

“If a Case is Too Baffling for You to Decide . . .” (Deut 17:8–13): Between Constraining and Expanding Judicial Autonomy in the Temple Scroll and Early Rabbinic Scriptural Interpretation¹

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1 Introduction

While the present paper will compare two early, and radically opposite, efforts to understand Moses's prescription for the establishment of an autonomous high court upon the Israelites' entering into the land of Canaan following his imminent death (Deut 17:8–13),² it is useful first to recall, by comparison and contrast, several previous biblical narratives that deal with the establishment of a judiciary that served *under* Moses during the period of wilderness wandering. Only then can we consider the relationship between the “inner-biblical” variations and their “extra-biblical” interpretations and seek to understand the grounds, argued by some to be polemical, for the strong alterities among the latter.

The three extant accounts are remarkable for their differences from one another as well as for what they share in contrast to the court prescribed in Deut 17. In Exod 18:13–27, it is Jethro, Moses's Midianite father-in-law, who, just

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2 I have previously treated early rabbinic representations of this high court in other contexts: Steven D. Fraade, *From Tradition to Commentary: Torah and its Interpretation in the Midrash Sifre to Deuteronomy* (Albany: State University of New York Press, 1991), 83–87; idem, “Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization,” *AJS Review* 3 (2007): 21–23; idem, “A Heart of Many Chambers’: The Theological Hermeneutics of Legal Multivocality,” *HTR* 108 (2015): 113–28.

prior to the revelation at Mt. Sinai,³ suggests the establishment of a system of judges to adjudicate conflicts between the Israelites as a way of lessening the burden upon Moses, who up to that point had been the sole judge of such conflicts among the people, serving as an *intermediary* between them and God in such matters of conflict (Exod 18:15–16). However, even after Moses assigns the “small matters” (הדבר הקטן) to the newly-selected judges, the “major” (הדבר הגדל) or “difficult” (הדבר הקשה) matters (Exod 18:22, 26) are to be brought to Moses, who would still bring them to God (Exod 18:19–20). Although biblical scholars such as Nahum Sarna emphasize here the “secular nature of the judicial agency,”⁴ even as judiciary facilitation devolves closer to “the people” the judicial structure and line of command remains very much under the ultimate authority of God via Moses as his prophetic communicator.

A similar, although somewhat separate, tradition must lie behind the narrative of Num 11:10–17, 24–25, set in the period of wilderness wandering, that is, *post-Sinai*(-revelation), in which God, in response to Moses’s complaining about the burden of taking responsibility for the people by himself, instructs him to gather a council of seventy experienced elders, with whom he can share the burden of leadership. In this account, the council of elders is brought to the tent of meeting, where they directly experience divine communication and receive a portion of the (divine) spirit from Moses. Although it is unclear here what their exact leadership or judiciary role is, their charismatic authority is both divinely and Mosaically conferred.

Finally, in Deut 1:9–18, placed soon after leaving Horeb (Deut 1:6), Moses himself takes credit for having instituted a judicial body of wise and discerning men to lead the people and adjudicate their disputes as a way of lessening the burden on Moses of having to do so alone, while still referring the difficult cases to Moses. Whether Moses decides such referred cases on his own or, as in Exodus, by seeking God’s judgment, or perhaps by oracular means, is not clear.⁵ Once again, the tradition of Exod 18 is re-chronologized so that Moses’s judicial innovation, now at his own initiative, occurs *post-Sinai*(-revelation).⁶

3 Since ancient times interpreters have suggested that this narrative should be relocated to after the revelation at Mt. Sinai. See *Mek. Yitro* 1 (ed. Horovitz-Rabin, 188); *b. Zebah.* 116a; Ibn Ezra on Exod 18:1.

4 He continues: “Its organizational structure is humanly devised and its personnel are drawn ‘from among all the people’ (v. 21), from ‘all Israel’ (v. 25)—from the civil and not the ecclesiastical sphere.” Nahum M. Sarna, *The JPS Torah Commentary: Exodus* (Philadelphia: Jewish Publication Society, 1991), 100.

5 See Jeffrey H. Tigay, *The JPS Torah Commentary: Deuteronomy* (Philadelphia: Jewish Publication Society, 1996), 13 (comment on Deut 1:17).

6 See Bernard M. Levinson, “*The Right Chorale*”: *Studies in Biblical Law and Interpretation*, (FAT 54; Tübingen: Mohr Siebeck, 2008), 52–86 (esp. 62–68). For more on the relation of

What these accounts of juridical innovation have in common is that they all take the form of narratives, rather than direct prescriptions, and are all *ad hoc* responses, however differently ascribed (to Jethro, God, or Moses), to Moses's predicament of having to lead the people and adjudicate their interpersonal disputes alone. They do not prescribe judicial institutions beyond the period of the wilderness wandering and the life and leadership of Moses (as early rabbinic interpretations understand them to do).⁷

By contrast, Deut 17:8–13 is legal in form, mandating the formation of a high court, located in יהוה אשר יבחר יהוה (“the place that the Lord your God will have chosen”) (v. 8; cf. v. 10), to which difficult cases are to be referred after settlement in the land of Canaan. It is similar in its referral (rather than appellate) function to the *ad hoc* juridical bodies just discussed.⁸ However, it differs significantly in several regards, the first being the prominent role assigned to the “levitical priests” (הכהנים הלויים) and to an unspecified (but note the definite article) singular השפט (“the judge” [NJPS: “the magistrate”]).⁹ There is no role assigned here to a prophet (on whom see Deut 18:9–22), or, for that matter, a monarch (on whom see Deut 17:14–20) in overseeing or authorizing the high court's deliberations and decisions.¹⁰ Unlike Exod 18:21, 25 and Deut 1:13, 15, no qualifications are given for the appointment of judges, except for their priestly lineage, not previously specified.

While it is unclear what methods are to be employed by this body in reaching its verdict (e.g., scriptural interpretation, reason, oracular means, or some combination thereof),¹¹ the text emphasizes that the court's verdict is

these three accounts to one another, see Tigay, *The JPS Torah Commentary: Deuteronomy*, 422–23.

7 For similar comparisons, see Jeffrey Stackert, “Before and After Scripture: Narrative Chronology in the Revision of Torah Texts,” *JAJ* 4 (2013): 168–85, esp. 181–85, with references to previous scholarship. For early rabbinic texts that find in these biblical passages prototypes for later rabbinic courts and legal authority, especially in the role of the anonymous “elders,” see, for example, *m. Rosh HaShanah* 2:9; *t. Rosh HaShanah* 1:18; *m. Sanhedrin* 1:6.

8 Early rabbinic texts amalgamate the *ad hoc* and permanent bodies. See previous note.

9 For the singular השפט, see also Deut 17:12.

10 For the juridical role of the priests according to Deuteronomy, see 19:17; 21:5; 33:10. In other biblical books, see Ezek 44:24; 2 Chron 19:8–11.

11 For reason, see Tigay, *The JPS Torah Commentary: Deuteronomy*, 164 (comment on Deut 17:9). For oracular or mantic means, see Bernard M. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (Oxford: Oxford University Press, 1997), 127–30; Michael LeFebvre, *Collections, Codes, and Torah: The Recharacterization of Israel's Written Law* (New York and London: T & T Clark, 2006), 40–47. The latter view derives from the emphasis on the cultic center as the location of the high judiciary, rather than from any explicit reference to cultic means. See also below, nn. 20, 70.

authoritative and final, with a death penalty stipulated for anyone who willfully disobeys its ruling (Deut 17:12). In short, and in particular contrast to (and in hermeneutical dialogue with) its pre-Deuteronomistic, wilderness-period antecedents, the central Deuteronomistic court of Deut 17:8–13 (like the local courts suggested by Deut 17:2–7) functions fully autonomously and with complete authority, without explicit recourse to prophetic, high priestly, or royal oversight—in modern parlance, without “checks and balances.”¹²

I shall argue that this *inner-biblical* Deuteronomistic shift to a more autonomous, less prophetically- and royally-guided court for the post-Mosaic Israelite “constitution” generates strikingly different hermeneutical responses (both in form and in substance) in our earliest “*post-biblical*” reflections thereon—in the paraphrase of the *Temple Scroll* from the Dead Sea Scrolls and in the commentary of *Sifre Deuteronomy* from the early strata of Tannaitic rabbinic literature, the possible reasons for which we shall consider in conclusion. Or, viewed conversely, to what extent do the later hermeneutical responses, divergent as they are from one another, *extend* a debate, as it were, already implicit in Deuteronomy’s own transformation of its scriptural antecedents?

