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INTRODUCTION

This thesis concerns two related works of legal discourse, the Mishnah and Tosefta, produced by Jewish scholar-sages in Late Roman Palestine. In these works, sages appear as central protagonists and shapers of **halakhah (Jewish law)**.¹ They are portrayed not only as individuals and in small gatherings of sages, but also as “the SAGES” (חכמים), a term that seems intended to represent an authoritative majority or consensus of the network of sages, or of a sub-group such as the majority of sages in a certain city, or even the majority of a small gathering of sages. **In order to distinguish this collective term from the more general use of “sages,” I use “the SAGES” (small caps) to refer to those who participate in halakhic discourse as a group with one voice.** The way expressions such as “the SAGES say” are used in a vast number of halakhic disputes colors the SAGES with a collective authority that is not possessed by individual sages. The prominent role of the SAGES in the Mishnah and Tosefta provokes my thesis question, “How do the Mishnah and Tosefta depict the authority of the SAGES as a group?”

The Mishnah and Tosefta were produced in the traumatic period following the destruction of the Second Temple in 70 C.E. Although there remained some hope that the Temple would be rebuilt, the removal of this center of Jewish national life proved to be the death knell for almost all Jewish religious sects of the time and also served as a powerful stimulus for the radical transformation of what remained. In the first one hundred and fifty years following the destruction of the Second Temple, a group of Jewish scholar-sages, known to us as the Tannaim, received, transformed, and transmitted the laws and lore of pre-destruction Judaism. The sages were literate, but they apparently carried on these processes primarily in the form of oral discourse and transmission. As the era was drawing to a close, the sages began to redact the traditions in a more formal manner. The first work of the sages to be redacted, in about 225 C.E., was the Mishnah, a compendium of halakhic (Jewish legal) discourse whose redactors selected, sorted, shaped, and supplemented received tradition. It is possible, though far from certain, that the Mishnah was written down when it was redacted;

¹ I define words that may not be familiar to non-specialist when they first occur. They emboldened to draw attention to their importance of the role they play in this thesis.

even if written down, it is not established that it was circulated in written form during the third century.

The Mishnah is divided into six parts, or Orders, according to these broad categories:

- Seeds, concerning with prayer and blessings, tithes, and agricultural laws
- Festival, concerning the laws of the Sabbath and the Festivals
- Women, concerning marriage, divorce, and related matters
- Damages, concerning civil and criminal law
- Holy things, concerning sacrificial rites and dietary laws
- Purities, concerning laws of ritual purity and impurity of the body and food

These Orders are subdivided into tractates that focus on more discrete areas of halakhah.

What actions are mandated, permitted, or forbidden? What is valid or invalid, ritually pure or impure? What penalties are imposed for infractions? The Mishnah later became a foundational work in the formation of Rabbinic Judaism.

After the Mishnah and the waning of the **Tannaitic period (70 - 225 C.E.)**, the scholar-sages produced about a half-dozen works concerning the legal implications of the biblical books Exodus through Deuteronomy. These works are known as the halakhic midrash collections (**midrash may be loosely understood as “interpretation”**). However, unlike the Mishnah, which is ordered according to subject matter, the halakhic midrash collections are structured as verse-by-verse commentaries. The halakhic midrash collections (also referred to as the halakhic midrashim or midrash halakhah) were probably redacted in the second half of the third century C.E. or just after the turn of the century (Stemberger 1996, 250-251). Although they were redacted after the closes of the Tannaitic period, which came to an end with the redaction of the Mishnah, they consist almost entirely of tannaitic materials. As is the case with the Mishnah, it is not known whether the halakhic midrash collections were written down when they were redacted or at a later time, and, if written, whether they were circulated in written or oral form.

The Tosefta, a work similar to the Mishnah, was redacted at about the same time as the halakhic midrash collections (ibid, 157). Like these collections, it was redacted after the close of the Tannaitic period but consists almost entirely of tannaitic materials. The Tosefta is less tightly edited than the Mishnah, yet both are organized topically in the same six Orders and all but a few of the same tractates. The Tosefta is about three times the size of the Mishnah and therefore includes a broader representation of received tradition than the Mishnah does. The Mishnah and Tosefta also share a significant amount of material, sometimes word-for-word (or nearly so). At times, materials from parallel Mishnah and Tosefta tractates illumine each other, producing a clearer picture of the issues at hand. In

other cases, the Mishnah and Tosefta discuss different aspects of the same broad topics. The Mishnah and Tosefta are so similar in structure, content, and style that they are considered to be parallel or synoptic works. The parallel relationship of the Mishnah and Tosefta has long been recognized and underlies the methodology of this thesis.

All of the works mentioned above include some Jewish lore but focus on halakhah. All include the sages' discussions of traditions that had been handed down to them. Where the halakhic midrash collections focus their discourse on the verse under discussion, the Mishnah and Tosefta are arranged topically and are somewhat more wide-ranging in their interests. Thus, while the halakhic midrash collections often cite material that is also found in the Mishnah or Tosefta that have come down to us, their modes of discourse have less in common with the Mishnah and Tosefta than with one another.

