and strong, even if not always followed. See 1 NEUSNER, *supra* note 2, at 426; 2 *id.* at 205–23; YITZHAK D. GLAT, *THE TEACHINGS OF R. ELIEZER B. HYRCANUS AND THEIR POSITION IN THE HISTORY OF HALAKHA* 74, 321 (1968).

31. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note

ent tradition reports it slightly differently: "Great was that day, for everything at which R. Eliezer looked was burned up."<sup>32</sup> R. Eliezer himself tore his clothes and sat on the earth: as if he were sitting *shiva*, mourning the death of his father (or is it Father?).<sup>33</sup> Nor does the story stop with mourning, blight, and destruction.

R. Gamliel was traveling on a ship, when a huge wave arose to drown him. "It appears to me," he said, "that this is on account of none other than R. Eliezer ben Hyrcanus."<sup>34</sup>

Note that Gamliel is the source of the explanation of the causality: if it was not a miracle, it was at least an indication of R. Gamliel's bad conscience. But the story contends that it was a miracle: the storm stopped when R. Gamliel justified (to Heaven) R. Eliezer's excommunication as necessary to avoid disputes in Israel and preserve the peace of the community.<sup>35</sup>

Rabban<sup>36</sup> Gamliel, it should be noted, was the head of the Jewish community in Judea. Presumably, in that role he presided over the ban of R. Eliezer. Not incidentally, R. Gamliel was also the brother of R. Eliezer's wife.

Then, each morning at the time for individual supplicatory prayer, Eliezer's wife, Imma Shalom—Peace Mother, as her name translates—distracted him, out of fear for the safety of her brother, Rabban Gamliel.<sup>37</sup> In the other calamity episodes, the redactor avoided directly blaming R. Eliezer: there is no suggestion that the destruction of one-third of the crops or the storm or even the burn-

2, at 237–38.

32. "R. Jeremiah said, 'A great tribulation took place on that day. Wherever R. Eliezer's eye looked, it was burned, and not only so, but even one grain of wheat—the half [that he looked at] would be burned, and [the other] half not burned.'" JERUSALEM TALMUD, *Mo'ed Qatan* 3:1, translated in 1 NEUSNER, *supra* note 2, at 425. The word translated "tribulation," ׀ ן ן , also, I think, could be translated "conflict."

33. See BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 238.

34. *Id.*

35. See *id.* at 239.

36. "Rabban" was an honorific given to leading scholars including the Patriarch (*nasi*), the head of the Jewish community in Judea in the Talmudic period. The position of *nasi* was normally hereditary and held by the descendants of Hillel (himself said to be a descendant of David), although there are some exceptions. Our R. Gamliel was the grandson of the Gamliel (Rabban Gamliel the Elder) mentioned in Acts 5:34. R. Gamliel the Elder, the first to use the title Rabban, was Hillel's grandson. See ALFRED J. KOTLATCH, WHO'S WHO IN THE TALMUD 194 (1964); 1 JACOB NEUSNER & WILLIAM SCOTT GREEN, DICTIONARY OF JUDAISM IN THE BIBLICAL PERIOD 242, 470 (1996) (discussing Gamliel I and Gamliel II).

37. BABYLONIAN TALMUD, *Bava Metzia* 59b, translated in STEINSALTZ, *supra* note 2, at 239.

ing of his eyes was caused by R. Eliezer or at his request, as opposed to by Heaven acting out of Its own sense of outrage. Here, however, the implication of R. Eliezer's vengefulness is clear. One day, Imma Shalom was distracted herself, or made a mistake about the calendar and thought it was a day without supplicatory prayers, and upon finding her husband praying, she shouted, "You have killed my brother" just before the horn sounded announcing Gamliel's death.

R. Eliezer asked her how she knew, and she answered in precisely R. Hisda's words from the Gemara's discussion before Akhnai: "I have a tradition from my father's father's house: all Gates are locked, except the Gates of wrongs (*ona'ah*)."<sup>38</sup>

That, appropriately, is the end of the Akhnai story. It is framed by the tradition that *ona'ah* kills; internally unified by the repetition of "inclined": just as the walls inclined to fall, so too the Torah, on Joshua's interpretation, directs R. Eliezer to incline after the majority; and by the repetition of "bested": just as Joshua tells the walls to mind their own business when rabbis are "besting" one another in arguments over the law, so Elijah reports to R. Natan that God laughed when His children "bested" him. And it emphasizes, if only by the length of the sequel, which is considerably longer than the core story itself, the fear of R. Eliezer and his power to destroy the whole world.

But elsewhere we are given more stories that, I think, belong as part of the Akhnai cycle and should be before us in attempting to discuss it further.

### 1. *The Death Penalty for Disrespect*

First, Imma Shalom's knowledge of a tradition that one could die for insulting another is attributed elsewhere to Eliezer himself:

R. Eliezer says, "the sons of Aaron died only because they taught [law] in the presence of Moses their master."<sup>39</sup> R. Eliezer had a disciple who taught a law in his presence. R. Eliezer said to his wife, Imma Shalom, "I shall be surprised if this man will live out the year." He did not live out the year. She said to him, "Are you a

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38. *Id.* at 239–40. Unlike the rest of the Akhnai story, the Imma Shalom section is in Aramaic (suggesting that the redactors had it in a Babylonian, rather than Palestinian, version). Her tradition from her ancestor Hillel, however, reverts to Hebrew and is word for word identical to R. Hisda's, which is also reported in Hebrew. Hisda is a Babylonian Amora who headed the academy at Sura in the early fourth century. See KOTLATCH, *supra* note 36, at 214.

39. The word translated "master" is *rav*, literally, "greater," but commonly "rabbi" or "teacher."

prophet?" He said to them, "I am neither a prophet nor the disciple of a prophet, but I have this tradition: 'Whoever gives a legal decision in the presence of his master is liable to the death penalty.'<sup>40</sup>

One of the traditions about R. Eliezer's deathbed confrontation with his disciples also makes the same point. The sages—R. Joshua and R. Akiva are named—enter his room while he lies on his deathbed and sit four cubits away, the distance required by the ban.

"Why did you come here?" said he to them. "To study Torah," they replied. "And why did you not come before now?" he asked. [I take it that this is a complaint about the ban.] They answered, "We had no free time." He then said, "I will be surprised if they die a natural death." [The parallel version has: "I fear for the disciples of this generation, that they will be punished by death from Heaven . . . because they did not come and attend on me."] R. Akiva asked him, "And what will my death be?" He answered, "Yours will be harsher than theirs."<sup>41</sup>

Thus, in this story, Akiva's death (the Romans executed him for his support of the Bar Kokhba Revolt by ripping him apart with iron combs, making him one of the most famous martyrs in Jewish history<sup>42</sup>) is made to be the predictable result of the disrespect he and his colleagues showed R. Eliezer by shunning him.

R. Eliezer, then, is associated with the demand to respect others, especially teachers.<sup>43</sup>

40. BABYLONIAN TALMUD, *Erubin* 63a, translated in SONCINO, *supra* note 2. There are several parallel versions, some of which have the death occurring within a week, or even before the end of that Sabbath day. One specifically states that the tradition is "from my masters"—that is, his teacher, Yohanon ben Zakkai, and the latter's teachers, the House of Hillel. This is the same source that Imma Shalom cites: her father and father's father are the House of Hillel. The parallel versions are collected and translated in 1 NEUSNER, *supra* note 2, at 114–16.

The phrase "liable to the death penalty" is a technical term generally referring to death penalties imposed by Heaven rather than by human courts.

41. BABYLONIAN TALMUD, *Sanhedrin* 68a, translated in SONCINO, *supra* note 2. For the parallel version, see THE FATHERS ACCORDING TO RABBI NATHAN 107–10 (Judah Goldin trans., 1955) [hereinafter ARN]; 1 NEUSNER, *supra* note 2, at 414–16.

42. See, e.g., BABYLONIAN TALMUD, *Menahot* 29b, translated in SONCINO, *supra* note 2; ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE AND THE LAW, *supra* note 24, at 203, 207.

43. This point is emphasized in other stories, such as the episode at the wedding of R. Gamliel's son where R. Eliezer objects to R. Gamliel serving wine to his students, but R. Joshua accepts it. See BABYLONIAN TALMUD, *Kiddushin* 32b, translated in SONCINO, *supra* note 2. For parallel versions, see 1 NEUSNER, *supra* note 2, at 407–08. Strikingly, R. Eliezer is portrayed as having denied this respect to his own father: one version of his youth contends that he ran away from home in the middle of planting season to study Torah with Rabban Yohanon ben Zakkai against the express orders of his father. See ARN, *supra* note 41, at 43; 1 NEUSNER, *supra* note 2, at 443–45. A parallel version of the same story combines his disobedience with the

## 2. *Close Friends and Relatives; Deposing Gamliel for Disrespect*

Second, a number of stories illuminate the relationship of the main protagonists in Akhnai. Talmudic debates are often artificially constructed discussions in which the opinions of rabbis who could never have met each other are presented as if they were engaged in face to face conversation; in Akhnai, for example, R. Natan was active after the main protagonists and the story of his meeting Elijah may be an indication that the issue was not entirely resolved earlier. In contrast, the debate between R. Eliezer and R. Joshua, R. Gamliel and Imma Shalom is not presented as merely part of an ongoing scholarly discussion: these four are portrayed as having actual, and lengthy, relationships.

Most obviously, the characters in the sequel are key figures in R. Eliezer's life: his wife Imma Shalom, one of the few women in the Talmud credited with traditions of her own, and his brother-in-law, Rabban Gamliel. The tradition also includes numerous stories connecting Eliezer to his debating partner Joshua. Thus, one of the two Eliezer origin stories presents Eliezer and Joshua as having been childhood prodigies in the same classroom (the other, in contrast, has Eliezer as a late starter, not knowing any Torah until he ran away from home at the age of twenty-two or twenty-eight).<sup>44</sup> The very implausibility of Joshua as a childhood friend of Eliezer testifies to the felt need to personalize the Akhnai debate. Other stories amplify their long association. In the dramatic story of Rabban Yohanon ben Zakkai's escape from besieged Jerusalem just before the destruction of the Temple, Yohanon decides to pretend to be dead; Joshua and Eliezer then carry the coffin out for burial outside the city walls.<sup>45</sup> Joshua and Eliezer are listed as two of R.

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respect-teaching we have here. While Eliezer apparently has no qualms about leaving his father in the middle of the plowing, his respect for authority returns when his father comes to find him at the academy: Eliezer refuses to teach while his father is standing up. See 1 NEUSNER, *supra* note 2, at 445.

There is also the alternative death-bed scene where R. Eliezer is asked how one can assure oneself of a place in the world to come, and he delivers four pithy sayings, starting with: "Take care for the honor of your colleagues." BABYLONIAN TALMUD, *Berakoth* 28b, translated in SONCINO, *supra* note 2; see also ARN, *supra* note 41, at 94; 1 NEUSNER, *supra* note 2, at 413-14.

44. See 1 NEUSNER, *supra* note 2, at 419-20.

45. See BABYLONIAN TALMUD, *Gittin* 56a-b, translated in SONCINO, *supra* note 2; ARN, *supra* note 41, at 36. Not incidentally, Yohanon employs this device out of fear of his compatriots, not the Romans. (He fears being killed as a deserter by the zealots.) That cycle of stories continues by explicitly tying the destruction of Jerusalem to the same disrespect that underlies Akhnai. Jerusalem, says one account, was destroyed because of the rudeness of one man.