2 *Temple Scroll* (11Q19) 56.1–11 (ed. Yadin)¹³

One of the earliest “rewritings”¹⁴ of Deut 17:8–13 (but extant only for vv. 9b–13) is to be found in the *Temple Scroll* (henceforth TS), discovered among the Dead

12 But cf. below, n. 41 for the representation of the court’s membership by Philo and Josephus as including a prophet and/or High Priest.

13 Yigael Yadin, ed., *The Temple Scroll* (3 vols.; Jerusalem: The Israel Exploration Society, 1983), 2:251–52. Significant differences between Yadin’s text and that of Elisha Qimron (*The Temple Scroll: A Critical Edition with Extensive Reconstructions* [Beer Sheva: Ben Gurion University of the Negev Press; Jerusalem: Israel Exploration Society, 1996], 81), mainly in matters of reconstruction, will be noted below. The text of James Charlesworth, ed., *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations, vol. 7: Temple Scroll and Related Documents* (Tübingen: Mohr Siebeck; Louisville: Westminster John Knox, 2011), 374–77, follows the readings and reconstructions of Qimron. Qimron produced a later edition, *The Dead Sea Scrolls: The Hebrew Writings* (2 vols.; Jerusalem: Yad Ben-Zvi, 2010), 1:195, with some changes from his earlier edition, which will be noted below, referred to respectively as Qimron (1996) and Qimron (2010) when they differ from one another. In each case of uncertainty I checked the online digital images of 11Q19. Interestingly, Yadin (other than his running comments to the text) does not devote a detailed treatment to this section of the *Temple Scroll* in vol. 1 of his edition. However in discussing the “Statutes of the King,” he suggests that the priestly-dominated judicial council that governs the king according to 11Q19 57.11–15 is based on Deut 17:9–13 (idem, *Temple Scroll*, 1:350). Nor does Lawrence H. Schiffman treat this

Sea Scrolls,¹⁵ which exhibits several variants in both order and wording from those verses as preserved in the Masoretic Text (henceforth MT):¹⁶

1	[א] 17 ואלה [ש] ו[פטים] 18 אשר יהיו 19 בימים ההמה [ודרשתה] 20 והג[ידו לכה את]
2	הדבר אשר עליו ב[אתה לדרוש] 21 והג[ידו לכה את המשפט] 22
3	ועשיתה על פי התורה אשר יגידו לכה ועל פי הדבר
4	אשר יואמרו לכה <vacat> מספר התורה ויגידו לכה באמת
5	מן המקום 23 אשר אבחר לשכין שמי עליו ושמרתה לעשות
6	ככול אשר יורוכה ועל פי המשפט אשר יואמרו לכה
7	תעשה לוא תסור מן התורה אשר יגידו לכה ימין

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- section in his book *Sectarian Law in the Dead Sea Scrolls: Courts, Testimony and the Penal Code* (BJS 33; Chico, CA: Scholars Press, 1983). However, see Schiffman, *The Courtyards of the House of the Lord: Studies in the Temple Scroll* (STDJ 75; Leiden: Brill, 2008), 93–94.
- 14 I am well aware of the methodological difficulties of employing the term “rewritten Bible” for the *Temple Scroll*, since we cannot presume that the authors/editors of the *Temple Scroll* understood themselves to be “rewriting” a canonical scriptural text identical to what would eventually become the Masoretic Text of the Bible. However, in the absence of any Qumran scriptural texts of Deut 17:8–13 with which to compare the *Temple Scroll*, we are left to draw comparisons with MT (and ancient versions). Note that the only extant fragment of our scriptural passage in the Dead Sea Scrolls (2QDeut^b [2Q11 in DJD 3:61], covering Deut 17:12–15) is identical to MT.
- 15 Here is not the place to enter at any length into the thorny questions of the dating and possible sectarian (whether broadly or narrowly) provenance of TS as a whole or of this section in particular. Suffice it to say that I find nothing in TS that either requires or precludes a sectarian provenance with respect to the Qumran community (or communities), or its immediate antecedents. Nor, to my mind, is framing the question of sectarian provenance in simple either/or terms the best way to proceed.
- 16 The top several lines of the column are missing due to decay, and, presumably, would have contained the equivalent of Deut 17:8 and the beginning of v. 9.
- 17 MT has ואל, “and to,” but cf. Deut 17:12 for או אל, “or to.” The latter appears to lie behind the *Peshitta* and some manuscripts of LXX for Deut 17:9. However, some versions (Samaritan Pentateuch and Vulgate) of Deut 17:12 presume a text reading ואל. See Schiffman, *The Courtyards of the House of the Lord*, 93–94. Note that NJPS translates ואל of Deut 17:9 as “or [to],” on which see Tigay, *The JPS Torah Commentary: Deuteronomy*, 165, 374 n. 44.
- 18 Qimron (1996) restores as: ה[ש] ו[פטים]; but in his later edition (2010) he has: ה[ש] ו[פטים]. For the plural, see 11Q19 61.8–9 and Deut 19:17, 18; as well as *Tgs. Onq., Neof.* Deut 17:9.
- 19 Qimron restores as: יהיה; but in his later edition he has: יהיו.
- 20 Qimron restores as: ודרשן]. The third person plural is also found in Samaritan Pentateuch and LXX (ἐκζητήσαντες). For the possible significance of this variant as suggesting an oracular basis for the high court’s rulings, see below, n. 70.
- 21 Qimron restores as: אשר עליה לדרוש.
- 22 Qimron: המשפטים. This seems the more likely based on the online digital image.
- 23 MT: מן המקום ההוא (“from this place”). See below, n. 32.

- 8 ושמואל והאיש אשר לוא ישמע ויעש בזדון לבלתי
 9 שמוע אל הכוהן העומד שמה לשרת לפני או אל
 10 השופט וימת²⁴ האיש ההוא ובערתה הרע מישראל וכול
 11 העם ישמעו ויראו ולוא יזידו עוד בישראל <vacat>

For the sake of comparison here is MT Deut 17:8–13:

- 8 כי יפלא ממך דבר למשפט בין־דם לדם בין־דין לדין ובין נגע לנגע דברי ריבת בשעריך
 וקמת ועלית אל־המקום אשר יבחר יהוה אלהיך בו:
 9 ובאת אל־הכהנים הלויים ואל־השפט אשר יהיה בימים ההם ודרשת והגידו לך את דבר
 המשפט:
 10 ועשית על־פי הדבר אשר יגידו לך מן־המקום ההוא אשר יבחר יהוה ושמרת לעשות
 ככל אשר יורוך:
 11 על־פי התורה אשר יורוך ועל־המשפט אשר־יאמרו לך תעשה לא תסור מן־הדבר
 אשר־יגידו לך ימין ושמאל:
 12 והאיש אשר־יעשה בזדון לבלתי שמע אל־הכהן העמד לשרת שם את־יהוה אלהיך
 או אל־השפט ומת האיש ההוא ובערת הרע מישראל:
 13 וכל־העם ישמעו ויראו ולוא יזידו עוד:

The following chart shows the correlation between TS and MT:²⁵

line	Temple Scroll col. 56 (ed. Yadin)	Deuteronomy 17 (MT)	verse
1	[א] אל ה[ש]פטים אשר יהיו בימים ההמה [זדרשתה וזהג[ידו לכה את]	9 וְאַל־הַשֹּׁפֵט אֲשֶׁר יִהְיֶה בַיָּמִים הָהֵם וְדָרְשֶׁתָּ וְהִגִּידוּ לְךָ אֵת	9
2	הדבר אשר עליו ב[אתה לדרוש והגידו לכה את המשפט	9 דְּבַר הַמִּשְׁפָּט:	9
3	ועשיתה על פי התורה אשר יגידו לכה ועל פי הדבר	10a, וְעָשִׂיתָ עַל־פִּי הַדָּבָר אֲשֶׁר יִגִּידוּ 11a לְךָ /... עַל־פִּי הַתּוֹרָה	10a, 11a
4	אשר יואמרו לכה [מספר התורה ויגידו לכה באמת	11a אֲשֶׁר יִרְוֶךְ	11a