In nearly two millennia since their redaction, the Mishnah and Tosefta have been studied separately and compared with each other. I will review this literature in chapter 2. The stable scholarly consensus has been that the two are identical, or nearly so, in their views of key halakhic issues. Although a few scholars have recently called attention to local halakhic differences between the Mishnah and Tosefta, to my knowledge none has claimed that the two works embody substantially different perspectives on any broader issue. Questions about this consensus arose during my study of the parallel tractates Mishnah and Tosefta Parah that discuss the rituals involving the red cow, based on Numbers 19:2–10. On the basis of a synoptic comparison, there are quantitative differences in these tractates' use of the term "the SAGES" and of individual, named sages. The Mishnah includes the opinions of fewer individual, named sages than the Tosefta (fifteen sages in the Mishnah compared to thirty in the Tosefta). Taking into account the difference in length between these tractates (Mishnah Parah is about two-thirds the length of Tosefta Parah), Tosefta Parah cites individual sages about a third more often than does Mishnah Parah. At the same time, in these parallel tractates the SAGES as a group appear far more frequently in the Mishnah than in the Tosefta (twenty-one times in the Mishnah versus ten in the Tosefta). Again considering the relative lengths of the two works, the term "the SAGES" appears about three times more often in Mishnah Parah than in Tosefta Parah. For some reason, Mishnah Parah places more emphasis on the SAGES as a group than does Tosefta Parah. Conversely, Tosefta Parah takes more notice of individual sages than does Mishnah Parah.

Given the status of the SAGES as an authoritative group and the importance that the Mishnah and Tosefta both assign to legal authority, a three-fold difference between the occurrences of the term "the SAGES" in these parallel tractates seemed to be significant. The

question naturally arises as to whether the Tosefta as a whole assigns a lesser place to the SAGES, and values individual opinions more, than does the Mishnah. My continuing review of existing scholarship on the Mishnah/Tosefta relationship failed to turn up any work that addressed these issues; apparently no one else had noted the disparity in the references to the SAGES in the Mishnah and Tosefta or any differences in the way these works portray the SAGES.

An analysis of digital texts² of the entire Mishnah and Tosefta produced preliminary confirmation of the same tendencies I observed in Mishnah and Tosefta Parah. In the Mishnah, the SAGES rule as a group roughly three times more often than in an equal amount of material in the Tosefta.³ One might suggest several possible reasons for this disparity. The Mishnah and Tosefta may embody different stages of one tradition, different segments of a larger tradition, and/or the views or tendencies of different redactors. It could also be suggested that the Mishnah places a higher priority on consensus, as represented by the SAGES, and the Tosefta on diversity, as represented by individual named sages.

However, these statistics, while suggestive, do not reveal the nuances of the Mishnah and Tosefta's construal of the SAGES as a group. Nuanced observations about the way the Mishnah and Tosefta depict the authority of the SAGES would have to rest on an analysis of the way the Mishnah and Tosefta employ the term "the SAGES" in a representative body of texts. If the results of this analysis are unambiguous, they will establish whether the Mishnah and Tosefta portray the SAGES' authority in identical or divergent ways.

I start by accepting the consensus view that the Mishnah and Tosefta are comparable works, both of which consist primarily of tannaitic materials,⁴ that are susceptible to synoptic analysis. As I proceed with my research, I will endeavor to remain open to questions about this consensus. In the remainder of this introduction, I will address issues that affect my approach: the redactional identity the Mishnah and Tosefta; the embedded-ness of the Mishnah and Tosefta in the tannaitic oral cultural context. Then I will describe the particular synoptic approach that I adopt in this thesis.

2 The digital text of the Mishnah is a transcription of Albeck's edition. The text digital text of the Tosefta is that of the *editio princeps*. Although neither is a critical edition, the digital texts are adequate for rough statistical calculations. In the dissertation itself, I use Lieberman's Tosefta text and Albeck's Mishnah, noting where MS Kaufman, the preferred manuscript, differs from Albeck in a significant way.

3 Since these results are not central to my research but only propelled it in the direction it is now taking, I do not present detailed results of that study in this dissertation.

4 Stemberger 1996, 150.

The Redactional Identity of Rabbinic Works

Some recent scholarship has challenged the idea that **rabbinic works (works produced during third through sixth centuries of the Common Era, the formative period of Rabbinic Judaism)** have a coherent redactional identity, suggesting that their texts are unstable and therefore one may compare only their unique manuscripts versions. Do the texts of Mishnah and Tosefta manuscripts that we have before us today represent unified, coherent works that may be compared? Or do the unique characteristics and significant number of variants in the textual witnesses undermine their identity to such an extent that we can only compare the text of one Mishnah manuscript (such as MS Kaufman) with the text of one Tosefta manuscript (such as MS Vienna)?

Peter Schäfer's article, "Research into Rabbinic Literature: An Attempt to Define the Status Quaestionis," (1986) stimulated an ongoing debate of these issues among some text-critical scholars of rabbinic literature. Surprisingly, little scholarship of the Mishnah/Tosefta relationship has taken notice of this debate, even though it bears directly on the redactional identity of these works. If the Mishnah and Tosefta are both identifiable works, they may be compared. However, if they represent irremediably variegated, unclear, or corrupted composition, redaction, and transmission, they cannot.

I begin with Chaim Milikowsky's definitions of the terms work, document, and text. When dealing with written productions, a **work** is "used to denote **the author's or editor's product** (one which may never have existed in any concrete mode of expression such as a book or a manuscript). **A document is an artifact which contains a concrete mode of expressing a work:** thus the manuscripts of Leviticus Rabbah are the documents of the work, conceptualized as Vayyikra Rabbah. **The text of the work is the actual word-after-word presentation of the original product and the text of the document is the word-after-word presentation found in the manuscript.** Generally, texts of documents are used to try to reconstruct texts of works . . ." (Milikowsky 2006, 82; I have formatted the quote to highlight Milikowsky's definitions). In addition, differences between the texts of two or more documents are called variants. If the variants between two or more texts are significant enough, we may say that these texts represent different versions of the work. In this thesis, I assume Milikowsky's definitions of these terms, though it is uncertain whether the works in question—the Mishnah, Tosefta, and halakhic midrash collections—were redacted in writing

or orally.⁵ Because of this uncertainty, I will use the term “text” in a generic way to refer to a sequence of words in written or oral form.