Yohanon's disciples in a series of passages listing Yohanon's praise of each of the disciples or each of their responses to a problem he posed.<sup>46</sup> At the bris of Elisha ben Abuyah, later famous for his apostasy, R. Eliezer and R. Joshua sat apart from the celebration and studied Torah so intensely that "the words of the Torah rejoiced as on the day they were given on Sinai, and fire played around them, for were they not originally given on Sinai in fire?"<sup>47</sup> R. Joshua and R. Eliezer traveled with R. Gamliel to Rome to save the Jews from a decree of destruction.<sup>48</sup> R. Joshua named his son Hyrcanus, presumably after R. Eliezer's father.<sup>49</sup> Akiva is sometimes said to have studied with R. Eliezer and R. Joshua, as if they were team teachers.<sup>50</sup> They are debating partners in countless legal disputes: there are even instances where it appears that the redactors simply use their names as convenient stand-ins for two sides of a debate.<sup>51</sup> And R. Joshua figures in several of Eliezer's death-bed and funeral scenes, along with Akiva, powerfully praising Eliezer. It is Joshua, in the Talmud's version, who pronounces the ban ended when Eliezer dies.<sup>52</sup>

Furthermore, R. Gamliel's relationship with R. Joshua is inversely parallel to his relationship with his brother-in-law: R. Gamliel is said to have been deposed as Patriarch for insulting R. Joshua.<sup>53</sup>

### 3. *R. Eliezer the Great: The Scholar Celebrated*

Finally, Akhnai is not the only story that affirms R. Eliezer's special knowledge of the law: he is repeatedly said to be a scholar of a special kind. R. Yohanon ben Zakkai calls him a "plastered cistern that loses not a drop,"<sup>54</sup> meaning a master memorizer who never

46. See MISHNAH, *Avot* 2:8-10, translated in THE MISHNAH 448-49 (Herbert Danby trans., 1933) [hereinafter DANBY]; see also ARN, *supra* note 41, at 76; 1 NEUSNER, *supra* note 2, at 419.

47. RUTH RABBA 6:4, translated in 1 NEUSNER, *supra* note 2, at 430. The *Jerusalem Talmud* reads: "a fire came down from Heaven and surrounded them." JERUSALEM TALMUD, *Hagigah* 2:1, translated in 1 NEUSNER, *supra* note 2, at 429.

48. See DEUTERONOMY RABBA, 2:24, translated in 1 NEUSNER, *supra* note 2, at 451. Neusner thinks this story refers to a different Eliezer, but does not explain why.

49. See 1 NEUSNER, *supra* note 2, at 431.

50. See BABYLONIAN TALMUD, *Nedarim* 50a, translated in SONCINO, *supra* note 2.

51. See *supra* note 30.

52. See BABYLONIAN TALMUD, *Sanhedrin* 68a, translated in SONCINO, *supra* note 2.

53. See BABYLONIAN TALMUD, *Berakoth* 27b-28a, translated in SONCINO, *supra* note 2.

54. MISHNAH, *Avot* 2:8-10, translated in DANBY, *supra* note 46, at 448.

forgets what he is told. His traditions from Yohanon are said to go back directly to Sinai.<sup>55</sup> Eliezer reports of himself, and others report about him, that he never taught anything that he did not learn from his teachers; one series of stories has various questioners unsuccessfully trying to force him to rule on something where he had no tradition.<sup>56</sup> On the other hand, he is also said to have created many new laws—three hundred laws on the subject of a bright spot (leprosy?), three hundred, or perhaps three thousand, laws about planting cucumbers.<sup>57</sup> Whether his knowledge is inherited or creative, he claims it is enormously extensive:

For if all the seas were ink,  
and all the reeds pens,  
And all the men scribes,  
They could not write down  
All the Scripture and Mishnah I studied,  
Nor what I learned from the Sages in the Academy. . . .  
Moreover, I derived three hundred laws from "*Thou shalt not suffer a sorceress to live.*" And some say that R. Eliezer said, "Three thousand laws."<sup>58</sup>

Nor does the redactor challenge this self-praise: rather, the same passage goes on to say that Akiva said at Eliezer's death:

Woe unto me, my master, because of thee! Woe unto me, my teacher, because of you! For you have left the whole generation fatherless! . . .<sup>59</sup> "*My father, my father, chariot of Israel and the horsemen thereof.*" Many coins do I have but no money changer to sort them out.<sup>60</sup>

Perhaps most significantly, and strongly parallel to Akhnai, additional stories indicate Heaven's respect for R. Eliezer's legal rulings. Another *Bat Kol* once said that R. Eliezer, along with Samuel the Small and R. Hillel in the prior generation, was "worthy of the Holy Spirit."<sup>61</sup> I have already mentioned the Heavenly fire that

55. See MISHNAH, *Yadaim* 4:3, translated in DANBY, *supra* note 46, at 783.

56. See BABYLONIAN TALMUD, *Sukkah* 28a, translated in SONCINO, *supra* note 2 (R. Eliezer responding evasively to questions about which he had not learned from his teachers); BABYLONIAN TALMUD, *Yoma* 66b, translated in SONCINO, *supra* note 2 (same). Based on this tradition, one modern author studies Eliezer's sayings as a source for the most ancient levels of halacha. See GILAT, *supra* note 30, at 1-2.

57. See BABYLONIAN TALMUD, *Sanhedrin* 68a, translated in SONCINO, *supra* note 2 (telling of Rabbi Eliezer's death-bed proclamation of his extensive studies).

58. See ARN, *supra* note 41, at 109 (quoting *Exodus* 22:17).

59. Hebrew has no capital letters. This passage could also be translated as "you have left the whole generation Fatherless!" Is the problem that the master coin sorter and legal expert Eliezer has died, or that he—or more properly Akiva and his friends—have witnessed the end of legal truth with the departure of the Father?

60. ARN, *supra* note 41, at 110 (quoting *II Kings* 2:120).

61. JERUSALEM TALMUD, *Abodah Zarah* 3:1, translated in 1 NEUSNER, *supra* note



surrounded him as he studied at Elisha's bris.<sup>62</sup> And, just as the *Bat Kol* accepts Eliezer's ruling in Akhnai, so elsewhere: God Himself cites R. Eliezer when He is doing His own studying.

R. Aha in the name of R. Yosi b. Hanina said, "When Moses went up to the firmament, he heard the sound of the Holy One, blessed be He, sitting and occupied in [studying the Torah] section dealing with the Red Heifer, and saying the law in the name of the responsible authority: 'R. Eliezer says, "A heifer a year old and a Red Heifer two years old."'"<sup>63</sup>

In short, just as Akhnai affirms that R. Eliezer was a scholar, not just a magician or a table pounding, third-rate lawyer—he first brought all the arguments in the world, and only when those failed did he proceed to miracles, and his miracles are clearly accepted as indeed miraculous—so too the other sources, both ones that seem to be clearly conscious of Akhnai and ones that do not, emphasize R. Eliezer's skill, sophistication, and knowledge. He is not banned for false prophecy, incompetence, or even for being wrong on the merits.

Nonetheless, the law is according to Joshua, not Eliezer, in Akhnai, and indeed, whenever they debate.<sup>64</sup>

## II. SIMILARITIES

We have then a very strange story. Eliezer is a highly respected rabbi, known for his extreme fidelity to the tradition: the plastered cistern, he was the first in and the last out of the academy each day, never napped in class, never forgot anything he had learned, and never taught anything he had not heard from his teachers.<sup>65</sup> His direct teacher, in turn, is the most respected leader of the prior generation, the man who is credited with rescuing Judaism from the disaster of the Destruction of the Temple,<sup>66</sup> while his teachers'

2, at 417.

62. See *supra* text accompanying note 47.

63. MIDRASH TANHUMA, *Hukat* 24, translated in 1 NEUSNER, *supra* note 2, at 302. The tradition God quotes appears in the same words in the Mishnah. See MISHNAH, *Parah* 1:1, translated in DANBY, *supra* note 46, at 697; see also 1 NEUSNER, *supra* note 2, at 302. The passage from the Midrash implies, though perhaps not strongly, that God takes Eliezer's view to be the normative one. Is this a remnant of an ancient attempt to rehabilitate R. Eliezer as an halakhic authority? Or is it a further confirmation that the law is as the rabbis say, not as God wishes it were?

64. See *supra* note 30.

65. See BABYLONIAN TALMUD, *Sukkah* 28a, translated in SONCINO, *supra* note 2.

66. See *supra* note 45. After escaping from Jerusalem, R. Yohanon ben Zakkai went on to found the academy at Yavneh where rabbinic Judaism was constructed.

teachers are Hillel and before him a direct line back to Moses at Sinai.<sup>67</sup> In a legal system that treats as its "grundnorm" the reception of Torah at Sinai, these are the highest possible qualifications.

If this praise of Eliezer were not enough, he is also credited with perhaps contradictory, but equally praiseworthy, virtues. In Yohanon ben Zakkai's academy, he taught things that no one had ever heard before; his brilliance awed even the greatest teacher of the generation.<sup>68</sup> In Akhnai itself, he is credited with "every argument in the world": he is not merely a repeater of what he heard in class.

On other levels, he is also credited with admirable traits: he is able to perform miracles and magic—not just the flying trees of Akhnai or the killing of his brother-in-law, but growing instant cucumbers as well.<sup>69</sup> Indeed, the sources even report that, far from a bloodless academic, Eliezer made love to his wife as if he were possessed by a demon, and only in the middle of the night so that he would concentrate solely on her and not be distracted by other women who might pass by in the street.<sup>70</sup> His wife credited the famed beauty of their children to his focus and intensity in bed.<sup>71</sup>

Furthermore, on at least three separate occasions, Heaven certifies to R. Eliezer's skill or accuracy as a transmitter of the law: in Akhnai itself, in the episode where the *Bat Kol* pronounced him one of two in the generation worthy of the Heavenly Spirit, and when God Himself studies Torah using R. Eliezer's tradition—impressing Moses so much that the latter asks why Eliezer was not chosen to receive the Torah at Sinai and then, successfully, pleads that Eliezer be his descendant.<sup>72</sup>

And even though the Rabbis reject the ruling of Heaven in Akhnai, they seem to agree with its assessment of R. Eliezer's scholarship: even the death-bed story that centers on his excommunication celebrates his learning as well; and, in the end, those who

67. See MISHNAH, *Yadaim* 4:3, translated in DANBY, *supra* note 46, at 783.

68. See 2 NEUSNER, *supra* note 2, at 344 (quoting Yohanon, Eliezer's instructor, as stating that "[i]f all the sages in Israel were on one scale of the balance, and Eliezer ben Hyrcanus in the other, he would outweigh them all").

69. See BABYLONIAN TALMUD, *Sanhedrin* 68a, translated in SONCINO, *supra* note 2 (discussing Eliezer recounting a time when, in teaching Akiva about planting and gathering cucumbers, they were miraculously planted and gathered during the discussion); ARN, *supra* note 41, at 109 (same).

70. See BABYLONIAN TALMUD, *Nedarim* 20b, translated in SONCINO, *supra* note 2.

71. See *id.*

72. See *supra* text accompanying note 63. It may be worth emphasizing that to be Moses' descendant is not a trivial matter in the rabbis' strongly hierarchical society of hereditary privilege.

shunned him mourn him as the father of his generation.

No campaign of vilification here, then.

What is more, the issue over which he is excommunicated is itself rather strange and troubling in its triviality. Ritual purity was of extreme importance while the Temple stood: one had to be pure to approach the Temple and a sacrifice made by an impure priest was invalid. But with the destruction of the Temple, the main technique for regaining purity—the strange ritual of the Red Heifer—ended as well. The necessary result was that, regardless of whether Akhnai's oven transmits impurity, everyone was quickly in a state of ritual impurity: anyone who had been in contact with a dead body (animal or human) or a graveyard was impure, and so was anyone who has been in contact with such a person; and without the Red Heifer, there is no way to remove the impurity. Purity, therefore, became something of a moot issue with the destruction of the Temple.<sup>73</sup>

What then in this dispute is of sufficient gravity to warrant parricide—the excommunication of the “father of his generation”<sup>74</sup> and the favorite of God, and indeed, the metaphorical excommunication of God Himself?<sup>75</sup>

One explanation is the jurisprudential issue: not purity but the nature of law is at issue. Akhnai stems from a deep discomfort with a series of jurisprudential issues that are quite familiar; indeed, in its different language it confronts many of the same problems as modern American theorists.