24 Qimron: יומת. This is uncertain in the online digital image.

25 Underlined text in both columns indicates a significant variant in wording between TS and MT. Bolded text appears in one of the texts but not the other. I begin with TS and correlate MT to it, rather than vice versa. For a similar comparison, see Gershon Brin, *Issues in the Bible and the Dead Sea Scrolls* (Tel Aviv: Tel Aviv University and Hakibbutz Hameuchad, 1994), 173–75 [Hebrew].

line	Temple Scroll col. 56 (ed. Yadin)	Deuteronomy 17 (MT)	verse
5	מִן הַמְּקוֹם אֲשֶׁר אִבְחַר לְשֹׁכֵינִי שְׂמִי עֲלֵיו וְשִׁמְרָתָהּ לַעֲשׂוֹת	מִן־הַמְּקוֹם הַהוּא אֲשֶׁר יִבְחַר יְהוָה וְשִׁמְרָתָהּ לַעֲשׂוֹת	10b
6	כְּכֹל אֲשֶׁר יִזְרָכֶה וְעַל פִּי הַמִּשְׁפָּט אֲשֶׁר יִזְרָכֶה לֵבָּהּ	כְּכֹל אֲשֶׁר יִזְרָדֶה: /... וְעַל־הַמִּשְׁפָּט אֲשֶׁר־יִאֲמְרוּ לָךְ	10b, 11b
7	תַּעֲשֶׂה לֹא תִסּוֹר מִן הַתּוֹרָה אֲשֶׁר יִגִּידוּ לָךְ יָמִין	תַּעֲשֶׂה לֹא תִסּוֹר מִן־הַדְּבָר אֲשֶׁר־ יִגִּידוּ לָךְ יָמִין	11b
8	וְשִׂמְאוֹל וְהָאִישׁ אֲשֶׁר יִשְׁמַע וְיַעֲשֶׂה בְּזִדּוֹן לְבַלְתִּי	וְשִׂמְאוֹל: / וְהָאִישׁ אֲשֶׁר־יַעֲשֶׂה בְּזִדּוֹן לְבַלְתִּי	11b, 12
9	שְׂמוֹעַ אֶל הַכּוֹהֵן הָעוֹמֵד שְׂמָה לְשֵׁרֶת לְפָנָיו אוֹ אֶל	שְׂמֹעַ אֶל־הַכּוֹהֵן הָעוֹמֵד לְשֵׁרֶת שָׁם אֶת־יְהוָה אֱלֹהֶיךָ אוֹ אֶל־	12
10	הַשּׁוֹפֵט וְיִמַּת הָאִישׁ הַהוּא וּבַעֲרָתָהּ הָרַע מִיִּשְׂרָאֵל וְכֹל	הַשּׁוֹפֵט וְיִמַּת הָאִישׁ הַהוּא וּבַעֲרָתָהּ הָרַע מִיִּשְׂרָאֵל: / וְכֹל־	12, 13
11	הָעַם יִשְׁמְעוּ וְיִרְאוּ וְלֹא יִזְדוּ עוֹד בְּיִשְׂרָאֵל	וְהָעַם יִשְׁמְעוּ וְיִרְאוּ וְלֹא יִזְדוּ עוֹד	13

As noted above,²⁶ several variants appear either in other ancient witnesses or are variants internal to MT, and, therefore, cannot be taken to reflect specifically on the exegetical choices of the “author” of TS. Similarly, changes from references to God in the third person to God’s speaking in the first person (lines 5, 9) are unremarkable. Overall, lines 1, 7–11 of TS appear to “follow” verses 9, 11b–13 of MT. However, verses 10 and 11a appear to have been broken and rearranged. Among the seeming changes in TS, when compared to MT, are significant changes in word order, substitution of words, and entire interpolations.

Among the most striking of such variations are the transfer of the beginning of v. 11 (על-פי התורה אשר יורוך) to an earlier position, following the beginning of v. 10 (ועשית על-פי הדבר אשר יגידו לך), and the interchanging of התורה in TS for הדבר in MT (TS lines 3, 7), and הדבר in TS for התורה in MT (TS line 3).²⁷ However, the most remarkable difference is the complete

26 See above, nn. 17, 18, 19, 20.

27 The former interchange (התורה for MT הדבר) also occurs in some witnesses to SD, for which see Finkelstein’s edition, 207 line 8 (according to the Venice printing and MS London).

interpolation of *באמת* ויגידו לכה מספר התורה in line 4 of TS, without any equivalent in MT. Thus, where MT has in v. 11a *על-פי התורה אשר יורוך* (“in accordance with the Teaching/Torah which they will instruct you”), TS has in lines 3–4: *ועל פי הדבר אשר יואמרו לכה מספר התורה ויגידו לכה באמת* (“in accordance with the verdict which they will tell you <vacat> from the book of the Teaching [Torah] and which they will announce to you in truth”).²⁸ TS here clearly stresses that the source of the ruling to be announced is the “book of Teaching/Torah,” and that it is to be communicated “in truth,” that is, reliably and accurately.

Like the king of the following section in both Deuteronomy and TS, who is to keep beside him at all times a Teaching/Torah written on a scroll,²⁹ which is to govern his royal actions, so too the high court is to rule in accordance with the “book of Teaching/Torah” and to transmit that ruling in faithfulness to that text, possibly reflecting the influence of the king pericope on that of the high court.³⁰ The subordination of political office to Mosaic Torah (that is, to the text of Deuteronomy itself) is a leitmotif of the larger unit of Deut 16:18–18:22.

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- 28 For a variety of translations of *באמת*, see Yadin (“in sincerity”), Charlesworth (“truthfully”), Vermes (“in truth”), García Martínez (“accurately”), and Wise, Abegg, and Cook (“the truth”). The last would seem to understand the prefix *bet* as introducing a verbal object (“they shall pronounce to you the truth”). For this use of the prepositional object in Qumran Hebrew, see Jean-Sébastien Rey, “On the Prepositional Object with *bet* in Qumran Hebrew,” in *Hebrew in the Second Temple Period: The Hebrew of the Dead Sea Scrolls and of Other Contemporary Sources* (ed. Moshe Bar-Asher, Steven Fassberg, and Ruth A. Clements; STDJ 108; Leiden: Brill, 2013), 189–213. Thanks to Elitzur Bar-Asher Siegal for this reference. Yadin (*The Temple Scroll*, 2:251, in note to line 4) gives examples from the Dead Sea Scrolls of forms of *אמת* that express a sectarian (exclusive) claim to (divine) truth. See also below, n. 54.
- 29 According to Deut 17:18, *וכתב לו את־משנה התורה הזאת על־ספר* (“He shall have a copy of this Teaching written for him on a scroll. . .”). TS, interestingly, omits the word *משנה* (“copy”) from its rendition and has others (priests?) write the Torah for the king rather than his writing it for himself (11Q19 56.20–21). On this, see Yadin, *The Temple Scroll*, 1:344–45. For a detailed comparison of the “Torah of the King” in TS and early rabbinic literature, see S. D. Fraade, “The Torah of the King’ (Deut 17:14–20) in the Temple Scroll and Early Rabbinic Law,” in *The Dead Sea Scrolls as Background to Postbiblical Judaism and Early Christianity: Papers from an International Conference at St. Andrews in 2001* (ed. J. R. Davila; STDJ 46; Leiden: Brill, 2003), 25–60.
- 30 For the possibility of the opposite direction of influence, see above, n. 13. Just as the king might be corrupted by excessive women and wealth, so too the judges can be corrupted by bribes. See Deut 17:17 for the former and Deut 16:18–20 (as well as Deut 1:16–17) for the latter. TS (11Q19 51.11–18) goes even further in applying the death penalty to corrupt judges, perhaps under the influence of Deut 17:12. See Yadin, *The Temple Scroll*, 1:383–85; 2:227–29; Stackert, “Before and After Scripture,” 175–81.