Consider Shakespeare’s *Hamlet*. *Hamlet*, the work, exists in three early printed documents—the First Quarto of 1603 (also known as the “Bad Quarto”), the Second Quarto of 1604–5 (the “Good Quarto”), and the 1623 Folio. There are thousands of variants in the texts of these documents, including substantial portions of text that are included in only one or two of the documents. The differences among these three texts are great enough that they are often called versions. Traditionally, it has been the work of textual criticism to sift these versions carefully (with much less weight given to the Bad Quarto) in order to produce an eclectic text (a text produced by combining material from the texts of the existing documents) that, in the textual scholar’s view, approaches the ideal text of the work *Hamlet* as intended by Shakespeare. Thus, Jenkins’s edition of *Hamlet* (1982) in the Arden series is an eclectic text, as are most working scripts used to perform *Hamlet* on stage or in films. However, the new Arden *Hamlet*, edited by Thompson and Taylor (2006), presents all three texts with no attempt to reconstruct an ideal *Hamlet*.⁶ The Arden *Hamlet* signals a change in the world of Shakespeare scholarship that has now surfaced to the general public in this new edition.

In rabbinic literature, works such as the Mishnah and Tosefta do not exist in early manuscripts.⁷ The oldest extant Mishnah and Tosefta fragments, found in the Cairo Geniza, date to the seventh or eighth century. The oldest and most important Mishnah manuscript is MS Kaufman, dated no earlier than the eleventh century. There is currently no critical edition of the Mishnah. The oldest Tosefta manuscript is MS Erfurt, considered a thirteenth century manuscript. There are numerous variants (more in the Tosefta than in the Mishnah), though traditionally the variants are not significant enough to formally categorize the texts of these manuscripts as versions. Scholars such as Zuckerman (1881) and Lieberman (1955–1973) produced eclectic critical texts of the Tosefta. However, since they used different manuscripts as a base text, their critical texts differ.

These cases exemplify the situation found in rabbinic literature generally. The earliest substantial manuscripts originate in the Medieval period. There are many variants in the texts of these manuscripts. In some cases, such as Abot de Rabbi Natan, two versions are clearly

⁵ See Stemberger 1996, 31–44 for a balanced discussion of the problems involved in determining when early rabbinic works were circulated in written form.

⁶ There are other print and digital editions that present *Hamlet* variants in other ways. The two Arden editions mentioned are simply examples of two different theoretical approaches.

⁷ The information in this paragraph is from Stemberger 1996, ad loc.

attested in the manuscripts. The manuscript witness to rabbinic literature can thus fairly be described as late, sparse, and varied. Given these realities, is there a valid theoretical basis for a clear identity of rabbinic works and therefore for comparing them as works?

The new Arden *Hamlet* is paralleled by the publication of synoptic editions of rabbinic works (e.g., of the early mystical Hekhalot literature and the Tosefta), with the transcribed texts of their manuscripts presented in parallel columns with no attempt to produce a critical text. There are also software programs and online resources that allow one to view the variants either separately or synoptically. Lewis M. Barth's online "Pirke Rabbi Eliezer Electronic Text Editing Project"⁸ is based theoretically on the superiority of a synoptic presentation, while others (e.g., Hebrew University's "Online Treasury of Talmudic Manuscripts,"⁹ and Friedman and Moskovitz, "Primary Textual Witnesses to Tannaitic Literature"¹⁰) are pragmatic in approach, offering manuscript or transcription evidence as a scholarly tools.

The publication of the Arden *Hamlet* and editions of rabbinic manuscripts in parallel column in the later twentieth century is not coincidental. They are both expressions of developments that arose in German scholarship in the broader field of textual criticism, exemplified by the Gabler *Ulysses* (1984). As Peter Shillingsburg wrote, "the 'multiple text' editors are . . . represented by Hans Gabler, editor of Joyce's *Ulysses*. . . Its primary difference from previous editorial principles is its insistence on multiple or fluid texts" (Shillingsburg 1989, 58).

Although these developments primarily arise from German scholars' emphasis on the textual history and instability of print-era works, they have also influenced textual criticism of rabbinic works. The ideology of the open, unstable work was applied to rabbinic works in Schäfer's 1986 article. Schäfer interacted with classical rabbinic textual criticism as well as the theoretical work of Arnold Goldberg and Jacob Neusner.¹¹ Just as other German and Anglo-American textual theorists addressed the existing theory and practice of textual editing (the classical eclectic text with critical apparatus) in print-era works, Schäfer addressed similar factors in the realm of rabbinic textual scholarship. He quoted Goldberg concerning

8 <http://www.usc.edu/projects/pre-project/graphics/index-04.html> (accessed on April 15, 2011).

9 http://www.jnul.huji.ac.il/dl/talmud/intro_eng.htm (accessed on April 15, 2011).

10 <http://www.biu.ac.il/js/tannaim/sources1.html> (accessed on April 15, 2011).

11 Similar views of rabbinic works were advanced by another German scholar, Hans-Jürgen Becker, (2000).

the nature of rabbinic works, “‘Once it has been written, every text is exclusively synchronic, all the textual units (*textemes*) exist simultaneously. . . . The synchronicity of the text is . . . the simultaneous juxtaposition of the various units, independent of when the units originated’”(Schäfer, 145). In other words, in Goldberg’s view, rabbinic texts are not susceptible to diachronic analysis. This presents a problem: in order to study any work, “Goldberg himself must finally decide on one text, and in doing so—in many cases anyway—must decide *against* one or several other texts” (ibid). This involves the study of textual history, which Goldberg’s thesis undermines.