Akhnai, on this reading, is comfortingly familiar despite its strange surface aspect. It asks our questions—about the problem of the historicity of law, the majoritarian difficulty, the boundary or membership problem, and the problem of meaning. And it can be understood to reach an at least somewhat familiar solution—rejecting original intent as unworkable, denying the possibility of absolute truth in law, and affirming, above all, the need for civility and ongoing discourse. In this reading, thus, Akhnai ele-

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73. Of course, Akhnai takes place quite close to the time of the Destruction; the analysis in the text may be anachronistic. Neusner suggests, for example, that Eliezer (and his contemporaries) may have expected the Temple to be rebuilt relatively quickly. See 2 NEUSNER, *supra* note 2, at 299–300; see also GILAT, *supra* note 30, at 307. In such a circumstance, one might become hyper-conscious of maintaining purity, so as to be able to resume sacrifice when possible, and all the more so since the Red Heifer purification ritual was no longer practical.

74. As Akiva refers to him in his funeral oration. See *supra* text accompanying note 60.

75. Eliezer, after all, could not have performed those miracles himself; it is God, not His agent, who is rejected when the miracles are denied.

vates process over substance, conversation over answers, and civility over righteousness: lawyerly values all.

This Akhnai is the ultimate test case. First, because it comes from a tradition that claims a singular Originator and access to both historical and current truth, it avoids the difficult metaphysical problems that distract many of our discussions of statutory interpretation. When God is the legislator, issues of collective intent or the changing will of the masses drop out. Second, because it involves substantive issues about which we don't care, we can examine the jurisprudential issues—what is law, how should it be understood, and the like—without the pressing reality of the substantive political results that often drive jurisprudential arguments that center around abortion or desegregation. Few commentators have persuasively separated their views on the merits of the abortion or desegregation debates from their views on the process of resolving them; but even fewer of us, I imagine, will have our view of Akhnai's process driven by the need to reach the right answer on the issue of the oven's transmission of Levitical impurity.

#### A. *The Problem of the Past: Stasis Is Death*

##### 1. *Aitz Hayyim He:*<sup>76</sup> *The Necessity of Change*

Jewish law is based upon the Torah given to Moses at Sinai. For the medieval commentators, indeed, Akhnai was one of the proof texts for the proposition that only Torah from Sinai, not law given before or law given after, not man-made law or democratically selected law, is legitimate law. Thus, Maimonides goes so far as to claim that even laws presented in the Torah as having been given before Sinai are binding on Jews only because of Sinai,<sup>77</sup> and some modern readers have claimed—based on a strong reading of a single letter that varies in different manuscripts—that he takes the same position even with respect to the seven Noahide laws given to the gentiles.<sup>78</sup> Conversely, as Akhnai clearly suggests, law given after

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76. "It [the Torah] is a Tree of Life": a living law.

77. See MAIMONIDES, COMMENTARY ON MISHNAH, *Hullin* 7:6, discussed in Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1084 (1991); J. David Bleich, *Judaism and Natural Law*, VII JEWISH L. ANN. 5 n.B (1988).

78. See Bleich, *supra* note 77, at 7–11 (discussing MAIMONIDES, MISHNEH TORAH, *Hilkhot Melakhim* (Law of Kings) 8:11). But cf. N. Lamm & A. Kirschenbaum, *Freedom and Constraint in the Jewish Judicial Process*, 1 CARDOZO L. REV. 99, 116–19 (1979); Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073, 1077 (1991); see also MAIMONIDES, MISHNEH TORAH, *Hilkhot Melakhim* (Law of Kings) 9:1, discussed in Suzanne Last Stone, *Sinaitic*

Sinai, or at least after the end of prophecy, is not legitimate: even if Messiah himself were to announce the abrogation of a law from Sinai, he would be disregarded—and worthy of the death penalty.<sup>79</sup>

Jewish law, then, is ancient and seemingly unchangeable law. Furthermore, it faced seeming irrelevance. Torah from Sinai is Temple-centered law devoted to the rituals of sacrifice and Levitical purity, to the monarchy and the struggle against it, and to the idealized and intensely conservative agriculture of a settled peasantry in control of its own destiny. But by the time of Akhnai, the Temple was destroyed and therefore both sacrifice and ritual purity impossible, the King overthrown by a foreign empire and the state destroyed, large segments of the people in exile, and patrimonies gone even beyond the capacities of a Jubilee year to restore them.

Akhnai, then, represents a struggle over the problem of unchanging law in changing times. This, of course, is a central problem in modern legal theory.

Modern theorists might examine it in this way: Law is by its nature old, a product of the past. In the case of our common-law based, constitutionally circumscribed legal system, it is often the product of an extremely old and quite foreign past. This leads to a series of difficult issues regarding the meaning of our laws: critically, the problem of how one reads a law, the words of which have remained the same even as their meanings have changed. (I leave aside the perhaps more difficult issues of whether laws, many of which merely reflect, rather than resolve, ongoing conflicts, can reasonably be understood to have “a” meaning at all; whether we, as lawyers or historians, have the tools that would be necessary to discover such determinate historic meanings even if they existed; and whether a system that takes the majority—not a law given at Sinai—as its sovereign should care about historic meanings anyway.)

Living things change and adapt; stasis is death. Law and tradition, it seems to me, are much the same here. When the world changes, meanings change and the law must change as well. Because law exists only in relation to a given social state, it must adjust to the changes in the world in order to remain the same, and if it does not, it is entirely different. Ritual purity after the destruction of the Temple cannot be the same as it was before the destruction: merely ignoring the new world doesn’t preserve the old one.

Consider, for example, the common nineteenth-century anti-

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& *Noahide Law*, 12 CARDOZO L. REV. 1157, 1167 (1991).

79. See *supra* note 24.

abortion laws that were overturned by *Roe v. Wade*.<sup>80</sup> Many of the relevant statutes were passed at a time when abortion was a dangerous operation, far more dangerous than pregnancy,<sup>81</sup> and when women had little independence—no right to vote and little possibility of earning a living or surviving outside of a conventional family. Indeed, married women had not even achieved a full right to their own property. Under those circumstances, the law could not have been the product of a legitimate democratic process—those most affected were disenfranchised. Furthermore, a decision to have an abortion could rarely have been an expression of a woman's autonomy; rather, abortion was easily understood as a dangerous procedure likely to result in the death or crippling of the victim. Barring abortion, then, could have been understood as protecting an individual—the pregnant woman—whom the general legal and economic scheme had put in a relatively helpless state. In contrast, today, legal abortion is safer for the mother than carrying a pregnancy to term and women have far more access to the resources necessary to make an independent decision regarding childbirth.<sup>82</sup> This difference in the world means that the old statutes have a dramatically different significance in the modern world than in the quite different one in which they were passed.

Indeed, the statutes not only have a different meaning, they themselves are different. In contrast to the nineteenth-century ban on abortion that protected women from an unsafe operation and from those who might force them to undertake it, a modern ban—even if embodied in the same words—bars an entirely different operation undertaken by different people faced with a different set of alternatives.<sup>83</sup>

Crucially, the nineteenth-century statute expressed no view regarding any potential conflict between the interests or rights of pregnant women and fetuses—in the nineteenth-century state of

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80. 410 U.S. 113 (1973).

81. See *id.* at 148–51 (explaining statutes prohibiting abortions were once justified on ground that abortion is more dangerous than childbirth).

82. See Daniel J.H. Greenwood, *Beyond Dworkin's Dominion's: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 571 n.51 (responding to RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* (1993)) (citing study estimating that mortality rate for pregnancy in 1982 was approximately 25 times higher than mortality rate for abortion).

83. Cf. JORGE LUIS BORGES, *Pierre Menard, Author of Don Quixote*, in *FICCIONES* 45, 45–55 (Anthony Kerrigan ed. & Anthony Bonner trans., Grove Press 1962) (describing modern author who, with much work and creativity, produces book that has same words as *Don Quixote* but, of course, is entirely different).

affairs, even the most abstract consideration of those rights or interests would have been hard put to find a conflict. Today, in contrast, anyone who can imagine a fetus independent of its mother can set the interests of the fetus against those of the pregnant woman, leading to an entirely different struggle than the one the nineteenth century sought to control. With the change in medical techniques, a modern abortion ban can only be an expression of state power to coerce, not protect, women, and that coercion must be based on a controversial view of the status of the fetus that simply was unnecessary when the statutes were passed. Abortion bans, then, are an example of a statute that may have changed its meaning and effect without changing its terms, from a paternalistic protection of women to something quite different.<sup>84</sup>

On a less controversial level, the classic taxicab accident case that serves to introduce the principles of piercing the corporate veil in many business organizations courses, *Walkovszky v. Carlton*,<sup>85</sup> demonstrates much the same phenomenon. In 1922, following a year in which 13,000 New York City taxicabs had killed 2056 people, the New York Legislature enacted a statute requiring that taxicabs carry minimum insurance coverage of \$2500.<sup>86</sup> Then, as now, the background rules regarding the taxi medallion (which is both quite valuable and judgment proof) and corporate form (which allowed a taxi company, by using mortgaged taxis and keeping the dispatching and garage service in a separate corporation, to avoid having any assets other than the medallion) made it likely that the insurance policy would be the only asset available to accident victims.<sup>87</sup> Uniform pricing, combined with on-street hailing and uniform external appearance, similarly result in intense market pressure to skimp on maintenance.<sup>88</sup> Presumably, then, both the pur-

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84. See Greenwood, *supra* note 82, at 571 n.51 (discussing change in abortion issues).

85. 223 N.E.2d 6 (N.Y. 1966).

86. See Act of Apr. 13, 1922, ch. 612, 1922; *People v. Martin*, 197 N.Y.S. 28 (1922). The current statute is codified at N.Y. VEHICLE AND TRAFFIC LAW § 370 (McKinney 1996).

87. See, e.g., *Elenkrieg v. Siebrecht*, 238 N.Y. 254 (1924) (allowing corporate shareholder to escape liability for corporate actions even where corporation was a "subterfuge" to escape liability).

88. Customers cannot choose to pay more for higher quality, due to price regulation. Nor can they increase the business of the better-maintained fleets: first, the number of cruising cabs is restricted to create an artificial shortage, and second, the system of street hailing prevents any brand loyalty or discrimination by customers, because they are unable to identify the provider (or the expected quality level) prior to hiring the cab. Under these circumstances, the lowest cost provider has the highest profit margins regardless of the level of quality provided, and, in a competitive

pose and the effect of the 1922 insurance statute was to limit the downward spiral created by the rest of the regulatory scheme and to assure that to some degree accident costs were treated as a cost of business, while also assuring victims of a significant recovery in the event of an accident. Alternatively, the statute might be viewed as part of a comprehensive legislative scheme to protect innocent victims while also encouraging business to engage in the taxi business by limiting and making more predictable the cost of accidents.

Subsequent to the original statute's passage, the legislature occasionally amended it to accommodate for inflation.<sup>89</sup> However, by the time Mr. Walkovszky was run over in 1962, the minimum had been raised only to \$10,000, an arbitrarily small amount. Market pressures, of course, assured that few taxicab companies held more than the minimum insurance amount and that few taxicabs took more than minimal preventive measures.

The question before the court, then, was what to do where the statute—originally enacted to protect accident victims<sup>90</sup> or to fairly divide the costs of accidents between victims and perpetrators—was now serving to increase the number of accidents and assure that their costs were borne only by individuals in no position to prevent them. By honoring the words of the statute, the *Walkovszky* court reversed their meaning.

The problem is common in our system and often results in unanswerable questions. Our Second Amendment, for a final example, guarantees citizens the right to bear arms, at least in a well-organized militia. But when the amendment was enacted, the arms in question were not terribly useful as instruments of mass murder.<sup>91</sup> And the right to bear them was in a rural slave-holding soci-

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market, cab operators will compete to produce the cheapest product regardless of quality. Anyone who has ever ridden in a New York City taxicab can verify that the results match the theory.

89. In 1934, the legislature changed the requirement to a minimum of \$2500 per judgment or a maximum of \$5000 for all judgments. *See* Act of Aug. 24, 1934, ch. 902, 1934 N.Y. Laws 1848. In 1951, the amounts were increased to \$5000 and \$10,000 respectively. *See* Act of Feb. 17, 1951, ch. 17, 1951 N.Y. Laws 62. In 1958, they were again increased to \$10,000 and \$20,000, where they remained at the time of the litigation. *See* Act of Mar. 14, 1958, ch. 221, 1958 N.Y. Laws 221.