One effect of the seeming transpositions and insertions in lines 3–4 is to delay, and thereby reduce the importance of, מן המקום (“from the place”) as the authoritative source of the ruling by preceding, and thereby upending it with מספר התורה (“from the book of Teaching”). The authority of the court’s ruling derives less from its location, as important as that remains, than from the Torah text from which it rules and communicates באמת (“in truth”). It is tempting to think that the space left by the scribe before מספר התורה serves to accentuate that important inserted detail.³¹ Similarly perhaps, TS’s dropping of the demonstrative pronoun ההוא (“this”) from מן-המקום ההוא (“from this place”) in verse 10b of MT renders the “place” as being somewhat less determinative.³²

I am less certain how to understand the other major interpolation, that of transforming דבר המשפט (“the verdict in the case”) in v. 9 to הדבר אשר עליו (“the matter for which you came seeking, and [for which] they will tell you the verdict”) in line 2.³³ TS may be seeking to limit the role of the high court to deciding only cases of inter-personal dispute referred up to it from local courts, thereby excluding from its purview broader legislative decisions that are not so occasioned. This is in striking contrast to the assignment of broader legislative functions to the Sanhedrin in early rabbinic literature, which institution’s authority is grounded in Deut 17:8–13.³⁴ Whether or not, or to what extent, it is advisable to read TS in light of later rabbinic exegeses of Deut 17:8–13 is a question to which we shall soon return.

Yigael Yadin, in comments to his edition of TS,³⁵ interprets the interpolation of מספר התורה ויגידו לכה באמת as follows: “There is virtually no doubt that these changes were designed to prohibit the fixing of any law according to oral tradition, i.e., any law not written and interpreted in the Pentateuch.” And

31 We have no way of knowing how TS would have rendered אל-המקום (“to the place”) of Deut 17:8, since it is not preserved. My contention is that through the insertion of מספר התורה prior to מן המקום, TS privileges the “book of Teaching/Torah” as the immediate source (and, in a sense, the authority) of the ruling, over the place in which the ruling is made. Note especially the parallel use of the locative מן and מן with מספר התורה and המקום respectively, as denoting originating sources of judicial authority (the “book” or the “place”).

32 I offer this suggestion somewhat tentatively since the demonstrative pronoun is lacking in LXX, while present in Samaritan Pentateuch and *Peshitta* Deut 17:10. It should be noted that this is the only scriptural occurrence of the phrase המקום ההוא, except for Deut 12:3, which does not refer to the Temple site.

33 For Qimron’s different reconstruction, see above, nn. 21, 22.

34 See Fraade, *From Tradition to Commentary*, 83–87 for the rabbinization of the sorts of rulings to be made by the high court according to SD §152.

35 Yadin, *The Temple Scroll*, 2:251.

again, “There is a plainly polemical element, castigating those who do not ‘declare in sincerity’ according to the Torah.” Although he does not mention them by name, Yadin would appear to be alluding to the Pharisees as the purveyors of “oral tradition,” against whom TS is polemicizing by requiring the court’s rulings to derive directly from the written Torah “in truth.”³⁶ Since there is, it seems to me, nothing inherently polemical in the language of TS, and since we have no direct evidence for how the Pharisees would have interpreted Deut 17:8–13, Yadin’s confident claim can be tested only by looking at how the earliest rabbinic commentary to Deuteronomy interprets these same verses, in the hope of finding traces of an earlier polemic.³⁷

36 This understanding of TS as mounting a polemic against “the Oral Torah” of the Pharisees is endorsed by Daniel R. Schwartz, “Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law,” in *The Dead Sea Scrolls: Forty Years of Research* (eds. D. Dimant and U. Rappaport; Leiden: Brill; Jerusalem: Magnes Press and Yad Izhak Ben-Zvi, 1992), 229–40 at 234 (referring to Joseph Baumgarten for the same view). Following Yadin, Schwartz claims that “In the *Temple Scroll*, the paraphrase of this passage systematically substitutes תורה for דבר, thus indicating that one should follow the judges only when their rulings are indeed Torah.” The semantic evidence is hardly so “systematic” (see above at n. 27), and Yadin’s and Schwartz’s polemical inference from it is thereby exaggerated. Menahem Kister similarly endorses Yadin’s polemical reading, but with additional arguments in idem, “Marginalia Qumranica,” *Tarbiz* 57 (1988): 315–25 (esp. 315–16) [Hebrew]; idem, “Two Formulae in the Book of Jubilees,” *Tarbiz* 70 (2001): 289–300 [Hebrew]. For the most recent reiteration, see Elisha Qimron, *The Dead Sea Scrolls: The Hebrew Writings*, 1:139–40 [Hebrew], xxxvii–xxxviii [English]. I will consider these arguments for polemic in section 5 below.

37 I do not presume that earliest rabbinic literature provides us with a window onto the Pharisees, but that the comparison can nevertheless be mutually illuminating, regardless of the lack of chronological proximity. The question of the attitude of the Pharisees pre-70 CE to revealed “oral Torah” (as distinct from received “ancestral tradition,” however recorded) is fraught with methodological difficulties. See Josephus, *Ant.* 13.297; with which compare 17.41 and 18.12; Matt 15:1–12 (// Mark 7:1–13); *Megillat Ta’anit* scholion Tammuz 4/10 (Vered Noam, *Megillat Ta’anit: Versions, Interpretation, History* [Jerusalem: Yad Ben-Zvi, 2003], 78 [Hebrew]), citing Deut 17:11. For discussion, see Martin S. Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE–400 CE* (Oxford: Oxford University Press, 2001), 38–61; S. D. Fraade, “Literary Composition and Oral Performance in Early Midrashim,” *Oral Tradition* 14 (1999): 33–51, esp. 39–42. On the scholion to *Megillat Ta’anit* Tammuz 4/10, see the articles by Kister, cited above, n. 36, as well as Cana Werman, “The Torah and the *Te’udah* on the Tablets,” *Tarbiz* 68 (1999): 473–92 (esp. 488–90) [Hebrew]. I will return more fully to this question in section 5 below.

3 Sifre Deuteronomy §§152–155 to Deuteronomy 17:8–12 (ed. Finkelstein)

As I have discussed this passage at length elsewhere,³⁸ I shall only highlight key aspects of the commentary as it relates to our discussion of TS, cognizant that we have the commentary of *Sifre Deuteronomy* (henceforth SD) in full, but are missing the initial lines of TS's "retelling" of Deut 17:8–12.

1 (§152). In commenting on v. 8, SD redefines the sorts of cases that come before the high court (and its local analogues) from civil matters of social dispute and damage to rabbinic determinations of legal categories, whether civil, criminal, or ritual, thereby expanding its role from a referral court to a legislative and scholastic body.³⁹

2 (§153). SD differentiates between the verbs ועלית and ובאת, in vv. 8 and 9 respectively, with the former referring to ascending to the high court on the Temple Mount, and the latter being freed to include the (rabbinic) court at Yavneh (the approach to which does not require ascent): ובאת, לרבות בית דין: שביבנה ("And you shall come': this is to include the court which is in Yavneh").⁴⁰

3 (§153 cont.). In its comment on v. 9, SD stresses that while Scripture mandates a court comprising priests and Levites (in Deuteronomy, "levitical priests"), a court consisting of lay judges (as signified by the השפט of the verse) alone is still qualified to rule. This implies a reading of ואל as meaning או אל,⁴¹

38 See above, n. 2.

39 See above, n. 34. To give one example, לדם בין דם נדה לדם יולדת לדם זיבה, ("Between blood and blood" [usually taken to refer to cases of homicide]: between menstrual blood, the blood of birthing, and the blood of a flux").