Schäfer noted that while Goldberg saw all texts of a rabbinic work as synchronic, Neusner’s documentary method viewed rabbinic works as having a clear identity based on redactional characteristics. However different, these theories had one identical implication in practice: the text to be studied is chosen entirely apart from historical considerations. Schäfer noted that Neusner’s approach—researching the works either by a *textus receptus* or by a critical text where one exists—disregarded the textual history of rabbinic works, a move that Schäfer considered a liability.¹² So, in obviating both the external and internal historical aspects of rabbinic works, Neusner’s documentary method, while having the virtue of isolating individual rabbinic works as objects of scholarly research, had the weakness of ignoring some crucial characteristics of those works, namely their internal multiplicity of voices and the complexity of their history of transmission.

Neusner was aware of the weakness of the approach, established by the “Wissenschaft des Judenthums” in nineteenth-century Germany, that saw rabbinic works as collections which had a precise final redaction and an original textual form (or Ur-text) that could be accurately reconstructed from the variants to be found in extant manuscripts. This was in line with the view of textual criticism regnant in academic circles of that period and exerted a strong influence on the textual scholars who, through the mid-twentieth century, produced a number of critical editions of rabbinic works. Neusner later summarized his views, explaining that “from the very beginning of the documentary method, I took account . . . of the uncertainty of the text tradition for any given passage or even for documents as a whole.

12 As Daniel Boyarin wrote, “The problem is not that [Neusner] denies an internal history to the text, then, but that he does not take seriously the implications of that history for ‘asking the principal documents, one by one, to tell us their picture of the topic at hand’ (Neusner 1990, 185) The problem is that Neusner can only see a single socio-cultural formation as harmonious and undifferentiated, while in fact . . . [n]o document except the most simple ever consists of ‘a single continuous and harmonious statement’ (184)” (Boyarin 1992, 458).

Indeed, the uncertainty of readings in any one passage provoked the search for recurrent and large-scale uniformities. In the Mishnah, for example, the method focused upon the characteristics that recur through the document, not on the details that appear only here or there. . . . At no point does my description of a document rest upon a specific reading or unique traits that occur in some place” (1999b, 76). He based this approach on his observation that “every Rabbinic document we possess from the formative age, however diverse or fluid the text tradition on which we work, exhibits throughout its textual testimony precisely those uniformities of rhetorical, topical, and logical traits that come under description in the documentary method” (ibid, 77). These distinct traits of individual rabbinic works secure the identity of those works despite the presence of variants.

Unfortunately, Schäfer ignored Neusner’s theoretical and practical work on redactional identity. Instead, he approached the subject on a purely textual basis. “Thus, to give an example, both Vatican manuscripts of the Bereshit Rabba (MSS Vat. Ebr. 60 and 30) represent texts which are quite different from that of the London manuscript (MS British Museum, Add. 27169) . . . The variations are sometimes so great that the redactional identity of the work is questionable. Is it meaningful to speak of one work at all, or rather of various recensions of a work?” (Schäfer 1986, 146). Even more, Schäfer questioned whether these manuscripts are so autonomous that Bereshit Rabba may be considered “merely an ideal or fictitious entity” (ibid, 146).

Schäfer used the relationship between the Mishnah and Tosefta as an example of his views about the nature of rabbinic works. His remarks are relevant to my thesis.

The realization has long been generally accepted that simple dependence models are senseless. The Mishnah is not dependent on the Tosefta, nor is the Tosefta as a whole dependent on the Mishnah. The separate investigation of individual tractates produces a much more complicated picture. Although it can be shown that for the main part of the material, the Tosefta presupposed the Mishnah, and is to be understood as its very first commentary, this result cannot be applied to all tractates. There appear to be Mishnah tractates which presuppose the Tosefta, and above all there are Tosefta tractates which identify it as an independent “work” *vis-à-vis* the Mishnah, in which the Tosefta does not refer to the Mishnah, at least not to the one extant today. Finally certain Tosefta tractates suggest that they appeal to another (earlier?) Mishnah than the one which became normative through the final redaction.

Here, too, the question is: which entities can be compared to one another? Quite obviously these are not “the” (one) Mishnah and “the” (one) Tosefta, for already this quite cursory review shows that we must distinguish between three different “Mishnahs”: a postulated Mishnah which can only be “reconstructed” from reference to it in the Tosefta; a Mishnah that has given rise to the Tosefta commentary; and a Mishnah which is by contrast to be regarded as a reaction to the Tosefta. Likewise, we obtain three different “Toseftas”: a Tosefta related to an

otherwise unknown Mishnah; a Tosefta appealing to the existing Mishnah; and a Tosefta completely independent of any Mishnah. . . .

Recent research attempts to evade the thus accentuated problem by no longer comparing ‘the’ Mishnah with ‘the’ Tosefta, but only individual Mishnah and Tosefta tractates. The relationship between Mishnah and Tosefta manifests itself differently in different tractates; accordingly, *different answers are concurrently possible*, depending on the situation of the individual tractate. . . . but this picture, too, referring to every tractate as a whole, remains static. Although there is, as yet, no substantially detailed investigation into the relationship between individual Mishnah and Tosefta tractates, it would hardly be too speculative to predict that the same problem will arise on the tractate level as on the level of the Mishnah as a whole *versus* the Tosefta as a whole. Even on the level of the individual tractate, *one* constant factor determining the relation will not always emerge, but the individual tractate, too, will contain different material which, *within the same tractate*, requires different models of the relation between Mishnah and Tosefta. Thus the problem of the boundaries of a work, with regard to the relationship between Mishnah and Tosefta, as well as to the extent of delimitation of the “works” Mishnah and Tosefta, becomes more acute. We are finally referred to “raw material,” to relatively small literary units, that can only be interpreted and compared as such, and no longer as exactly determinable parts of well-defined works. (ibid, 147–49)

Subsequent scholarship has confirmed Schäfer’s view that varying relationships between the Mishnah and Tosefta exists on the sub-tractate level.¹³ There is clearly no single textual relationship between the two works.