90. *See* *Green Bus Lines v. Ocean Accident & Guaranty Corp.*, 287 N.Y. 309 (1942).

91. For example, smoothbore muskets still in use at the beginning of the Civil War required "a fairly steady hand to hit a barn door at fifty paces." BRUCE CATTON, *MR. LINCOLN'S ARMY* 187-88 (1962). *See generally* DON HIGGINBOTHAM, *WAR OF AMERICAN INDEPENDENCE* (1983) (discussing weapons in the Revolutionary War period); PIERS MACKESY, *WAR FOR AMERICA* (1964) (same). Even as late as the Civil War, casualties from disease far exceeded deaths from battle. *See* BELL WILEY, *THE*



ety that saw standing armies and revolts of the disenfranchised noncitizenry (including slaves, Indians, and the poor) as the key threats to freedom, and that routinely created militias consisting of the entire voting citizenry to protect the latter from the former.<sup>92</sup>

The words simply have no clear application to the right to carry semiautomatic pistols in a modern urban society with a standing army (that, together with debt service on its past wars and peacetime buildups, accounts for roughly half the federal budget); that, even in these post-Cold War days, views foreign invasion as a clearer threat than a domestic insurrection by the unarmed; without any analogous institution to the eighteenth-century militia; and with a generally, if not universally, different understanding of the composition of the citizenry and the relationship of citizens to noncitizens.<sup>93</sup> Nor is it clear what the Second Amendment has to say about the international drug trade's arms race with local police departments.

Thus, the problem is not that we cannot understand the meaning of the words, their significance, or their effect in 1787; it is that there is no clear way to transfer that meaning or to recreate those effects in our world. The weapons are different, the threats are different, the social forms of organization are different, the views of freedom are different. Thus, there is no original understanding or plain meaning to apply to today's world: all understandings of the words must transform them. To allow a heavily armed citizenry and banditry together with an even more heavily armed government is entirely different from the eighteenth-century notion of lightly arming each while simultaneously disarming those parts of the population most likely to oppose both government and citizenry; more likely to lead to Beirut's war of all against all than to the Spartan republicanism—including the ever present threat of revolt by helots

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LIFE OF BILLY YANK 124, 143–48 (1971); cf. BELL WILEY, THE LIFE OF JOHNNY REB 30, 244 (1971) (recounting ineffective shooting and stating that illness far surpassed injury among southern soldiers); BRUCE CATTON, MR. LINCOLN'S ARMY 186–87 (1962) (describing technical improvements of Civil War weapons over predecessors).

92. Cf. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857) (arguing, inter alia, that African Americans could not be citizens because citizens have the right to bear arms); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 651 (1989).

93. For brave attempts to make the words work, see, for example, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162–73 (1991) (examining texts in light of eighteenth-century meanings to conclude that Amendment meant to impose a particular vision of federalism and to bar a standing army and a federal draft) and Levinson, *supra* note 92, at 643–57 (emphasizing contemporary importance of republican and individualist readings of Second Amendment in popular legal culture).

or slaves—some of the authors of the amendment may have had in mind. Similarly, to allow, in 1997, male, white, property-holding citizens to form well-organized militias under the command of the local gentry and armed with smooth bore muskets costing a significant part of a year's income surely would be equally foreign to the meaning, significance, or effect of the Second Amendment in 1791.<sup>94</sup>

The problem, then, is that as the world changes, the law must change. To stay the same is to change: a \$2500 insurance minimum is entirely different in 1922 than in 1950; protection of the right to bear muskets in a well-ordered militia is entirely different in 1791 than in 1997. To stay the same, the law must have a principle allowing it to adapt and change as society does. If it loses that flexibility, it becomes an arbitrary imposition with an entirely different meaning than it had when it did fit the needs of society. Stasis is death, and dead law is quite different from living law, even if the words are the same. Akhnai's rejection of the word of God is a rejection of the idea that eternal law could also be unchanging law: the law is not in (unchanging) Heaven, but here on earth, where it must respond to the bitter realities of a world without purity.<sup>95</sup>

## 2. *The Counter-Majoritarian Problem: Binding the Sovereign*

In a constitutional democracy such as our own, moreover, the problem of unchanging law is compounded by the majoritarian attack on constitutional (and ultimately all) law known as the "counter-majoritarian problem." Why, asks the majoritarian, should a current majority be bound by a past one?

While this question is generally associated with a skeptical approach to constitutional adjudication elevating congressional authority over judicial interpretation, it is in fact a challenge to the legitimacy of the entire enterprise of law itself. Laws, if understood as authoritative rules binding in and of themselves, necessarily are past decisions binding the present.<sup>96</sup> In the United States, with its

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94. Lest reading "arms" and "militia" to mean the arms and forms of social organization available in 1791 seem entirely arbitrary, recall that this is precisely the approach the Supreme Court takes to the right to the civil jury trial: One is entitled to a jury trial where a jury trial was available in 1791. Any newer cause of action is exempt. See, e.g., James Fleming, Jr., *Right To a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 655 (1963).

95. Cf. Cover, *supra* note 1, at 12–13, 15–17, 60 (discussing difference in law once the Temple is destroyed and one Torah becomes many).

96. See generally JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). But cf. HANINA BEN-MENAHIM, *JUDI-*

ancient Constitution and its system of multiple checkpoints intended to assure that a mere faction of the majority is unable to pass a law,<sup>97</sup> there is no reason whatsoever to believe that failure to amend a law indicates that it has support of any current majority. Guido Calabresi suggests that this ought to make courts more willing to modify old statutes;<sup>98</sup> but the implications are far stronger: in a world of often fickle public opinion, it ought to make democratic jurists skeptical of the legitimacy of any purported law at all.

The counter-majoritarian difficulty, thus understood, is somewhat analogous to the problem of will encountered in moral psychology and familiar to lawyers in the context of contractual obligation. That is, how can a past self bind the present self? Why should the

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CIAL DEVIATION IN TALMUDIC LAW: GOVERNED BY MEN, NOT BY RULES (1991) (arguing Jewish law rejects rule of law).

97. See THE FEDERALIST NO. 10, at 21-23 (James Madison) (Roy P. Fairfield ed., 1981) (explaining how Constitution will protect against evils of factions); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (2d ed. 1986) (explaining how judicial review is check on executive and legislative branches). The counter-majoritarian problem is not a special characteristic of the courts but rather a characteristic of all levels of American government. We do not have a majoritarian system but rather a conservative one in which numerous individuals and differently defined groups are placed in positions to prevent the majority (or anyone else) from causing the state to act (or, in those not uncommon instances when the action/inaction distinction breaks down, to change the manner in which it has previously acted). Thus, to be enacted into national law, a proposal must command differently defined majorities in both Senate and House committees, then each of the Senate and the House, then a Senate-House conference, then be signed by the President. Neither the committees nor the Senate, of course, have any claim to national democratic representativeness. In the original scheme, the senators were themselves the product of variously defined majorities in state legislatures; today both House and Senate result from winner-take-all elections in variously defined districts, not a particularly majoritarian system. Criminal laws must additionally be enforced by both police and prosecutor, each of whom has complete discretion to refuse to enforce, and particular applications must be approved by a jury, again with complete discretion to refuse to apply the law. In the civil law, the executive branch or relevant regulatory agency often has similarly complete discretion to refuse to enforce even a law duly passed by the requisite majorities in the Congress. Our federalist division of labor between federal and state (and state and local) governments works in much the same way, often empowering local majorities to prevent national majorities from acting (and sometimes vice versa). Thus, effectively enforced laws require something quite different from majority support of the population or even of the population's representatives; many unrepresentative minorities (both before and after constitutional review by the courts) may prevent a law from being enacted, enforced, or changed.

98. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 101-09 (1982) (stating old statutes may not continue to command majoritarian support and therefore courts should have broader authority in interpreting them); *Quill v. Vacco*, 88 F.3d 716 (2d Cir. 1996) (Calabresi, J., concurring) (applying theory to declare right-to-die regulatory statute invalid but not unconstitutional).

past self's promise or contract be any more binding when the present self disavows it than would the past self's agreement to enter into slavery? I will not enter into the possible solutions to that problem except to point out that the problem for the law is more difficult: for while an individual self seems to have some continuity over time, it is far less clear why a majority composed of certain affluent, free, male, and long-dead individuals among the three million inhabitants of thirteen preindustrial colonies should be viewed as the same "self" as the current adult citizenry of the United States.

The counter-majoritarian difficulty may be generalized still further. It is the problem of the positivist principle that the sovereign can never be bound by the law (because it is the source of the law) as applied to a democratic polity in which the people are sovereign. If the will of the people changes, as it clearly does, how can the law, any more than the walls of a *Beit Midrash*, dare to intervene?<sup>99</sup>

Democratic majoritarianism, then, appears to require the impossible: that we have both law, which is inherently a product of the past, and also approval of a current majority, which is inherently in the present; that we accept the past and also live in a constant, timeless present; that we view ourselves as the same not only as who we were, but as who someone else was. By making the people sovereign, it seems to require that the law reflect each *Bat Kol* emanating from them.<sup>100</sup> But the people lack the postulated unity and continuity of God, and the law thus seems to dissolve into mere—and notoriously unsteady—public opinion.

Curiously, however, while the rabbis reject popular sovereignty and postulate that the will of the Sovereign is unchanging, the problem seems not to go away. Even when God is the Legislator, a legal system must confront the problem of the past governing the present.

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99. For a fuller discussion of this problem in the context of Jewish law, see MICHAEL WALZER, *EXODUS AND REVOLUTION* 73–90 (1985) (describing midrashic attempts to accommodate receipt of law at Sinai to demands of democratic theory).

100. See, e.g., JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 24–25 (Bk. II, ch. 1) (Willmoore Kendall ed. & trans., Henry Regnery Co. 1954) ("[T]o speak of [the general] will's putting limitations upon itself with regard to the future is absurd . . ."). Rousseau, of course, distinguishes between the will of all and the general will and would reject the notion that the general will is fickle or the same as public opinion. Nonetheless, he appears to suggest that a state retains liberty and legitimacy only so long as the two reach the same conclusion and, accordingly, his liberty is always in danger of disappearing. See *id.* at 87, 89 (Bk. III, chs. 10–11).

### *B. The Boundary Problem*

Akhnai highlights, as well, another central issue of modern debate. R. Jeremiah explains R. Joshua's winning line by saying we must defer to a majority. But the rabbis do more than that—they expel R. Eliezer (and Heaven, speaking through him) from the decision-making body.<sup>101</sup>

The problem here seems to be a fundamental one in democratic theory: the principle of majority rule cannot explain how the decision-making boundaries are set. A democratic regime demands that the minority abide by the will of the majority. But who is the majority and who is the minority is, ordinarily, an artifact of where the voting boundary lines are set, and from the perspective of democratic theory, the boundaries are entirely arbitrary. As a result, any democratic vote can be challenged as arbitrary, and any minority can redefine itself as a majority.

The boundary problem is well known to students of national self-determination and secession struggles in international law. It is often the case that the results of an election to determine the status of, say, the Western Sahara or Northern Ireland, are entirely predictable—and dramatically different—depending on who the relevant electorate is. Consider how difficult it would be to predict the results for Northern Ireland with each of the following possible electorates:

- Separate communal elections within Northern Ireland, requiring agreement of a majority of each community (the Lebanese model).
- The inhabitants of Northern Ireland (the Staten Island secession model and the typical U.S. municipal incorporation model).<sup>102</sup>

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101. The Eliezer stories do not make clear the consequences of his excommunication, beyond the fact that the rabbis (other than Eliezer's son) do not come within four cubits of him. See BABYLONIAN TALMUD, *Sanhedrin* 68a, translated in SONCINO, *supra* note 2 (explaining that ban required one to sit four cubits from Eliezer). The commentators and normative texts on excommunication, however, suggest that at a minimum he would no longer have taught in the academy. See, e.g., GILAT, *supra* note 30, at 323. After Eliezer's death, the ban was lifted and his teachings preserved and passed on, although usually as dissenting opinions rather than normative law. See ARN, *supra* note 41, at 109; *supra* note 30.

102. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 785–87 (1992) [hereinafter Briffault, *Voting Rights*] (describing process by which proponents of secession of Staten Island from New York City fought for and lost the proposal); Richard Briffault, *Our Localism: Part 1—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 74–76 (1990) [hereinafter Briffault, *Our Localism*] (explaining most states place municipal incorporation in hands of local residents and landowners).

- The inhabitants of the Island of Ireland, or the citizens of the Irish Free State and the province of Northern Ireland, voting together or separately (the national model).<sup>103</sup>
- The Irish People, defined as direct descendants of the inhabitants of Ireland at the time of the English invasion (or otherwise) whether resident in Ireland or not (the P.L.O. or Hawaiian native model).
- The Irish People, defined linguistically or culturally (the interwar Central European model).<sup>104</sup>
- The citizens of Great Britain (or the subjects of Her Majesty, or the inhabitants of Great Britain) (the French Pacific model).
- The (state) members of the European Community or of the United Nations (the Palestinian Mandate model).

In most of these elections, I suspect, the result would be a foregone conclusion, but the results will vary dramatically from election to election. Democratic theory directs us to respect the will of the majority, but says nothing about which majority is the right one.

Closer to home, this problem of defining the relevant electorate has determined our physical landscape, as the principle of local autonomy has allowed individuals to escape busing, or paying for the expensive schooling of the poor, or their social welfare needs, by retreating to the suburbs and a new, smaller, electorate. It is the central issue in gerrymandering cases from *Gomillion v. Lightfoot*,<sup>105</sup> where Tuskegee manipulated its boundaries so as to ensure that the black population was excluded from decision making, to the most recent cases under the Civil Rights Act; in districting cases such as *Board of Education of Kiryas Joel Village School District v. Brumet*,<sup>106</sup> where the issue was whether a district could be drawn so as to give what would otherwise be a tiny minority virtually unanimous control,<sup>107</sup> or, as in *United Jewish Organizations v. Carey*,<sup>108</sup> no control at all;<sup>109</sup> and in *Romer v. Evans*,<sup>110</sup> where the key issue was whether a local majority or a statewide majority would be allowed to define civil rights

103. See *Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

104. See Nathaniel Berman, "But the Alternative is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1800 (1993) (discussing post-World War I transformation from inherited political regimes to democratic government defined by nationalism).

105. 364 U.S. 339 (1960).

106. 512 U.S. 687 (1994) (plurality opinion).

107. See *id.* at 690 (holding unconstitutional the creation of school district limited to sectarian enclave).

108. 430 U.S. 144 (1977).

109. See *id.* at 152 (upholding voting districting plan which increased minority voting strength but reduced voting strength of Hasidic community by one-half).

110. 116 S. Ct. 1620 (1996).

norms.<sup>111</sup> And manipulation of electoral boundaries is the driving force behind most federalism disputes, as rival political forces seek to have issues determined in the forum in which they are most likely to obtain a majority or to be able to use public action/free rider problems to their advantage.

These are difficult and unsatisfying cases, as a group. They combine a deep sense that something manipulative has happened, that it is clearly wrong that after two centuries in which Tuskegee's blacks were disenfranchised, they should suddenly be disenfranchised again; or that a tiny sect (or racial minority) should suddenly be granted (or denied) self-governing privileges otherwise restricted only to the mainstream;<sup>112</sup> or that the ground rules for political participation should suddenly change just as a newly self-conscious group seeks to enter the forum. But at the same time, the decisions seem arbitrary and indefensible; absent a theory of who is entitled to form a self-governing group, why is it clear that class or party based districts are valid while race or religion based ones are not? What principled reason can be offered for determining that a state may not bar localities from offering additional protection to homosexuals,<sup>113</sup> but may bar localities from offering additional protection from concealed handguns and may not even allow localities to protect unusually dressed children?<sup>114</sup>

Certainly, majoritarian theory is no help in deciding these puzzling questions: the boundaries must be set before majoritarianism can be applied.<sup>115</sup> Indeed, that is why the suddenness of the change seems to be the main distinguishing feature of the cases: when all resolutions are arbitrary, the only available justifications

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111. See *id.* at 1623 (holding amendment to Colorado Constitution prohibiting state and local authorities from passing legislation protecting homosexuals from discrimination violated Equal Protection Clause).

112. Or is the intuition the opposite?

113. See *supra* note 111.

114. See *supra* note 106.

115. For discussion of the approaches that liberals and progressives have taken toward national boundaries, see Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 580-88, 597-601 (1996) (discussing problems raised by presence of undocumented workers for the nation-state model of community used by progressives). For domestic boundary issues, see Briffault, *Voting Rights*, *supra* note 102, at 800-05 (noting ideals of democratic government offer no guidance in defining the group of individuals that should be given authority to make decisions); Briffault, *Our Localism*, *supra* note 102, at 111-15 (arguing local governments possess more legal power than is generally claimed); and Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 631 (1983) (considering ramifications of redrawing attendance zones). For more general philosophical discussions, see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995) and MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

are "we have always done it that way," or, "it just happened that way."

On a more general level, the boundary problem is the problem of separatism. Boundaries and voting blocs need not be defined by geography, as proponents of proportional voting have long recognized. Nor need they be viewed as unchangeable aspects of a pre-legal world. But once it is recognized that politics, not geography or destiny, determine who gets to vote with whom, all majorities are mere artifacts of arbitrary agenda-setting moves. As the history of national self-determination movements—let alone *Kiryas Joel*—surely demonstrates, any self-defined group that views itself as consistently losing elections can propose a different set of boundaries in which it would consistently win.<sup>116</sup> Democratic theory cannot explain why anyone should be condemned to be a permanent minority rather than be the majority in a new institutional frame.

Majority will, then, seems hopelessly indeterminate, a mere consequence of earlier definitional moves indefensible within the terms of democratic theory. Without a theory of which majority is the right majority, the account of law as the product of majority will seems doomed to inconsistency. It is, indeed, an oven built of broken pieces held together by sand.

In Akhnai, R. Joshua's winning argument invokes the will of the majority, but the excommunication or shunning of his opponent, R. Eliezer, suggests a deeper unease with the majoritarian defense. It is the setting of the boundaries—admitting or rejecting R. Eliezer and the voices he commands—not the vote itself, that does the work here, as so often elsewhere.

### *C. The Majoritarian Difficulty, or, Might Doesn't Make Right*

Majoritarian theory suffers from yet another problem, closely related to the boundary difficulty. Given the arbitrary nature of the boundaries that define a majority, it is hard to see why a majority is entitled to rule: after all, it is only by accident that it is a majority at all. This moral arbitrariness is replicated on another level within any given set of boundaries: if a closely knit majority consistently wins, majoritarianism begins to look very much like oppression. Fairness seems to require some kind of sharing, not the winner-take-all of pure majoritarianism.

Indeed, majority approval seems to add very little moral weight at all: on any important matter, the mere fact that a majority ap-

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116. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 691 (1994).



proved an otherwise bad rule doesn't seem to make the rule any better. Thus, surely few people think that the American version of Apartheid was morally superior to the South African version merely because in the former the majority oppressed a minority, whereas in the latter a minority oppressed a majority. Similarly, if we were to conclude that Daniel Goldhagen is right that an overwhelming majority of Germans were vicious anti-Semites, prepared to kill Jews without any qualms whatsoever,<sup>117</sup> surely that picture would make Nazi Germany less—not more—attractive than one in which willing murderers were a small, but powerful, minority.

Majoritarianism, then, does not seem to provide an adequate answer to the losers. Either we must be able to say persuasively to the losers that they too will have a turn, that there is no permanent majority but rather a shifting coalition of pluralist interest groups,<sup>118</sup> or we must be able to claim that the law is morally right in some other sense, not just an act of majoritarian will.<sup>119</sup> In any event, while taking turns or proportional division or division according to contribution or membership each appear to have a clear moral power, majority rule, at least where the same people are always in the majority and the minority, does not. Mere democracy does not provide an adequate answer to those who don't get what they want, nor does it provide a moral justification for the majority to do what it wants. As Exodus puts it in the very verse R. Joshua cites as establishing the principle of majority rule itself, "Do not incline after the majority to do evil."<sup>120</sup>

Akhnai, curiously, not only affirms majority rule, but does so with precisely the same unease as is usual in democratic theory. First, it rejects the notion that right could trump the majority. R. Joshua's selective quotation repeats the same point made by the rejection of R. Eliezer's miracles: that is, the mere fact that Eliezer evidently is correctly interpreting Heaven's intent is not enough to make his view the law. The law is what the majority says it is, regardless of whether they are right, or even of whether we ought to incline after them to do evil. But then Akhnai is not content to rest upon majority will: the excommunication of Eliezer shifts the boundaries to transform a majority into unanimity.

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117. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* 223-31, 240-46, 358-60 (1996) (suggesting German population supported Holocaust).

118. See, e.g., ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* 90-119 (1956) (arguing pluralism involves taking turns rather than a permanent majority).

119. See RONALD DWORKIN, *LAW'S EMPIRE* 191-92 (1986) (stating morally significant law must reflect right morality).

120. *Exodus* 23:2.

This shift to unanimity is well known. In Jewish tradition, it underlies the midrashic explanation of the Sinai story that all the people accepted the law: all the people, born and unborn, male and female, free and slaves, each individually and all collectively.<sup>121</sup> Similarly, it is the classic move of liberal political theory as well—unanimity, not majorities, is the legitimate source of significant political decisions. For eighteenth-century social contract theorists and their twentieth-century heirs, the important political issues were removed from majoritarian politics and resolved by a hypothetical contract: since all rational people would agree to such a contract, said the theories, actual politics was unnecessary. Any difference between the actual results in actual politics and the theoretical results indicated a process failure in real politics that could be resolved by simply following the theory's recommendation. All important issues—and especially the most important ones of speech, religion, and perhaps property—are removed from the realm of suspect majority rule.<sup>122</sup>

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121. See WALZER, *supra* note 99, at 75, 79, 83–84.

122. Under the approach of most liberal theory in the contractarian tradition, important law is justified not because an actual majority *did* enact it, but because in a fair procedure from a fair starting position, fair-minded people all *would have* agreed to it. Ideal, theoretical, hypothetical unanimity, not actual majoritarian politics, justifies important law; only the trivial (or the easily divided up) is left for actual politics. See, e.g., THOMAS HOBBES, *LEVIATHAN* 87–90 (J.H. Dent & Sons Ltd. 1914) (1651) (stating all rational men would agree to create powerful state in order to preserve the one thing they need regardless of their private ends, namely life); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 65–68 (C.B. Macpherson ed., 1980) (1690) (asserting just state is one that all rational men at an equal starting point would agree to, to promote the means they all need regardless of their particular ends, namely life, liberty, and property); ROUSSEAU, *supra* note 100, at 13–16 (Bk. I, ch. 6) (arguing just state requires special conditions in which otherwise disparate individuals come to share and participate in a general will); *THE FEDERALIST* No. 10, *supra* note 97, at 16–21 (identifying majoritarian politics as factionalism, to be suppressed as much as possible in favor of view of general interest that all fair-minded gentlemen would agree to); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 3–6, 164–66 (1974) (stating just state is one which could have resulted from series of fair agreements; since all agreements are individual, there can be no minority); JOHN RAWLS, *A THEORY OF JUSTICE* 11–13 (1971) (maintaining just state is one that rational people would agree to under conditions intended to guarantee fair, unanimous, agreement); ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 21–27 (1970) (arguing any government not resulting from actual unanimous agreement is unjust); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 3–6, 358–59 (1980) (claiming just state is one that could be defended by rational argumentation to any fair minded listener under fair conditions); BRUCE ACKERMAN, *WE THE PEOPLE* (1994) (asserting Constitution, including non-Article V amendments, reflects a higher political process approaching meaningful consensus rather than ordinary majoritarianism). Once the basic law fulfills the requirements of these non-majoritarian processes, ordinary politics can be majoritarian, because the ordinary processes of coalition building, as de-

In between, the liberal nationalists of the turn of this century also sought to replace majoritarianism with consensus.<sup>123</sup> Much as the rabbis concluded that Eliezer's disagreement threatened the integrity of their uniformity, the nationalists sought to convert empires into nation states. Legitimate states, argued Wilson, Mazzini, and the inter-war system, must be composed of nations, that is, groups that are in fundamental agreement on the important issues of culture, morality, and history. This limits the scope of politics to issues of lesser importance or where logrolling might result in a fairer division of spoils. In any event, the majority must not be allowed simply to impose upon the minority: better to re-form as a community without it. This concept of the national law as a partnership agreement (not a corporate charter)<sup>124</sup> mandates the expulsion of Eliezer as much as it does the Minority Protection Treaties.