40 With regard to Yavneh as successor to the Jerusalem Temple, compare *m. Rosh HaShanah* 4:1–3.

41 See above, n. 17. This also implies that the singular השפט of v. 9, presumed to be non-priestly and non-levitical, can stand for a court full of lay judges. For a possible plural reading השפטים (as in Deut 19:17, 18), see above, n. 18. In Josephus's paraphrase in *Ant.* 4.218, he describes the high court as comprising ὁ τε ἀρχιερεὺς καὶ ὁ προφήτης καὶ ἡ γερουσία ("the high priest, the prophet, and the council of elders"). Some understand the prophet here to be another designation of the High Priest, and the council of elders to be Josephus's addition. See Louis Feldman, *Flavius Josephus: Translation and Commentary, Judean Antiquities 1–4* (ed. S. Mason; Brill: Leiden, 2000), 410–411. Philo, *On the Special Laws* 4.190, understands the court to consist of ἡ ἱερεῖς καὶ ὁ τῶν ἱερέων ἕξαρχος καὶ ἡγεμῶν ("the priests, and the head and leader of the priests"). For the High Priest as the supreme legal authority, presiding on the Temple Mount, see 4Q375 (Moses Apocryphon^a) 1 i 8–9, on which see Liora Goldman, "The Apocryphon of Moses: A Composition Representing the High Priest as the Supreme Judicial Authority," *Meghillot* 10 (2013): 181–200 [Hebrew]. In any case, the singular השפט/τὸν ἀρχηγὸν of v. 9 was understood by several ancient sources to have been

and that the single judge of the verse can stand for *plural* judges.⁴² Notice the dialogical rhetoric of SD here as elsewhere in this section: מצוה אל הכהנים ולוים, מצוה בבית דין שיהיו בו כהנים ולוים יכול מצוה ואם אין בו יהא פסול תלמוד לומר ואל השופט, אף על פי שאין בו כהנים ולוים כשר (“To the levitical priests’: It is required of the court that it has priests and Levites. Is it possible that even if so required, if there are no [priests and Levites on it] it is disqualified? Scripture teaches, ‘and [or] to the judge.’ Even though it lacks priests and Levites, it is qualified”).

4 (§153 cont.). The judges of the present should not be compared nostalgically to those of the past, but considered authoritative for their present-day credentials. Once again, the argument is made dialogically (and sarcastically): אשר יהיה בימים ההם, אמר רבי יוסי הגלילי וכי עלת על דעתך שתלך אצל שופט שאינו בימך (“Who will be [in charge] in those days’: Said R. Jose the Galilean: Did it occur to you that you would go to a judge who is *not* in your days?”).

5 (§154). Most radically, SD interprets v. 11, לא תסור מזהבבר אשר יגידו לך ימין, ושמאל (“You must not deviate from the verdict that they tell you either to the right or the left”⁴³), to mean: אפילו מראים בעיניך על ימין שהוא שמאל ועל שמאל להם (“Even if they show you that right is left and left is right, obey them”).⁴⁴ The midrash understands the seemingly redundant “right or left” to be the direct objects of “that they tell you,” rather than as adverbial accusatives of “deviate.” Thus, rather than taking them figuratively (“do not deviate in any way whatsoever”), SD takes them “literally” to refer to “the right (which you know to be the left) and the left (which you know to be the right).” In other words, ignore what you know/consider⁴⁵ to be the “truth” in order to uphold the judicial authority of the court, however “false” its rulings might be/seem to you.⁴⁶ That this radical understanding of not deviating “to the right or the

the High Priest. Thus, SD is unique among ancient interpreters in understanding השפט to designate a specifically *lay* leader.

42 See above, n. 18.

43 Literally, “right and left,” but the *waw* conjunction can have the meaning “or.” See above, n. 17. See also Gen 24:49; 1 Macc 2:22.

44 This midrashic “translation” requires the insertion of על (“concerning”) before “right” and “left.” See Gen 24:49.

45 This ambiguity reflects the Hebrew, מראים בעיניך, literally, “make appear in your eyes,” on which see the next note.

46 Compare Rashi and Nahmanides (RaMBaN) to Deut 17:11, with both citing SD’s interpretation, and the latter connecting it to *m. Rosh HaShanah* 2:9, on which see above, n. 7. See also *Midr. Tannaim* Deut 17:10 (ed. Hoffmann, 103): . . . שאם יאמר לך על שמאל שהיא ימין . . . (“If they say to you regarding left that it is right . . .”); as well as *Song Rab.* 1:18. Compare *Midr. Leqah Tov* ad loc., which represents SD’s interpretation as follows: אפילו דומה בעיניך (“Even if it appears to your eyes that

left” is formulated specifically to accentuate the autonomous authority of the court can be seen by the way in which SD (§162) comments on the very same idiomatic phrase in Deut 17:20, but now with respect to the king’s obligation to obey precisely his written Torah: *ולבלתי סור מן המצוה ימין ושמאל, שלא יסור מן* (“Nor deviate from the commandment to the right or to the left’: that he should not deviate from the commandment to the right or to the left”). In other words, the verse means precisely what it says, without any trace of the “creative philology” applied to the same idiomatic merism in Deut 17:11 alone.⁴⁷ Whereas the king is completely subservient to the commandments of the written Teaching/Torah, which is constantly by his side to guide him, never

right is left. . .”), thereby shifting the falsity from the rulings of the judges to the “eyes” of the addressee, and thus blunting somewhat SD’s seemingly radical interpretation. In any case, this strikes me as one of the most direct and extreme assertions of rabbinic “nominalism” to be found anywhere. On the use of “nominalism” (versus “realism”) to characterize rabbinic approaches to law, see Schwartz, “Law and Truth,” 229–40; Jeffrey L. Rubenstein, “Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment,” *DSD* 6 (1999): 157–83; Christine E. Hayes, “Legal Realism and the Fashioning of Sectarians in Jewish Antiquity,” in *Sects and Sectarianism in Jewish History* (ed. S. Stern; 1JSSJ 12; Leiden: Brill, 2011), 119–46. I employ this characterization here locally and not globally. With respect to the profound implications of this rabbinic “reading” of Deut 17:11, see Tigay, *The JPS Torah Commentary: Deuteronomy*, xxvii: “One of the most far-reaching influences of the book [of Deuteronomy] was achieved through the interpretation of 17:11 by means of which the rabbis found the warrant to create new laws when necessary, and not only to interpret the Torah. This extraordinary understanding of the verse played a major role in allowing Judaism to develop and meet the needs of new historic situations, and not become fundamentalistic and stagnant.” And again, *ibid.*, 165: “In rabbinic exegesis this verse does not refer only to judicial verdicts but serves also as warrant for the legislative authority of the Sanhedrin and its successors, the Sages. This interpretation was as important in the development of Jewish law as was Chief Justice John Marshall’s assertion of the right of judicial review in American constitutional history.” For further discussion, see Menachem Elon, *Jewish Law: History, Sources, Principles* (4 vols.; Philadelphia: Jewish Publication Society, 1994), 1:236–37, 242–61, 278–80; 2:481–85; Shlomo Zalman Havlin, *על* “החתימה הספרותית כיסוד החלוקה לתקופות בהלכה,” in *Researches in Talmudic Literature* (Jerusalem: Israel Academy of Sciences and Humanities, 1983), 164–65 n. 71. Thanks to Adiel Schremer for the last reference.

47 However, this is missing in some manuscripts, but is present in MS Vatican 25. The same biblical idiom is found in Deut 2:27; 5:29; and 28:14, but there is no extant SD commentary to those verses. For a similar usage, see Josh 1:7; 23:6; and compare Jonah 4:11. Note also Isa 30:21. In none of these does the expression “right or left” directly follow a verb of speech (e.g., *הגיד*) as in Deut. 17:11. Cf. *y. Horayot* 1.1 (45d) for the view opposite to that of SD. For its use in the Dead Sea Scrolls, see below, n. 54.

to waver at all in their observance, the high court's authority is neither subservient to Scripture nor dependent for its authority on the accuracy of its rulings.