It is hoped that these examples will be sufficient to draw attention to the underlying problem. The questioning of the redactional identity of the individual works of rabbinic literature inevitably also disavows the research approach to the work at the level of the final redaction. The terms with which we usually work—text, “Urtext,” recension, tradition, citation, redaction, final redaction, work—prove to be fragile and hasty definitions that must subsequently be questioned. What is a “text” in rabbinic literature? Are there texts that can be defined and clearly delimited, or are there only basically “open” texts, which elude temporal and redactional fixation? Have there ever been “Urtexte” of certain works, with a development that could be traced and described? . . . What distinguishes redaction from final redaction? What lends authority to the redaction? Or is the final redaction merely the more or less incidental discontinuation of the manuscript tradition?

All these questions . . . point to one basic problem, namely the relation between text and time. When the individual work of rabbinic literature . . . is no longer a stable quantity, provides no fixed frame of reference within which closed systems can be worked out and placed in chronological relation to one another, it becomes extraordinarily difficult, if not virtually impossible, to ask adequate historical questions of the texts, and to answer them (ibid, 149–50).

Schäfer thus narrowed the issue down to “relatively small literary units,” while at the same time avoiding the issue of redactional traits that Neusner had carefully and repeatedly

13 See especially Houtman (1997) and Jaffee (2001).

emphasized in published research since the 1970s. This alone is enough to call Schäfer's thesis into question. But there is another problem. Schäfer hoped that his examples of Berishit Rabba and the Mishnah/Tosefta relationship would demonstrate that the redactional identity of rabbinic works is questionable or nonexistent. However, as obvious as it may have seemed to Schäfer, he did not sufficiently demonstrate the connection between textual variants and redactional identity. (Is there no *Hamlet* because there are three versions with thousands of variants?) Schäfer has surreptitiously *defined* redactional identity vis-à-vis textual history. A clear and unified textual history would presumably yield a clear redactional identity. An unclear or variable textual history undermines the idea of redactional identity. Thus, like the rest of the German school, Schäfer emphasized instability and openness by focusing on variants and variation while deemphasizing the common textual material and characteristic traits found among documentary expressions of a work.

Schäfer asserted that since rabbinic works are “artificial products,” (ibid, 151) they are difficult to separate from one another. All we have are manuscripts, which *do* have a clear identity. “Before we speak of ‘works’, we should analyze the manuscript traditions of the works concerned as well as the whole of rabbinic literature in its diverse relations, and compile a nomenclature of the manuscript traditions . . . Only when this step has been taken shall we possibly also be able to make more reliable statements about individual works of rabbinic literature and their boundaries” (ibid, 150). Even after such analysis, our focus would not be on ‘the’ text as such, as if it can be fixed in time and space, but rather the history of the text as reflected in the transmission of its manuscript traditions” (ibid, 152).

Schäfer's argument reflected a clear shift of focus away from any particular stage in the history of a work (in particular, what is usually referred to as the redaction or final redaction) but to the history as a whole. This gives the appearance of an increased emphasis on both the particulars of that history—the manuscripts, the first impression, fragments, citations in other works, etc.—and on the work as a whole. However, Schäfer's attempt to salvage something concrete from his agnostic approach had its own weakness—the virtual impossibility of confidently reconstructing a history of the text based on manuscript traditions and other data that are late, sparse, and varied. Who knows how representative the scattered manuscripts we possess actually are? Imagine, for example, that *Hamlet* were represented only by the Bad Quarto, fragments of a nineteenth-century printed edition, and a DVD of Kenneth Branagh's 1986 film version. Would this enable us to present “a history of the text” with confidence? This is not far from the disjointed situation that prevails in the textual history of early rabbinic works.

What, then, are the materials from which to construct a textual history of a rabbinic work? A smattering of witnesses that remain from a rich oral tradition (part of which was never written down and thus has been irretrievably lost) and the written and printed records. But Schäfer, using a concept that originated in the scholarship of print-era works that generally have a rich documentary history, did not address the fragmentary evidence available for the construction of the textual history of rabbinic works. It would seem, then, that he did not succeed in establishing a sound basis to assert that a “history of the text” is any clearer a reflection of actual history than critical editions’ reflection of the “final redaction” of a work.

And yet, it is difficult to fault Schäfer’s argument that without close investigation (and sometimes not even then), the chronological priority of a text in one work over a similar or parallel text in another cannot be assumed. Thus, though Work B may have been redacted after Work A, a specific portion of Work B may in fact have been composed (orally or in writing) earlier than its parallel in Work A. At the same time, a portion of Work B may be commenting on an earlier version of a text now found in altered form in Work A. Moreover, these works have all almost certainly undergone change in the process of oral or written transmission. Thus, there are a number of possible diachronic relationships between texts found in two or more documents or oral compendia. These very scenarios are all reflected in recent scholarship of the Mishnah/Tosefta relationship.

The work of the German and Anglo-American textual theorists, represented in rabbinic studies by Schäfer, necessitates a certain caution about claims concerning the relationship between whole works. Taken at face value, Schäfer’ broad claims about redactional identity would undermine my thesis question, which compares the Mishnah and Tosefta as works with clear redactional identities. If he is correct, I could, at best, compare one or more Mishnah manuscripts with one or more Tosefta manuscripts. Any conclusions I might draw from this comparison would be relevant only to those documents and not to the works called “Mishnah” and “Tosefta.” Before proceed with my thesis, it is crucial for me to identify a sound basis for considering the Mishnah and Tosefta as works, and not merely names given to an array of discrete manuscripts and printed editions. I will begin with Chaim Milikowsky’s response to Schäfer’s article.