#### *D. Akhnai's Issues*

Akhnai thus confronts familiar problems of unchanging law in changing times. What does the law mean when the world is turned upside down? Do we act as if the world has not changed even when it has? Or must we adapt the law to accommodate new circumstances? Should we follow Eliezer, teaching nothing that we were not taught by our teachers, as the best way to maintain a tradition? Or must the law adapt, as Joshua contends, because Eliezer's literalism can preserve the tradition only in the sense that amber pre-

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scribed by *The Federalist No. 10* or Dahl, *see, e.g.*, ROBERT A. DAHL, WHO GOVERNS (1961), assure that pork will be divided in a roughly proportional way, rather than according to the unfair winner-take-all rule that majoritarianism appears to require.

These solutions seem to suffer from two generic problems. First, we are unable to agree on the characteristics of the fair negotiation, so that those characteristics seem as arbitrary and as determinative as the boundaries of an electoral district. The results follow not from the negotiation but from the definitions that precede it. *See, e.g.*, READING RAWLS (Norman Daniels ed., 1989). Second, the range of agreement that could result from a fair negotiation is simply too narrow: too many issues remain that are neither subject to proportional division (in the Dahlian or pork barrel manner) by shifting majorities, nor subject to a theoretical, philosophical, unanimity based on liberal abstinence or neutrality (on the model of our First Amendment). *See, e.g.*, Greenwood, *supra* note 82, at 559, 624-30 (arguing abortion debate cannot be resolved using the usual liberal techniques).

123. *See, e.g.*, Berman, *supra* note 104.

124. In a partnership, as opposed to a corporation, any member can dissolve the entity at any time. *Compare* UNIF. PARTNERSHIP ACT § 31(2) *with* REV. MODEL BUSINESS CORP. ACT § 14.02(e). Accordingly, significant decisions must be made unanimously, not by a mere majority. *Compare* UNIF. PARTNERSHIP ACT § 18(h) *with* REV. MODEL BUS. CORP. ACT §§ 10.01(b), 10.03(e).

serves, killing the spark and keeping only the outer shell?

Which is the law, it asks: The past (that is, the law as accepted at Sinai), or the present (the Author's current understanding of it)? The understanding of those bound by it, those who have accepted it, or the understanding of the Author? The will of the (current) majority, the will of the (Sinaitic) majority, or the logic of the text, as expounded by the (current) interpreters or as expounded by its Author?

Akhnai rules one way: the present prevails, the past is rejected, the law is not in Heaven but for men. Eliezer is excommunicated and God endorses the rule that one need not follow correct traditions. The celebration of Eliezer's fidelity to the past only heightens the strength of the rejection of both sides of our debate: neither original intent theory, represented by Eliezer's fidelity to the tradition from Sinai, nor heavy handed constitutionalism, represented by Eliezer's insistence on following the *Bat Kol*, which I take to represent the best Herculean understanding of the law, are accepted. Rather, the rabbis establish their system, one renowned above all for its stability and, at least in its later development, inflexibility, on the seemingly shifting sands of a majoritarian interpretivism. The present majority wins, even if it is wrong as both history and best understanding, but it wins by interpreting, not declaring, the law.

At the same time, Akhnai highlights the problems with its own solution. God may have laughed at being defeated in the argument: Joshua's witty misinterpretation of a Biblical line that, in context, teaches the opposite of the lesson he derives from it, is too clever not to give enjoyment. But on the more serious life and death issues, Heaven remains with Eliezer, and the Talmud—even while affirming Joshua's rule—is not afraid to point out that Eliezer remains Heaven's favorite. Akiva, after all, was raked by Roman iron combs; Eliezer died in bed, a very old man, surrounded by his students and praised as the father of his generation.

Eliezer's greatness lies in his fidelity to the past; the text's celebration of him is not only a rejection of original intent and the rule of ancient law but also an acknowledgment of their attractiveness. Like Eliezer, the past may be hard to live with, but without it, we must surely echo Akiva's funeral oration for Eliezer: "Woe unto me . . . For you have left the whole generation fatherless."<sup>125</sup>

And while Akhnai preserves the principle of majority rule, it was only at the cost of expelling Eliezer—ultimately, as the death-

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125. ARN, *supra* note 41, at 110.

bed scenes suggest, an unsatisfactory solution. If Eliezer remains one of us even after his excommunication, still the father of his generation, then the unanimity necessary to legitimate majority rule by boundary shifting has not worked. And if not only every argument in the world, but even divine intervention, is insufficient to persuade the majority to follow what is right, then surely the prospects of the liberal social contracts are dim indeed.

### *E. Pessimism*

Akhnai, then, appears first as a reproach. Each of the problems discussed threaten the coherence of our system of jurisprudential thought. Our finest philosophers publish lengthy rationalizations, but it seems to take less and less time for the following generation of graduate students to find the logical errors that underlie the seeming resolutions of our contradictory principles. We want to believe in will and continuity, in democracy and right, in coherence and wisdom, but we can not make these consistent.

The leading account of how we can determine law—we might call it coherentism<sup>126</sup>—itself acknowledges that only a Greek demigod could practice it. And this notion of coherence and internal consistency seems positively contradictory to much of our received (Greek) wisdom about wisdom, which consists mainly in knowing when to be inconsistent or how to resolve conflicts between incompatible principles without abandoning any of them.<sup>127</sup> Today, as

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126. Dworkin calls it law as "integrity," DWORKIN, *supra* note 119, at 176–86, but that term claims both too much and too little. Too much because it contends that contradiction is necessarily in bad faith, a form of dishonesty. But that is surely wrong: one can, and we all do, honestly and in good faith, hold values that contradict each other: peace, justice, and charity, for example. See, e.g., MISHNAH, *Avot* 1:2, translated in DANBY, *supra* note 46 (The world stands on three pillars:  $\text{אֱמוּנָה}$   $\text{יִרְאָה}$   $\text{וְחַסְדִּים}$  (Torah/law, work/worship and acts of lovingkindness/charity), or, in a different version, *id.* 1:18,  $\text{אֱמוּנָה}$   $\text{וְיִרְאָה}$   $\text{וְשָׁלוֹם}$  (justice, truth, and peace)); Cover, *supra* note 1, at 98–103 (describing legal order as inseparable from individual and conflicting individual interpretations which give it meaning). Too little, because the honest recognition of internal incoherence—I want to honor both A's contribution to our enterprise and B's membership, the former suggesting a principle of "he who does not work, neither shall he eat," and the latter an altogether different principle of "love thy neighbor" or "to each according to his needs"—would not meet Dworkin's theoretical requirements. See also Greenwood, *supra* note 82, at 576 & nn.74–78 (rejecting elevation of consistency to a moral principle).

127. See ARISTOTLE, NICHOMACHEAN ETHICS 5 (Martin Ostwald trans., Bobbs-Merrill Educ. Publ'g 1962) (describing truth as resisting mathematical precision). For recent commentary, see, for example, ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 59–61, 176 (1993) (explaining Aristotle's political philosophy requires practical decision making).

always, consistency seems possible only for those who take a radically truncated and procrusteanly narrow view of the world: and then it leads directly down the road of hubris to disaster.<sup>128</sup> Reflective equilibrium and internal coherence are achieved only by dismemberment—abandoning important parts of our internally inconsistent world views—or death; in life we, like the author of the theory of reflective equilibrium himself, more often reach a state of creative tension or chaotic turbulence.<sup>129</sup> Perhaps it is this inability simultaneously to reach consistency and wisdom that leads to the consistent failure of the hypothetical agreement that is the traditional solution of the philosophers of the liberal tradition to the problems of majoritarianism.<sup>130</sup>

Akhnai speaks to our issues but does not resolve them either. Even in a radically different legal system, even with the problem of collective intent removed, even without the full range of problems of shifting will, even without a politically charged underlying substantive issue distorting our thinking about the meta-issues of jurisprudence, we see the same problems, the same partial solutions, and the same resulting tensions. Perhaps, then, Akhnai confirms what our philosophers' failure to persuade suggests: Wisdom, not rational coherence, is the best to which we can aspire; peace, by real compromises in real politics, not justice from ideal agreements in hypothetical conversations, is the goal to which we should aspire.

*F. Akhnai as the End of Truth: Law After the  
Enlightenment (Before the Messiah)*

Akhnai illustrates our modern dilemmas in yet one other way. It is the myth of a legal system attempting to understand the consequences of the end of known truth. Modern thought typically is seen as beginning with the loss of faith or the withdrawal of religion from the public sphere with the beginning of the Enlightenment. Modern political and moral theory can be understood as the struggle to explain the Good and the Right without resorting to God.

Akhnai, despite the miracles and direct Heavenly intervention, is a strikingly familiar discussion of the same problem. The Temple's destruction and the end of prophecy mark the end of God's

128. See, e.g., JEAN FRANCOIS MARIE AROUET DE VOLTAIRE, *CANDIDE* (Random House 1975) (1759).

129. Compare RAWLS, *supra* note 122 (arguing requirements of justice can be derived from hypothetical unanimous agreement) with JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (arguing just society is founded on zone of overlapping consensus rather than unanimity); see also Greenwood, *supra* note 82, at 559, 576 nn. 74–78.

130. See *supra* note 122.

active intervention in the world (until the coming of the Messiah)—even the Heavenly voice that remains in Akhnai is only a *Bat Kol*, literally a “daughter of a voice” or an echo. Truth—especially the truth of God’s eternal, Temple centered law—has withdrawn as well; Akhnai confronts the modern problem of recreating law without assurance that legal rights will in fact be Right.

The sense of loss is palpable in the texts: “formerly,” the Tosefta says, “there were no disputes in Israel.”<sup>131</sup> The law was known and everyone agreed. In any event, if there were disagreements, the Urim v’ Thummim of the High Priest could always give a definitive answer.<sup>132</sup> But with the destruction of the Temple, there is no definitive answer from Truth, until Messiah comes to resolve all disputes.<sup>133</sup> Moreover, with the suspension of the Sanhedrin as a single definitive decision-making body, there is not even a supreme court or parliament with the final say: much as in our own system with its multiple sources of sovereignty and no body with ultimate authority over all the others, or, as in any democracy, where decisions of the majority are always subject to challenge by a later majority or a redefined set of boundaries, the debate can continue forever (or at least until the restoration of the Temple in Messianic days). As it does.

### III. DIFFERENCES

#### A. *Family Disputes and Family Laughter*

The myth-making stories of Jewish law highlight what our philosophic tradition places in the background and perhaps the reverse as well. Legal philosophic discourse in the social contract and broader liberal traditions abstracts from particularity. Ideally, we seek a resolution to the boundary problem, or the majoritarian difficulty, that applies to both Ireland and Palestine, South Boston and the South Malkind Islands, to the abortion dispute and desegregation, to the Second Amendment as well as the First. In recent years, it is true, the grand theorizers have retreated somewhat, but both law and philosophy still aspire to Rawls’s “veil of ignorance.”<sup>134</sup>

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131. TOSEFTA *Sanhedrin* i, 1, quoted in URBACH, *supra* note 22, at 299; cf. MAIMONIDES, INTRODUCTION TO THE TALMUD 89–90 (Judaica Press ed., 1975); HANINA BEN-MENAHEN, *supra* note 96.

132. See Numbers 27:21.

133. See Cover, *supra* note 1, at 60 (“But the Temple has been destroyed—meaning is no longer unitary.”)

134. See RAWLS, *supra* note 122, at 12, 19.

The Eliezer myth, in contrast, is brutally particular. It is essential to the story that the participants are all closely connected, deeply concerned with each other and, ultimately, rather thin-skinned. Eliezer is excommunicated based on the argument of his close associate Joshua—in one story, his fellow student from preschool. Eliezer takes his revenge on his father-in-law, Rabban Gamliel, who survives long enough to be ousted from his position as head of the community by none other than Joshua, and for no other offense than, once again, showing insufficient respect to another rabbi. While we, and the tradition, extract a universal moral from it, the story itself does not do so; even the rulings that a *Bat Kol* is to be ignored, or that the Halakhah follows Joshua in disputes with Eliezer, are not stated explicitly or as general rules.