4 Temple Scroll and Sifre Deuteronomy Compared

Before considering more carefully whether the differences between TS and SD with regard to their very different understandings of the laws governing the conduct and constitution of the high court reflect a mutual polemic (that is between TS and Pharisaic antecedents to SD), as has been claimed by Yadin and others, their fundamental differences, as well as some surprising similarities, should be accentuated in their own rights:

1. To begin with a similarity, both texts downplay somewhat the importance of *מִן־הַמָּקוֹם הַהוּא אֲשֶׁר יִבְחַר יְהוָה* ("from that place that the Lord will choose"), although TS does so less explicitly than does SD, as might be expected from their respective modes of discourse ("rewritten Bible" and dialogical commentary): TS by inserting the requirement that the court's rulings derive *מִסֵּפֶר הַתּוֹרָה* ("from the book of Teaching/Torah"), even as they are transmitted *מִן הַמָּקוֹם* ("from the place"); SD by extending the place where the court meets to include Yavneh, presumably as successor to the Temple mount (and Jerusalem). Clearly, the implications of the latter are greater than the former, but in each case the displacement is significant in its own right, with TS limiting the court's rulings to being based in Scripture, and SD expanding the very geographical locus of where those rulings occur. In either case, however, the emphasis on *הַמָּקוֹם* is offset without being eliminated.⁴⁸ That which is so transformatively innovative in Deuteronomy, the centralization of priestly and judicial authority, generates somewhat decentering interpretative innovations no less consequential for their respective interpretive communities, in effect rolling back Deuteronomy's chief innovation, but in decidedly different ways. It would be tempting to suggest, especially if we knew that TS is of sectarian provenance, that the decentering of place plays a similar role in TS, if representing a community in *exile* from the Temple and Jerusalem, as it does in SD,

48 See also above, n. 31. See my article, "Memory and Loss in Early Rabbinic Text and Ritual," in *Memory and Identity in Ancient Judaism and Early Christianity: A Conversation with Barry Schwartz* (ed. Tom Thatcher; Semeia Studies 78; Atlanta: Society of Biblical Literature, 2014), 113–27.

if representing a community living in the aftermath of the *destruction* of the Temple and Jerusalem. I shall, for now, resist that temptation.⁴⁹

2. As already emphasized, while TS appears specifically to *restrict* the purview of the court to its biblically mandated function of deciding difficult cases of intra-communal conflict that are referred to it by lower courts,⁵⁰ SD *expands* those kinds of cases to matters of scholarly dispute regarding the categories of ritual and religious law as well as criminal and civil law.

3. Not only does SD broaden both the location and purview of the court, it also loosens the bounds of its membership so as to allow for a court without any priestly or levitical members. I find no hints of any of these exegetical moves in TS, which would appear to require a priestly-levitical majority, even if possibly weakening the importance of its location.⁵¹ At most, the plural form [ש]ו[פטים] . . . in line 1 of TS, mainly reconstructed and conjectural,⁵² concords with SD's allowance of a court made up of more than a singular lay judge,⁵³ but it would not seem to carry the same expansive understanding as it does for SD.

4. Finally, and possibly most importantly, we have the fundamental contrast between TS's interpolation of *באמת לכה התורה ויגידו לכה באמת* ("from the book of the Teaching [Torah] and which they will announce to you in truth"), and SD's radical interpretation of v. 11, *לא תסר מן-הדבר אשר-יגידו לך ימין ושמאל*, ("You must not deviate from the verdict that they tell you either to the right or the left"), as *אפילו מראים בעיניו על ימין שהוא שמאל ועל שמאל שהוא ימין שמע להם* ("Even if they show you that right is left and left is right, obey them"). The former insists that the court rule according to scriptural (revealed) "truth," while the latter stresses the binding authority of the present-day court regardless of whether its subjective rulings are "true" or not.⁵⁴

49 See above, n. 15.

50 See above, at n. 33 and Levinson, *Deuteronomy*, 127–30.

51 Cf. 11Q19 57.11–15 for the priestly dominated composition of the council of the king. For Yadin's connecting it to Deut 17:9–13, see above, n. 13.

52 See above, nn. 18, 19.

53 For the singular judge being the High Priest according to Philo and Josephus, following, presumably the LXX, see above, n. 41.

54 See above, n. 46. Although TS represents v. 11b without variation (except for "replacing" *הדבר* with *התורה*, on which see above, n. 27), it should be noted that similar uses of "right or left," in the context of requiring absolute and unwavering obedience to the *true* law, can be found elsewhere in the Dead Sea Scrolls: 1QS I, 15; III, 10 (=4Q257 I iii 14); 4Q266 (4QD^a) 11 17–18; 4Q504 (4QDibHam^a) 1–2 ii 14 (restored); CD (MS B) XX, 29b–30a, 30b–31a. The language of 1QS I, 15 is particularly apt in relation to our case: *ולוא לסור מחוקי אמתו וללכת ימין ושמאל* ("and not to turn aside from his true laws [by] going either [to] the

5 Arguing with Arguments for Polemic

As noted above, several distinguished scholars have argued that TS reflects, first and foremost, a polemical response to the Pharisaic claim for the authority of the laws contained in the “oral Torah” (תורה שבעל פה),⁵⁵ and even that SD contains the residue of a Pharisaic, or at least early rabbinic, anti-sectarian response affirming the authority claimed for the same.⁵⁶ I will focus on the two central arguments for this polemical understanding, that of Yigael Yadin (followed by Daniel Schwartz) and that by Menahem Kister.⁵⁷ Yadin claimed that TS intentionally, systematically, and polemically replaces the word דבר in its proto-MT base-text with תורה on the assumption that the former denotes an *oral* legal pronouncement (oral Torah), while the latter denotes one grounded in the *written* Torah alone. Whether or not these lexical assumptions are valid, the textual evidence from the sources we have examined is far from consistent in supporting Yadin’s claim: TS once retains דבר (TS line 2 in relation to MT verse 9), twice replaces דבר with תורה, and once replaces תורה with דבר (the last directly contravening Yadin’s argument).⁵⁸ The fact that the change from דבר to תורה also occurs in SD (according to excellent textual witnesses),⁵⁹ contrary, again, to Yadin’s presumptions, suggests that these variations are the products of scribal carelessness (whether ancient or medieval, whether ascribed to errors of copying or of memory), due to the repetitiveness of the scriptural phrasing, carrying thereby no ideological cargo.

Kister’s argument for a mutual polemic is more interesting, and while resting, as I shall demonstrate, on weak ground, cannot be as easily dismissed. Kister relies on the scholion to *Megillat Ta’anit* Tammuz 4/10, which comes

right or [to] the left”), as noted by Kister “Marginalia Qumranica,” 316. For the addition of אמת (“truth”) in the Dead Sea Scrolls to biblical idioms wherein it is absent, see 1QS 1, 5; VII, 2 (and its parallel in 4QS^e [4Q259]); IX, 17 (and its parallels in 4QS^d [4Q258] and 4QS^e [4Q259]); 11Q5 (11QPs^a [Psalm to the Creator]) xxvi, 10–11. Therein אמת (“truth”) is added to the scriptural idioms צדקה ומשפט (“righteousness and justice”) and משפט צדק (“righteous justice”). Compare the above Dead Sea Scrolls texts with Gen 18:19; Prov 21:3; Ps 33:5 for the former, and Deut 16:18; Isa 1:21 for the latter. So far as I could determine, these biblical idioms never appear with אמת in all of classical rabbinic literature. Note also the expression יהוד אמת/אמתו (“community of [his] truth”) in 1QS II, 24, 26 (partly restored); III, 7.

55 The term, of course, is not to be found in any pre-rabbinic source. See above, n. 37.

56 See above, nn. 36, 37.

57 For publications, see above, n. 36.

58 For specifics, see above, at n. 27 and n. 36.

59 See above, n. 27.

down to us in two main recensions as represented by MS Oxford (henceforth “O”) and MS Parma (henceforth “P”).⁶⁰ They speak of the Sadducees (P) or Boethusians (O)⁶¹ as having had a ספר גזרתא/גזירותא/גזירות (“book of decrees”), which was destroyed on Tammuz 4 (P) or 10 (O), thereby qualifying that day as a semi-festive day on which fasting and eulogizing are prohibited. In the longer version (O), it is the “sages” who rebuke the Boethusians for having recorded their extra-scriptural laws in written form. This manuscript (but not P) then cites two verses in support, Exod 34:27 and Deut 17:11, with the conclusion that, מלמד שאין כותבין בספר (“[this] teaches that they [=one] should not write [extra-scriptural laws] in a book [=scroll]”). The two prooftexts share the phrase על פי, meaning “according to,” followed by either הדברים (“the verdicts/commandments”) in Exod 34:27, or התורה (“the teaching/instruction”) in Deut 17:11. In the first case, the continuation of the verse designates the commandments as the basis of the (renewed) covenant, while in the second case, the continuation of the verse stresses complete obedience to the decisions handed down by the high court.