Milikowsky (1988) strongly disagreed with Schäfer’s underlying premises, methodology, and conclusions, which he saw as overly skeptical. Where Schäfer saw great instability and questionable redactional identity of rabbinic works, Milikowsky saw a manageable number and character of variations and clear redactional identity except in the

case of some works produced late in **the Amoraic period (225 - @500 C.E.)**. Although conceding a few points to Schäfer (such as the multi-dimensional relationship between Mishnah and Tosefta and the appropriateness of synoptic texts for some rabbinic works), Milikowsky took issue with Schäfer's approach to redactional identity.

Milikowsky concurred with Schäfer's emphasis on the study of manuscripts, but disagreed that a focus on manuscript history is the only viable option in the study of rabbinic works. Unlike Neusner, he did not focus on redactional traits, but engaged Schäfer on Schäfer's own turf—the texts of manuscripts and works. He considered Schäfer's assertion that works such as Bereshit Rabba lack a clear redactional identity as “an extreme claim and one would expect it to be preceded by extensive textual analysis of at least several rabbinic works. Schäfer's argument is programmatic rather than analytic, and at its core appears to be based upon impressionistic assumptions which, to my mind, do not withstand careful scrutiny” (ibid, 202). He continued, “the question of recensional variation should not be identified with the question of redactional identity” (ibid, 204). Thus, “in contrast to Schäfer's suggestion that the variations among the manuscripts are so great that we must doubt the redactional identity of much of rabbinic literature, I would like to suggest that we have barely begun the groundwork which will let us decide if recensional variations exist” (ibid, 204). In other words, in stark contrast with Schäfer, Milikowsky did not equate recensional variation with unsure redactional identity nor did he grant that recensional variation has even been established as a characteristic of rabbinic literature. He thus identified a primary weakness in Schäfer's approach: Schäfer's assumptions are not supported by extensive textual analysis that would demonstrate that rabbinic works have recensional variations and lack clear redactional identity.

In his rejoinder, Schäfer (1989) asserted that there are additional problems in determining the redactional identity of rabbinic works.

The crucial point in Milikowsky's line of reasoning is his understanding of “work” and “redaction.” This understanding, which determines his estimate of “variants” (of whatever kind), is a premise which is constantly presupposed but never established. Essentially, it signifies that every writing of rabbinic literature has two histories: namely, a pre-redactional and a post-redactional history. In the middle of these two histories stands firmly and unshakably the zero-point, like, as it were, an absolute watershed between the essentially distinct pre- and post-redactional histories.

The redactional identity of a work happens at this zero-point. (ibid, 90)

Schäfer attempted to undermine the idea that there is such a zero-point by emphasizing the production and presence of textual variants across a timeline that goes beyond the supposed point of final redaction. With such variation and instability, there can be

no zero-point; the ontological uniqueness of variants guarantees that rabbinic writings do not have a clear redactional identity.

Schäfer did not succeed in demonstrating that the identity of rabbinic works (including the Mishnah and Tosefta) is undermined by the variation and instability resulting from the lack of a clear redactional zero-point and the consequent blurring of the distinction between redaction and transmission. The reason for this may be social. Entirely apart from theoretical considerations, the number and nature of variants must reach a certain threshold in order to challenge coherent identity, and that threshold is not determined by a theoretical construct but by the way the work and its variations are perceived by individuals and social groups that are concerned with the work. The number and kind of variants in manuscripts and printed versions of *Hamlet* and of rabbinic works in general apparently do not pass the threshold where human beings and concerned social groups no longer perceive them as works with a clear identity.

There is now general agreement that most rabbinic works did not have a precise point of final redaction or an entirely clear distinction between redaction and transmission; that the texts of rabbinic works were fluid to one degree or another. However, Schäfer's claim that the resulting "variations are sometimes so great that the redactional identity of the work is debatable" (Schäfer 1986, 146) is not commonly accepted. For example, Alberdina Houtman (1997) presented a strong case that variants do not undermine the redactional identity of the two Mishnah and parallel Tosefta tractates she studied.

I will use the term "**definitive redaction**" rather than "final redaction" (which may imply that no further change took place) when referring to **the redaction that produced the version of the work that is known to us today, while allowing for some post-redactional change**. Based on a general knowledge of manuscripts of rabbinic works, and even acknowledging that most rabbinic works received a definitive redaction at some point, it is apparent that over time these works remained somewhat open, with later amoraic works generally being more open than tannaitic and earlier amoraic works. But eventually the amount of redaction and the number of those considered (or considering themselves) authorized to make anything but corrective scribal adjustments in the textual tradition decreased to a virtual zero-point, at which time the scribe felt he could no longer alter the manuscript he was copying. This process would likely have proceeded at different rates and terminated at different points in the case of different rabbinic works. At that historical zero-point (rather than at the point of definitive redaction) the text would be considered too holy or too stable to be altered—not so untouchable that spelling and minor variants of wording

could no longer be altered, but closed enough that anyone working with the text would know that it was no longer possible to add or subtract substance. This model envisions works, each with distinct characteristics (à la Neusner), which remained open for a limited amount of time (a generation or even a century or more) to materials that did not necessarily share the distinct characteristics of the so-called original text. This is very different from Schäfer's "open-text" concept (1986, 150), wherein works are never closed except (mistakenly, Schäfer believes) by the editor of a critical edition, an argument that is weakened by his failure to demonstrate that rabbinic texts were always open. Despite his important contributions to the field of rabbinic scholarship, Peter Schäfer did not succeed in displacing the idea of identifiable works that may be read and studied in reasonably accurate, though not perfect, texts.