This is a family dispute, not an abstract debate over universal principles. Emotion and personal connections are not left behind the veil of ignorance; particular situations are not abstracted away in a pre-social state of nature. In contrast to Rawls, who assumes that the persons in the contracting position are “genetic lines”—entire family trees with no room for conflicts with the in-laws—and in contrast to liberal theory generally, which often has no explanation or space for children except perhaps as parts of their parents, Akhnai centers on a struggle between generations, the children overthrowing the father of the generation and the Father himself, in an Oedipal reversal of the Biblical drama of the sacrifice of Isaac. Eliezer abandons his own father for his teachers and affirms that teachers, not fathers, are the true authority figures. But his own students call him “the father of the generation,” even as they overthrow him and the ultimate Authority as well.

Even the God that is overthrown, excluded from the legal system in the name of His own law, is not the universalistic Creator of Maimonides or Descartes: this is an intensely particular God, one who studies much as we do, cites Eliezer by name, and, most humanly, laughs. Philosophy never laughs: laughter requires ambiguity, paradox, particularity.

### *B. Broken Ovens*

Akhnai's oven itself is not just the subject of a debate about other matters, but important in its own right. A vessel has been shattered and the remnants gathered and rebuilt: the central image of the kabbalah's account of the creation centuries later. The question is whether the rebuilt oven has the same mystical significance as the original.

Biblical law provides that a dead snake coming into contact



with an oven conveys impurity to everything cooked in it. But now, the Biblical world, like the oven, has been shattered. The Temple is no more. God has withdrawn his Presence (*Shekhina*) and His protection from His House. The purity laws themselves are largely meaningless in this new world: What does it matter if one becomes impure if there is no Temple and no sacrifice, no Red Heifer with which to repurify? The entire system of sanctity has been shattered and is no more.

But just as Akhnai's oven has been created from the shards of destruction, so too the rabbis have recreated their legal world. Prayer, acts of loving-kindness and Torah study will replace sacrifice; kashrut will replace purity. The issue before Eliezer and the rest of the first post-Destruction generation is the status of this world made up of broken pieces cemented together over a core of sand, a world without the comforting absolutes of Temple sacrifice, divine revelation, and the certain knowledge that the Good and the True will prevail.

In this context, Eliezer's position is the nihilism of the fundamentalist: all or nothing. A reconstructed oven of broken pieces is no oven at all, just broken, meaningless shards. It has no significance in the world of purity: it cannot convey meaning to us or impurity to its contents. Eliezer takes the view of the law student who, on learning that the laws don't always provide clean resolutions to disputes or that judges must exercise discretion, concludes that argument is meaningless and that only the judge's politics matter (and that those politics themselves must be unexaminable givens in a pre-legal world or arbitrary results of breakfast). Or of the original intent theorist who argues that if judges do not do precisely what legislators thought they were directing them to do, they are free of all restraint whatsoever.

The rabbis, in contrast, are struggling to find meaning in a world without the perfection that Eliezer demands, one in which all we have to work with is broken vessels, without absolute truths, divine commands or the rest.<sup>135</sup> Astonishingly, they do this even while acknowledging that Eliezer, at least, still has access to the Truth that has been withdrawn from the rest. Seeking to build meaning in a world from which God has partially withdrawn, they respond to His withdrawal with an order of exile. And He laughs.

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135. See Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 481 (1974).

*C. The Paradox of Responsibility*

God laughs. "My children have bested Me, My children have bested Me."<sup>136</sup> Bested Me because they have out-argued me, because they have understood legal discourse as a competition in which sages "best one another," as R. Joshua put it,<sup>137</sup> and they are more skilled at it than the Holy One Himself. His lessons, then, have been learned; the student has surpassed the teacher. This is the "besting" that any parent hopes for: the mark that the child has grown up. Thus, a laugh of pleasure and delight.

Or perhaps a laugh of delight because of the specific way they have bested Him. The rabbis have understood that a tradition is not only recorded memories of the words given at Sinai, but must adapt to the changes around them. He laughs because they have understood the paradox that to maintain the tradition, they must change it, not fossilize it, that the unchangeableness of God's law is itself the source of the demand that it change.

Furthermore, they have used His own Torah to show that they, not He, are the proper guardians of the tradition and the proper ones to decide how it must be modified to remain the same. The Law is not in Heaven: that is, it is ours, here, and we are responsible for it. This generation, not the founders or the Author, must keep it in working order, understand it to the best of our knowledge. The refusal to accept Daddy's help is also the acceptance of responsibility for ourselves.

It is similar, in this way, to Burke's claim that the British people choose to see their constitution as an entailed inheritance, so as to better protect the good parts and discard the bad. The "idea of inheritance" may "leave . . . acquisition free but . . . secure . . . what it acquires,"<sup>138</sup> but it is only the idea, not the reality, of inheritance that does it. The "choice of inheritance" is a choice of the current generation rather than an imposition of the past. Thus, though Burke does not point it out, if the current generation chooses what to view as an inheritance and what to discard, it is the current generation that is determining the content of the law, and it is the principle of saving or discarding—not the principle of inheritance—that determines the content of today's law.

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136. See *supra* note 26 and text accompanying *supra* note 38.

137. See *supra* text accompanying notes 16, 26. The verb is the same in the two instances (Joshua's rebuke to the walls to stick to their place when scholars are "besting each other"; the Holy One's cry that His children have defeated Him).

138. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 36-39 (Mahoney, Library of Liberal Arts ed., 1955).

The rabbis, too, choose to see their Law as an inheritance coming from Sinai—even the radical innovation of majority rule must be based in a Torah text, however difficult the derivation. But like Burke, they also realize that this is a choice, not a true entail imposed by the earlier generation. For the rabbis, interpretation, of a strong kind, is necessary to derive the permission to interpret from the interpreted text. Perhaps the metaphor should be of a garden rather than abstract property: the tradition can be maintained only if the present generation takes responsibility for pruning, weeding, planting in the inherited garden, entail or no.

There is, thus, a message about the nature of law more broadly. Genesis tells us that God “gave” the earth and its flora and fauna to Adam. In another context, an early text attempts to explain what that gift meant. One of several answers is this:

When God created Adam he took him to see all the trees of the Garden of Eden and said to him: See how good they are. Everything that I have created, I created for you. Pay attention that you do not destroy my world for if you destroy it, there is no one to fix it afterwards.<sup>139</sup>

The same, I think, is true of the law. The law is not self maintaining. We cannot depend on voices from Heaven to fix it for us if we destroy it. Indeed, it is a mark of our maturity to recognize that voices from Heaven can never remove from us the responsibility of thinking for ourselves: On that day, My children grew up, they bested Me, as children do to parents when they reach maturity. Nor can we depend on interpretation—laws are not self explanatory. Interpretative methods are loose. Right and wrong answers can come from them—and the majority can get it wrong, as the majority did here, both on the small question of the purity of the oven, and on the large question of how to treat dissenters.

But still, we must follow the majority. And the majority must be guided by a firm grasp of what is right and what is wrong. The alternative—well, there is no alternative. In life, the alternative is that Yigal Amir<sup>140</sup> will eat us alive.<sup>141</sup> Somehow, we must defeat, but not excommunicate, those who would define murder as justice, peace as war, religion as hatred, democracy as themselves;

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139. ECCLESIASTES RABBAH VII, 12, 1, *translated in* ECCLESIASTES RABBAH 195 (A. Cohen trans., 1961).

140. The assassin of Israeli prime minister Itzhak Rabin.

141. “R. Hanina said, ‘Pray for the welfare of the *malchut* [the state or the government—here apparently referring to the Roman occupying authorities], for without the fear of it, people would swallow one another alive.” BABYLONIAN TALMUD, *Avot* III:2, *translated in* SONCINO, *supra* note 2.

who would listen to voices from Heaven or follow simple orders they think they have received, rather than struggling to understand what is right and what is wrong in a complex world that has been given to us to save or destroy ourselves, without much help from sources outside.

The Holy One's laugh is, then, the laugh of wonder at the sudden maturity of a people. His children are no longer the generation of the desert demanding a return to slavery so they could again sit by the fleshpots and remember the garlic, cucumbers, and fish of Egypt. Nor are they the generation of Samuel, demanding a king to rule over them like other peoples. Nor are they even the seemingly interminable generations chronicled cycling between forgetting and finding, lapsing from and returning to, the Law. Suddenly, they have understood that their collective life is theirs to make, that they must take responsibility for their Law.

The laugh is because of the acceptance of responsibility and the paradox it creates. The Law says, first, on the highest level, that it is not in Heaven, and specifically, that the majority should be followed. That is fundamental; whether Akhnai's oven is pure is not. So the rabbis are correct to follow their own, human, current understanding of the law, even if the original understanding was different.<sup>142</sup>

#### *D. Ambivalence*

But it could be another laugh too. Maybe it is also the laugh of satire or scorn: who do they think they are, thinking they have bested Me?<sup>143</sup> Heaven, after all, sides with Eliezer consistently. Are the rabbis simply hubristic? Humans attempting to displace God or judges refusing to acknowledge their limited role relative to the sovereign and, of course, doomed to failure? This reading must be rejected by the tradition, which holds both that the oven is capable of impurity and that Heavenly voices which vary from the law, as understood by its human keepers, must be disregarded. Yet, given the terrible punishment meted out to Rabban Gamliel, it surely cannot be ignored entirely.

The proof text for the rule of the majority is similarly disturbing: the plain meaning of the very verse R. Jeremiah cites for the right of the majority to ignore R. Eliezer is "Don't follow the many

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142. Cf. DWORKIN, *supra* note 119 (arguing original understanding was that original understanding is irrelevant).

143. Cf. Stone, *supra* note 1, at 861.

to do wrong."<sup>144</sup> Indeed, as the verse suggests, the Talmud recognizes precisely the issue I have referred to as the majoritarian difficulty. The simple fact of a majority cannot make right into wrong—and so, while the usual rule is, as stated in Akhnai, that the majority must be followed, the counter-rule is that a correctly reasoned opinion must be followed in any event.<sup>145</sup> Isn't the majority simply wrong in Akhnai?

The majority could be wrong, first, because it simply has reached the wrong result on the specific issue before it, the purity of Akhnai's oven. But that, I think, must remain essentially contested. The point, or a point, of the story is that even God does not have a privileged right to determine the issue, that in the world of imperfection, we can never know whether we are dealing with a whole or a broken vessel. The Halakha, like any Law, God-given or not, has issues not foreseen when it was given. Indeed, the purity of this oven is the least of them—far more important is how a nation can self-govern without a state and how a holy people, a nation of priests, can maintain its holiness and its priestliness without Temple or sacrifices. If the Law was given to the people, now it belongs to the people. They, not God, must adjust it to the new circumstances. Simple acceptance of the authority of the *Bat Kol*, then, must be rejected.

The majority, though, could be wrong on a different level. Its claim to being right is procedural: the rabbis must use their God-given intelligence to understand their God-given Law to the best of their God-given abilities, and are not entitled to abdicate in favor of carob trees, streams, or even great scholars. But even a majority is not entitled to dishonor the minority: if telling Eliezer that he had been excommunicated in a rude way would have been enough to warrant his destroying the entire world, then the simple act of excommunicating him itself must be enough to warrant granting his (otherwise not very attractive) prayers for revenge.

The story of Akhnai's oven appears in a section devoted to verbal "*ona'ah*"—intentional causing of distress. The Mishnah that gives rise to the discussion sets out a series of rules: Don't mislead

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144. *Exodus* 23:12.