Although not stated explicitly by the scholion, in both cases, the scriptural phrase על פי is understood, literally, as “by mouth,” thereby requiring the *oral*, rather than written, means of recording and transmitting non-scriptural laws and judgments, hence supplying midrashic warrant for the sages’ denial of legitimacy and authority to the Boethusians’ “book of decrees.”⁶² Kister wishes to see this interpretation of Deut 17:11 as the polemical opposite (not just in effect, but in intent and practice) to TS’s requirement that the high court’s rulings derive from *written* scripture: מספר התורה (“from the book of the Teaching/

60 For details, see Vered Noam, *Megillat Ta’anit*, 19–41, 317–426 [Hebrew]; idem, “From Philology to History: The Sectarian Dispute, As Portrayed in the Scholium to *Megillat Ta’anit*,” in *Recent Developments in Midrash Research: Proceedings of the 2002 and 2003 SBL Consultation on Midrash* (ed. L. M. Teugels and R. Ulmer; Piscataway, NJ: Gorgias, 2005), 53–95 (esp. 91–92); idem, “Megillat Taanit: The Scroll of Fasting,” in *The Literature of the Sages, Second Part: Midrash and Targum, Liturgy, Poetry, Mysticism, Contracts, Inscriptions, Ancient Science and the Languages of Rabbinic Literature*, (ed. S. Safrai et al.; Assen: Royal Van Gorcum/Fortress, 2006), 339–62 (esp. 351–53).

61 The Boethusians, whose name (ביתוסיין), variously spelled and understood, appears only in rabbinic literature, are variously identified or associated with, among other groups, the Sadducees and the Essenes.

62 Space does not permit me to treat the continuation of the scholion according to O, introduced by דבר אחר (“another matter”), for which see the articles by Kister and Werman cited above, nn. 36, 37, as well as the treatment by Noam (*Megillat Ta’anit*, 206–16 [Hebrew]); and her other writings on this passage, cited above, n. 60.

Torah”) in line 4. However, for these to be not just in ideational opposition, but more specifically in polemical response, one to the other, requires a chronological alignment (even if not exact) that Kister presumes, but which, as I shall presently argue, cannot be ascertained.⁶³

In the absence of internal evidence by which to date the various scholia to *Megillat Ta’anit*, that task is notoriously difficult. Their language suggests either Tannaitic (first two centuries CE) or Amoraic (third-fifth centuries CE) provenance, a broad chronological range. Of course, the scholia may certainly incorporate traditions that are earlier than their present textualized forms, possibly stretching well back into late Second Temple times. However, identifying such early rabbinic traditions in the scholia as having originated with proto-rabbinic tradents such as the Pharisees (of late Second Temple times) is particularly difficult given our lack of any extant Pharisaic sources. Since, in the end, each case needs to be judged on its own merits, what do we find with respect to parallels to the scholion’s interpretation of פִּי עַל in Deut 17:11 as denoting oral recording and transmission of law (in opposition to its rendering in TS), as well as in Exod 34:27, that might assist us in dating, if only in a relative way, their underlying exegetical traditions to Second Temple times?

To begin with Deut 17:11, which is most relevant to our case, it is noteworthy that the only Tannaitic source which interprets it is our own SD (plus a parallel in *Midrash Tannaim*). While the verse is cited frequently in later Amoraic and post-Amoraic sources, in not one (that I could find) is the phrase פִּי עַל interpreted as referring to “oral Torah” (or to orality of any sort). Thus, the interpretation of פִּי עַל in Deut 17:11 as denoting orality is found *only* in our scholion (and only in one of the two main recensions). Especially telling is the fact that SD, which correlates most closely with TS with respect to Deut 17:11 (and is our earliest evidence for early rabbinic interpretation of that verse) shows a total lack of interest in the phrase פִּי עַל as denoting orality of legal teaching, understanding it in its usual meaning, “according to.”

63 To some extent Kister builds his argument on that of Cana Werman (see above, n. 37), who argues for a polemical relation between the latter half of the scholion and *Jubilees* (roughly contemporaneous and in some ideational accord with TS), based on the scholion’s use of Exod 24:12 and Deut 31:19, which she argues are alluded to in *Jubilees* in the latter’s valorization of written revelation as its source. Again, however, the assumption of a direct polemical relation between the two texts rests on tenuous ground. The possibility that the two *can* be placed in ideational (or exegetical) opposition to one another does not necessarily require that they *are* responding to one another (or unknown intertexts).

By contrast, the phrase פִּי עַל in Exod 34:27, the first of the two verses cited by the scholion (in version O alone), is frequently and quite explicitly interpreted in rabbinic literature, both Palestinian and Babylonian, as referring to “oral Torah,” but *never* in a pre-Talmudic source (that is, never in a Tannaitic or even an early Amoraic collection), and *never* ascribed to a Tannaitic tradent.⁶⁴ Thus, in the absence of any pre-Amoraic parallel interpretations of either Deut 17:11 or Exod 34:27 (and no rabbinic evidence at all for the former, aside from the scholion), the default position must be to date the longer recension (O) of the scholion at the earliest to Amoraic times.⁶⁵ In the absence of any parallels from pre-Amoraic (let alone Second Temple) times, the contained traditions of this scholion cannot with any confidence be retrojected to an earlier time that would allow it to be in direct or indirect polemical exchange with TS.

Finally, to remind ourselves, there is no evidence that TS’s rendition of Deut 17:8–13 pays any particular attention to the phrase פִּי עַל of Deut 17:11 (or 17:10). Nor is there any such evidence from any other Second Temple source. TS’s major innovation in this regard is to stress that the high court’s rulings derive from the written book/scroll of the Torah, which would exclude as much the Sadducean or Boethusian “book of decrees” as it would the rabbinic “oral Torah,” if such a concept existed already in late Second Temple times, for which we have no clear and reliable evidence.⁶⁶

64 For a representative list of parallel sources, see Noam, in the “sources” note to her edition (*Megillat Ta’anit*, 78–79 [Hebrew]), to which could be added many post-Amoraic midrashic sources. For the Talmudic sources, see *y. Pe’ah* 2:4 (17a); *y. Meg.* 4:1 (74d); *y. Hag.* 1:8 (76d); *b. Git.* 60b; *b. Tem.* 14b. Interestingly, Exod 34:27 is cited once in the DSS, in a fragment of the *Damascus Document* from cave 4 (4Q271 4 ii 3 [DJD 18:178], partially paralleled in CD 16:1). Unfortunately, the text preceding the citation is broken, leaving us unable to determine how and for what purpose the verse is being cited. It appears, however, to be cited for purposes of emphasizing covenant formation and entry, with no reference to the written and/or oral nature of authorized covenantal teaching; that is, without any focus on the phrase פִּי עַל of the verse. So far as I can determine, this is the only citation of or allusion to Exod 34:27 in all of Second Temple literature. This text and its interpretation are discussed by Kister, “Two Formulae,” 299, who suggests that it be understood in relation to the scholion to *Megillat Ta’anit* Tammuz 4/10. Any such direct alignment, it seems to me, is highly unlikely.

65 Given the lack of any parallel, early or late, to the implied interpretation of the phrase פִּי עַל in Deut 17:11 in the O version of the scholion, we might entertain the possibility that the citation of that verse is an even later accretion to the text, an added scriptural citation to that of Exod 34:27, occasioned by the phrase פִּי עַל in both verses. If so, the use of this scholion to establish an exegetical polemical relation between it and the interpretation of Deut 17:11 in TS becomes even more precarious.