The Milieu and Method of the Mishnah and Tosefta

Martin S. Jaffee took a mediating position between Schäfer and Milikowsky, and differed from Neusner, focusing on the oral and literary processes involved in the transmission and shaping of rabbinic works. For Jaffee, the issue of redactional identity is related to redactional intentionality rather than to variants and their status vis-à-vis the work. Speaking with special reference to the Mishnah, Jaffee wrote that "There is enough coherence in many Rabbinic compilations to justify the postulate of some sort of governing plan that informs the collection of intermediate units into larger documentary wholes (see Milikowsky 1988). Yet these wholes are just disjunctive enough in structure to caution us against subjecting them to hermeneutical torture in order to secure their confession of harboring some sort of comprehensive redactional intentionality" (1999a, 22). Thus, the definitive redaction of a rabbinic work will be coherent and yet have many loose ends and disparate elements (more than Neusner would acknowledge) that reflect received tradition in ways that may not fully synchronize with the intentions of the redactors.

For Jaffee, rabbinic works are "anthologies whose compilers did not hesitate to alter the form and content of the anthologized materials, for the materials being gathered were never perceived as 'works' in their own right. [These anthologies] are collections of materials . . . known widely from antecedent tradition (whether oral or written one often cannot judge). They were brought together, after complex transmission histories of their own, in diverse new constellations depending upon the framework in which they were anthologized and the diverse degrees of redactional intervention employed by their compilers" (ibid, 22-23).

The resulting compilations of tradition were not intended to be self-referential works such as a modern law code. As Jaffee pointed out, “the anthological compilation points attention away from itself to a world of speech in which there are no documents, but much discourse. It points to a literary culture in which the minds and intentions of authors are displaced by the logos that emerges among people engaged in mutual discourse over the shared text” (ibid, 26). In other words, the tannaitic compilation is a loose organic whole that is part and parcel of the oral cultural matrix in which it originated. Tannaitic disputes, narrative, and other materials have been sorted, selected, shaped, and supplemented, fashioning a static representation of the larger, fluid tradition. According to Jaffee, the rabbinic anthology was not a work in the modern sense: the entire tradition, fluid as it was, was the work and the anthology was one way of embodying and transmitting it. In Jaffee’s words, “this oral-performative tradition intermeshed in numerous ways with scribal practices in which written texts were memorized and oral conventions of diction and formulation shaped what was written. The crucial point is that Rabbinic oral-performative tradition must be imagined as a diverse phenomenon, incorporating aspects of rote-memorization of documents (fixed-text transmission) and more fluid oral-performative aspects (free-text transmission)” (ibid, 24). One implication of Jaffee’s work is that the Mishnah cannot be understood in purely literary terms or categories.

A balanced review of the most common theories about the purpose and nature of the Mishnah led Stemberger to conclude that “Given today’s knowledge, it is no longer possible unequivocally to determine whether M was originally conceived as a collection, a teaching manual, or a law code. Indeed this alternative arises only for modern readers (1996, 138). In other words, if the redactors of the Mishnah intended it to be a law code, their idea of a law code was sufficiently different from modern law codes to call into question the idea that its redactors included or excluded material and shaped the Mishnah in the same ways that modern legislative writers produce legal codes. The same applies *mutatis mutandis* to other efforts to categorize the Mishnah and Tosefta in terms of literary genres. As a result, the use of terms like “law code” is of little if any methodological value.

If Jaffee is correct, tannaitic works did not have the kind of redactional identity that one would expect from a single author because it was not the redactors’ intention to produce a work with a structure, ideology, and character that would set it apart from the larger tradition. In other words, there is no evidence that they intended to create a work that would eventually be seen as the epitome of the Oral Torah or a fixed-text substitute for the mixed fluid- and fixed-text tradition. The redactors of the Mishnah (and Tosefta) worked self-

consciously within, and for the sake of, a mixed oral-literary culture rather than to produce a self-contained and self-referential literary work.

However we do see, if somewhat dimly, the handiwork of the redactors. They worked with traditions they had received and continued to receive even as they worked. Insofar as the definitive redactions are reflected in our Mishnah and our Tosefta, we are able to synoptically compare—albeit without the oral cultural context—the way they selected, sorted, shaped, and supplemented received traditions they have in common. Although there is so much we do not and perhaps cannot know, thanks to this written record, we can approach these works—and especially their closely parallel passages—with the expectation that differences in ideology, if they exist, can be surfaced.

When Were the Mishnah and Tosefta Circulated in Written Form?

The synthetic work of Gunter Stemberger (1996) is crucial to my assessment of the tannaitic milieu general and the Mishnah/Tosefta relationship in particular. While most of the scholarship reviewed in chapter 2 assumed that written forms of the Mishnah and Tosefta were in circulation in the third century C.E., Stemberger's careful review of the tannaitic literature found little relevant material and no definitive evidence for this practice. Concerning the value of late evidence, Stemberger wrote that "The assumption of centuries of verbally or even factually accurate tradition by oral transmission is a postulate which cannot be proven. Although it may not be true for every single case, one will have to assume in general that traditions which first appear in late texts must for that reason be late, even if they are attributed to early masters" (1996, 40).