145. Minority opinions can be accepted Halakha because they are correctly reasoned. See, e.g., ELIEZER BERKOVITS, NOT IN HEAVEN: THE NATURE AND FUNCTION OF HALAKHA 7 (1983) (contending majority rule applies only when two sides are equally persuasive (to later decision maker), but if one position is more convincing, later court must accept it regardless of numbers or prestige of earlier court); cf. BABYLONIAN TALMUD, 'Eduyot I:4, translated in SONCINO, *supra* note 2 ("The fathers of the world did not persist in their opinion.").

a merchant into thinking you are going to buy his merchandise if you aren't; don't remind the repentant sinner of his sin, or the convert of his pre-conversion behavior. This context is not trivial: R. Eliezer has been treated with precisely this disrespect, and his wife knows that his prayer will be answered and her brother, Rabban Gamliel, will die because "all the gates of prayer are locked except the gate of *ona'ah*."<sup>146</sup>

This majority is wrong, it seems to me, on a point as fundamental as the one on which it is right. Just as proper procedure requires that the rabbis not suspend their own judgment in the face of higher authority—whether Eliezer's or a Higher Authority still—so too proper procedure requires that the majority remember that the losers are also part of the community and must be treated as such.

Compare another key text discussing the limits to majority rule: Several generations prior to Akhnai, the rivals schools of Hillel and Shammai had disputed many issues. Eventually, another famous *Bat Kol* announced that the Halakha is according to Beit Hillel.<sup>147</sup> Unlike in Akhnai, that *Bat Kol* was accepted. But the later rabbis questioned the actions of Beit Shammai: the text<sup>148</sup> asks, how could Beit Shammai have continued to act according to their view of the law, even though, first, Beit Hillel was larger in number and therefore the majority was against them, and second, the *Bat Kol* had announced that the law was according to Hillel? In the first case, it suggests, majority rule wouldn't apply, since the Beit Shammai was "sharper"—thus following the principle that majority rule applies only when one side doesn't manifestly have the better arguments. In the second instance, R. Joshua's rejection of the *Bat Kol* would justify their stance. This text thus suggests that while both majority and Heaven (representing, in some sense, truth, or at least original intent) were against Beit Shammai, they were nonetheless entitled to follow their own views simply because they were better lawyers, and that neither the greater number nor the greater Heavenly support of Beit Hillel is in itself enough to explain Hillel's ultimate victory.<sup>149</sup> In another place, the Talmud

146. See *supra* text accompanying note 38.

147. See BABYLONIAN TALMUD, *Eruvin* 13b, translated in SONCINO, *supra* note 2 ("These and these [the words of Beit Hillel and Beit Shammai] are the living words of God and the Halakha is according to Hillel").

148. See BABYLONIAN TALMUD, 1 *Yevamot* 14a, translated in SONCINO, *supra* note 2.

149. David Kraemer argues that the account shows that Halakha is not the same as truth, since the "sharper" Beit Shammai would, at least on average, have come closer to the true understanding of God's will. See DAVID KRAEMER, *THE MIND OF THE TALMUD: AN INTELLECTUAL HISTORY OF THE BAVLI* 140–41 (1990). Note that this

offers a completely different justification for the acceptance of Hillel's view: Beit Hillel taught both their own opinions and those of Beit Shammai, while Beit Shammai taught only its own views.<sup>150</sup> That is, Beit Hillel—unlike the majority that excommunicated Eliezer<sup>151</sup>—observed the basic courtesy required to continue a community conversation.

But the ambiguity extends further, for it is Eliezer, not his opponents, who is known for behavior that makes community impossible. "On the day that Rabbi Eliezer ben Hyrcanus took his seat in the Academy, each man girded on his sword."<sup>152</sup> Eliezer is the man with special access to truth, and uncompromising truth is incompatible with a democratic society. Those who know the truth have no reason to bow to the majority—like Eliezer, they can appeal to Heaven.<sup>153</sup> Only by excluding his claim to special privilege could the community continue. But only by respecting his claim to truth can the world endure.

#### IV. CONCLUSION

Akhnai acts out the tensions of the majoritarian difficulties. It asks, with the counter-majoritarian problem, why the old law—personified by Eliezer—should prevail in the new era. It shows both the attraction and the importance of the traditional answer, both excluding it in favor of the current majority and condemning the majority for that exclusion.

It implicitly considers the boundary problem. Nothing in the Biblical texts cited explains why it is a majority of rabbis, rather

interpretation, like the simple reading of "My children have bested Me," assumes that the Author is not a particularly good interpreter of His work.

For another story that can be read to make the same point with the same ambivalence we have seen in Akhnai, see BABYLONIAN TALMUD, *Menahot* 29b, *translated in* SONCINO, *supra* note 2, which describes Moses, in Heaven. He sees God ornamenting the letters of the Torah and asks why He delays giving the Law by such seemingly trivial activity. The answer: Akiva will interpret even the ornaments into new laws. Moses then asks to see Akiva teaching, and is required to sit in the last row (reserved for the poorest students) and is unable to follow the discussion. Moses may have given the Law, but he doesn't understand its full implications particularly well.

150. See BABYLONIAN TALMUD, *Eruvin* 13b, *translated in* SONCINO, *supra* note 2.

151. Excommunication included a bar on presenting his arguments to the court. However, the ban was lifted after Eliezer's death and, of course, the Talmud presents dozens of rulings by R. Eliezer, both accepted and rejected. See *supra* note 30.

152. Stone, *supra* note 1, at 856 n.233 (quoting SHIR HASHIRIM ZUTA 29 (Buber ed.)).

153. Cf. LOCKE, *supra* note 122, at 91–92 (stating "appeal to Heaven" means going to war as last available resort).

than, for example, a majority of Jews, or a majority of prophets, that sets the rules. Here too the particularity of Akhnai is important. R. Eliezer and his opponents all reject the simple notion of a natural community of blood or divine selection. Respect is due to teachers—those you have chosen to follow—not fathers, says Eliezer's abandonment of his own father. Blood and marriage aren't enough to command respect for Eliezer either, nor does Gamliel's illustrious descent do it. This community is chosen and contested, not organic. It is the excommunication itself that defines the decision-making body: Rabbis, not prophets; the court below, not the Court Above.<sup>154</sup>

Indeed, even the ultimate implication that it was wrong to excommunicate Eliezer does not stem from a simple notion of natural boundaries or an inherited peoplehood created of blood and soil. It suggests, rather, a more sophisticated idea of a nation as a community of dialogue. The ban failed because, in the end, Eliezer is still part of the conversation.

It centers on the majoritarian problem itself, in its choice of proof text: the very authorization of majority rule reminds us that the majority is not authorized to do wrong. The very act by which the majority asserts its right to rule is simultaneously accepted as an act of the majority, and criticized as wrong: even a majority entitled to make the rules is not entitled to dishonor and exclude its minority members.<sup>155</sup>

It acts out our skepticism about the power of philosophic truth and legal argumentation to persuade. After all, before resorting to miracles, R. Eliezer first presented "all the arguments in the world" and fared no better. Sometimes even every argument—even correct arguments—fails to persuade. A political enterprise must confront the possibility that right reason may not prevail.<sup>156</sup>

It asks the covenantal or constitutional question: if the law is

154. Similarly, just as setting the boundaries allows a majority to define itself as the majority, it is the Rabbinic act of interpretation that justifies further interpretation, reading the Deuteronomic passage in a strikingly different way to allow strikingly different readings. Akhnai thus expresses both the understanding that only we can decide who we are and the intense discomfort this indeterminacy must create.

155. Urbach, indeed, argues that Eliezer was fighting for freedom of rabbinic interpretation against the centralizing tendencies of the hereditary Nasi, Rabban Gamliel, who claimed descent both from Hillel and David. See URBACH, *supra* note 22, at 600–01.

156. But see JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., The Liberal Arts Press, Inc. 1956) (1859) (arguing truth will prevail over falsehood in free competition); ST. AUGUSTINE, CITY OF GOD (Henry Bettenson trans., Penguin Books 1972) (advocating use of force in favor of truth). Akhnai rejects both positions.



the product of the agreement of people and sovereign, and itself creates the sovereign as sovereign, the sovereign must be bound by it. The Holy One is the God of Israel because of the covenant at Sinai, and that covenant, though dictated by Him, does not create Him as its interpreter. The Law, rather, is not in Heaven and does not require Heavenly intervention to be understood. So, God's sovereignty itself requires His withdrawal from the system; the covenant, and its internal logic, must be allowed to work itself out without further divine intervention.<sup>157</sup> We, not the human or divine Authors of the covenant, must take control of it.<sup>158</sup>

It acknowledges, too, the interpretive problems. Law is multifaceted, multi-meaninged. On one level, it is a sport, in which Sages seek to "best" one another or the Author himself, deriving new laws and explaining old ones in ways that no one has ever heard before. On another level, it is antiquarianism, never speaking anything that wasn't said before. But ultimately, it is about living together: neither insisting on the truth when it is unacceptable to others, nor excluding minorities when they are obnoxious, neither abandoning the tradition nor slavishly imitating its forms when their meanings are gone.

Akhnai is an attempt to recreate life in a world built of broken tiles on a core of sand, a world in which we, unlike R. Eliezer, do not have access to truth. The exclusion of R. Eliezer is the rejection of the simplicity of the Temple's world, where before the Destruction, the Father punished and forgave, sins were atoned by sacrifices, laws had fixed meanings, debates were quickly resolved, and the rules never changed. Akhnai is the parricide, parallel to Eliezer's own rejection of his own (natural) father, that mythologically marks the coming of age of a new nation.

Akhnai stands for the power of paradox over coherence, wisdom over logic. Rational philosophic thought seems absent—we are not even told Eliezer's arguments, and his opponents' snippets of out-of-context quotes from respected authorities are the worst form of legal argumentation. But the form is part of the message: It is through learning to live with one another, even our brothers-in-law, that we may, or may not, achieve life together. Law is a communal experience without a fixed or predictable result, not a set piece of logical inference or hypothetical conversations in which no real

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157. Burke comes to mind again, arguing that the English have succeeded in so elevating the King that he no longer rules. See BURKE, *supra* note 138, at 31 ("They left the crown . . . perfectly irresponsible.").

158. This is also a point of the story about Moses not understanding the full implications of his own Law. See *supra* note 149.

personality defects need be considered.

Akhnai is part of a massive battle to define the limits of civilized discourse. Invocation of absolute truth is incompatible with continued debate; Akhnai chooses discussion over truth, living together over correctness. Yet Eliezer, like the simple traditionalism for which he stands, remains attractive and important even when he must be excluded. The rejector of his own father, he like Abraham is at the moment of crisis unable to separate himself from his Father,<sup>159</sup> and excluded from adult community by that too childish obedience, he leaves the whole generation without teacher/father or Authority/Father.

But in rejecting him, the rabbis deny Eliezer—and the truth—the respect that he and it rightly demand, thus contradicting the very principle that entitles them to exclude him. Ultimately, he—but not his truth—is reaccepted; tragically, only on his death-bed and only at the cost of the contribution he could have made, the thousands of laws that he never taught anyone.

Akhnai teaches, I think, that truth and peace are often incompatible, and that we must respect both; that one must follow the majority even when it is wrong, but that one may not follow the majority to do evil; that mutual respect is more important than reaching the right answer; and that we should treat the law as an inheritance, but it is nonetheless our inheritance and we must be the ones deciding to treat it as such. It shows us determinacy coming out of an indeterminate law; interpretation creating radical new meanings where there were none, or few, before; the struggle to find the mechanisms of change that alone can keep the Law constant; and, not least important, the struggles of competing commitments, to God, community, husband, and brother. The Mother of Peace fails to make peace here, but she understands the principle: not principles but relationships will do it.

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So God laughed. Why? The Father saw that His education had worked. Akhnai marks the end of the childish Israelite people, those who complained at being brought out of the land of comfortable slavery where they sat by the fleshpots and defined themselves by descent, as the children of Israel. It marks the beginning of adulthood, where we have not answers and paternal guidance but end-

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159. See SHALOM SPIEGEL, *THE LAST TRIAL* (1993) (discussing various understandings of Abraham's failure to refuse to obey order that he kill his son).

less debate, bitter jealousies, and hurt feelings, principles we accept as necessary for life together but cannot apply, fathers-in-law who destroy us and vice-versa, spouses whom we make love to as if possessed by demons, beautiful children and political struggles that are not theorized but lived. If stasis and stable law are death, this is life.