66 See above, n. 37.

In the absence of any concrete textual evidence upon which to hang it, or a chronological bridge to allow it, the proposal for a mutual polemic between TS and SD, or between TS and the scholion to *Megillat Ta'anit* Tammuz 4/10, collapses. Of course, we must leave open the *possibility* that such a polemic *could* have existed. Kister's argument⁶⁷ that the contrast between TS's אשר יזאמרו לכה and SD's אפילו מראים בעיניך על ימין שהוא שמאל ועל שמאל שהוא ימין שמע להם is so stark, and the latter's interpretation of Deut 111:7 is so radical, that a polemical relation between the two must be presumed certainly needs to be seriously considered. However, I would resist the temptation to equate strong interpretation with polemic in any externally targeted sense of the word. Strong interpretations can just as easily be intended for intramural ears. At most, in this particular case, the interpretation could be directed at anyone who holds to the seemingly plain meaning of the verse (follow the high court's rulings without deviation) in accord with a legal realist view of jurisprudence (for its rulings correlate with objective/revealed "truth"), without any relation to orality per se. At the very least, the mere contrasting of the two interpretations of the same verse has proven to be of great value. However, we cannot avoid the fact that a direct polemic leaves no explicit traces at the textual level of the sources that we have examined, however much we might want to wish it into existence.⁶⁸

6 Conclusion

To some extent, comparisons between TS and SD are hampered by the fact that they employ very different rhetorical forms, resulting in TS's being more subtle and less direct in its rewriting of the high court biblical pericope than is SD in its employment of dialogical commentary in interpreting the same.⁶⁹ In

67 See above, n. 64.

68 Even if we were to presume that TS is a polemic, the most we could say is that its polemical targets are all those who (from the "author's" perspective) do not derive their rules or rulings "from the book of the Torah" and do not declaim them "in truth," which could just as easily be the Sadducees as the Pharisees, or, for that matter, anyone outside of the community of the "author."

69 For the possibility of viewing early rabbinic scriptural commentary, at least heuristically, as a kind of "rewritten Bible," notwithstanding its very different style and form of rhetoric, see S. D. Fraade, "Rewritten Bible and Rabbinic Midrash As Commentary," in *Current Trends in the Study of Midrash* (ed. C. Bakhos; JSJSup 106; Leiden: Brill, 2006), 59–78. For the interdependency of the two forms in the work of Philo of Alexandria, see idem, "Between Rewritten Bible and Allegorical Commentary: Philo's Interpretation of

a sense, SD through its form draws attention to its interpretations as TS does not. Nevertheless, their shared exegetical focus, and interestingly correlated interpretations, makes comparison between them inevitable if not simple. As I have argued (I hope not too polemically), unlike Yadin and his successors, I find no firm evidence for framing that comparison in terms of polemic, that is, in viewing TS as reflecting a polemical response to the exegeses articulated in SD (even if allowing for its having had Pharisaic antecedents which have not survived), or vice versa. Yet, in several significant ways, as we have seen, TS and SD pull the scriptural text in notably opposite directions. How might this be accounted for if not by assuming a direct (or even indirect) “conversation” between the two?

I suggest that the solution lies in the biblical text itself, which is to say, already in its inner-biblical interpretation and demand for interpretation. As I demonstrated at the outset, when viewed in its larger biblical context, the high court of Deut 17:8–13 is remarkably *autonomous* when compared to the earlier Pentateuchal narratives of courts or councils established to alleviate Moses’s leadership burden by adjudicating lower-level interpersonal disputes and damages. By contrast, there is no *explicit* requirement that this court consult with any other human or divine source, or that its rulings are anything less than final and binding.⁷⁰ This is all the more remarkable in light of both Deuteronomy’s and TS’s frank recognition of the corruptibility of judges.⁷¹

This judicial autonomy is similarly noteworthy when compared to the law of the king (Deut 17:14–20), immediately following our pericope, wherein the king’s autonomy is severely limited. As I have previously demonstrated, here too TS further constrains his authority and autonomy, whereas Tannaitic texts expand it.⁷² As suggested above, TS’s inclusion of ספר התורה as the source of

the Burning Bush,” in *Rewritten Bible after Fifty Years: Texts, Terms, or Techniques? A Last Dialogue with Geza Vermes* (ed. József Zsengellér; JSJSup 166; Leiden: Brill, 2014), 221–32.

70 The only possibility for the court’s consulting anything outside of its membership (and book of Teaching/Torah) would be if we were to adopt Qimron’s reading of TS as ודרשון (“they shall seek”), rather than Yadin’s reading of ודרשתה (MT: ודרשת) (“you shall seek”), and understand the former as denoting the seeking of an oracular verdict. For the verb ודרש in this sense, see Gen 25:22; Exod 18:15; 1 Sam 9:9; 2 Kgs 22:18; Jer 37:7. See above, nn. 11, 20. For a more scholastic use of the verb in this context, see the rabbinic sources referenced below, n. 75.

71 See above, n. 30.

72 See Fraade, “The Torah of the King”; David C. Flatto, “Between Royal Absolutism and an Independent Judiciary: The Evolution of Separation of Powers in Biblical, Second Temple and Rabbinic Texts” (Ph.D. dissertation, Harvard University, 2010); Yair Lorberbaum, *Disempowered King: Monarchy in Classical Jewish Literature* (New York: Continuum, 2011);

the court's rulings might reflect the influence of the law of the King, with its requirement that the king be constantly guided by a written Torah by his side.⁷³

The innovatively autonomous court of Deut 17:8–13 elicited directly opposite responses from TS and SD. The former found it too autonomous for comfort and sought, therefore, to reign it in, especially with respect to the “book of Teaching/Torah” as the sole source of legal rulings and “truth” as its principal measure. The latter found in that very same judicial autonomy (or at least the appearance thereof) an exegetical opportunity to further broaden its scope, loosen its reins, and extend its location so as to encompass the autonomous court(s) of the rabbinic sages, whether imagined or real, with their dichotomous teachings and rulings.

This is consistent with TS's employment of “*rewritten Bible*” as its exegetical platform and implied conceit of *absolute* truth (speaking as it does in the first-person divine voice), staying relatively close to the written text of Scripture, albeit with significant relocations and elaborations that limit the court's autonomy (and render it more “sectarian” with respect to “truth”). It is similarly consistent with SD's employment of *dialogical commentary* as its exegetical platform and implied conceit of *relative* truth, whereby it is able to transform the high court and its jurisprudence into something even more audaciously autonomous (and rabbinic). Both exegetical trajectories, while pointing in virtually opposite directions and employing very different rhetorical media, represent exegetical trajectories that originate from and are nourished by the same scriptural text (and its own innovative reworking of antecedent scriptural texts).⁷⁴

Inseparable from these different renditions of the composition and functions of the high court are the different rhetorical platforms that they employ (rewritten Bible and dialogical commentary), representing and instantiating two very different approaches to both scripture and to legal authority (and “truth”). The one (TS) I would characterize as oracular and declarative, and the other (SD) as dialogical and deliberative.⁷⁵ While both can be at times expan-

Bernard M. Levinson, “The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy,” *Cardozo Law Review* 27 (2006): 1853–88, esp. 1881 n. 128.

73 For TS's modification, see above, nn. 29, 30. For possible bleeding between the two pericope (high court and king), see above, nn. 13, 30.

74 For a similar experiment, see Jeffrey Stackert, “Before and After Scripture.”

75 For the more “deliberative” aspects of SD's rendition, see its comment on Deut 17:8 (§152), in which the litigants/disputing scholars ascend through a series of three courts, with

sive and at times constrictive of exegetical meaning, the one (TS) overall construes both exegetical and judicial truth as monological, absolute, and closed, while the other as dialogical, relative, and open. At least in this case, their media suit their messages remarkably well. A final, seeming irony: While TS takes significant liberties in “rewriting” its scriptural text, while claiming, implicitly, to transmit it “in truth,” SD preserves its scriptural text without change, while radically transforming its meaning through its explicit employment of commentary.

which compare *m. San.* 11:2; *t. Hag.* 2:9; *t. San.* 7:1; *b. San.* 86b; *y. San.* 11:3 (29d). Since my focus here has been on TS and SD in particular, and only on a small part of each, I resist making broader comparative characterizations of the corpora in which they are preserved: the Dead Sea Scrolls and early rabbinic literature. But see above, n. 46.

Sibyls, Scriptures, and Scrolls

John Collins at Seventy

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