Stemberger also found no definitive tannaitic evidence for a prohibition against the writing down and circulation of written versions of the oral traditions. Accounts of such a prohibition are found in later works. If the tannaitic redactors had good reason to break a general prohibition against writing down oral traditions, it is remarkable that there are no disputes about how the sages should go about the task of writing it down and how the written versions were to be construed and used. In the tannaitic network of sages, prohibition and practice were expressed in halakhic terms. Even common practices that did not arise from halakhic norms were given halakhic shape by the SAGES. Whatever their origins, prohibitions that remained outside the halakhic framework had no halakhic force. This tautology expresses the sealed nature of the halakhic system. If there was a general prohibition against circulating oral traditions in writing, and that prohibition was halakhic, where are the

tannaitic halakhic disputes and guidelines that would govern the breaking of that prohibition? Under what conditions was it permissible to write down and circulate oral traditions? How were written forms to be used? What was their status—did they bear a special authority in relation to the rest of the tradition or did they, perhaps, even supplant it? What was the status of traditions or opinions not included in these writings? Such are the kinds of issues that normally impel the tannaitic sages to engage in disputes, the “bringing diverse legal principles into juxtaposition and conflict” (Neusner 1981, 266). A profound halakhic innovation was purportedly undertaken without any halakhic guidelines, apparently leaving the redactors to decide these matters on their own and the larger network of sages to receive it, or not, based on their own judgment of what circumstances allowed such writing of the oral traditions and how to go about it.

Stemberger also concluded that “It is not possible to determine the date of transition from purely private written rabbinic texts to the public use of written copies . . .” (ibid, 43). The burden of proof in these matters lies with those who assert that there was such a prohibition and that the Mishnah was circulated in writing at a given time. In the absence of a body of historically relevant evidence, an agnostic stance on these matters is appropriate and methodologically sound. I do not know that tannaitic works were circulated in written form in the third century or that they were not. Therefore, I will approach the Mishnah and Tosefta, as best I can, with their oral culture in mind, attempting to avoid assumptions that spring from post-third century developments and, even more, those that arise from modern ideas about textuality and authorship. While I will be careful to look for tannaitic evidence where Stemberger did not find it, I begin with an agnostic view that we do not know that the Mishnah, Tosefta, and halakhic midrash collections were circulated in written form in the third century.

A Synoptic Method

Scholars continue to be interested in the moment when rabbinic works such as the Mishnah and Tosefta gained their characteristic shape and content (what I term their “definitive redaction”). Thus, even though “the extant texts of the Mishnah stemming from medieval manuscripts cannot be regarded as identical to the textual traditions that circulated from the early third century . . . Nevertheless, these texts must serve” our research purposes (Jaffee 2001, 184). Despite the presence of numerous variants in the textual witnesses to the

Mishnah and Tosefta, their redactional identity is not compromised; the Mishnah and Tosefta may be considered works with distinct identities.

From a documentary perspective, the redactional identity of the Mishnah and Tosefta rely on the notion that they each received a definitive redaction, at the hands of one or more sages. For my research purposes, investigation of the Mishnah and Tosefta depends on the general reliability of the textual witnesses to that redaction to establish the perspectives of the Mishnah and Tosefta on the SAGES and their authority. From the perspective of redactional intentionality, I follow Jaffee's view that tannaitic works express their redactor's general intentions in selecting, sorting, shaping, and supplementing the oral tradition but are also permeated with divergent views embedded in the tradition and were incorporated by the redactors, perhaps unawares. Then again, there is no direct evidence that the redactors intended to fashion self-contained and self-referential works. If this was not their intent, the presence of divergent views that reflected the larger tradition would not have presented a problem to them.

Having established that the Mishnah and Tosefta are works with distinct identities, produced in the Tannaitic period, I will employ synoptic methodology in order to identify common and distinguishing characteristics of their literary constructs of "the SAGES." As Lewis W. Beck wrote concerning synoptic methodology, "Obviously, a definition of synopsis must involve some reference to a whole. Etymologically, the word means 'seeing together,' . . . [which] applies to two different procedures: a process of seeing things in their togetherness or a process of seeing together various things" (Beck 1939, 338). Employing Tannaitic and later works to shed light on Tannaitic culture involves the first procedure: documents and archeological data are approached with sophisticated methodologies to study and describe their "togetherness," that is, what binds them together in a common culture, which is an example of the "whole" mentioned by Beck.

In this thesis, I use the second procedure, reading the Mishnah and Tosefta together, side by side, in order to illumine the similarities and differences in the way they handle common material depicting the SAGES and their authority. This involves close reading, first of the individual texts, then side by side. When I have attained a satisfactory reading of the texts – that is, a reading that others would presumably find to be reasonable and reasonably comprehensive – I focus on what they say about the Mishnaic and Toseftan construals of the SAGES and their authority, especially as they are depicted in halakhic disputes with individual sages.

The synoptic approach governed my research and determines the sequence of chapters in this thesis. After addressing methodological concerns in this introduction, my first task is to review the work of previous religious and academic scholars, beginning with near contemporaries of the redactors of the Mishnah and Tosefta in the third century C.E. In chapter 1, I demonstrate that other rabbinic works of that century did not distinguish between Mishnaic and Toseftan materials and therefore did not view the two works synoptically. In chapter 2, I show how this changed no later than in the fourth century, by which time the Mishnah had become the focus of halakhic study while the Tosefta and other non-Mishnaic works became pedagogically and halakhically secondary. During this era, the Talmudim treated the Mishnah and Tosefta synoptically – not in a systematic way but text by text, including all of the Mishnah but only parts of the Tosefta or Tosefta-like material. The remainder of chapter 2 brings the review of scholarship of the Mishnah and Tosefta up to the present.

Early in my research, I developed a typology of the forms of tannaitic dispute so that I could classify the disputes in which the Mishnah and Tosefta show the SAGES expressing their views and interacting with individual, named sages. While one can engage in research and synoptic analysis without such a typology, it becomes essential when one is collating varieties of dispute in order to gauge their measure and influence in each work. I describe this typology in chapter 3

In chapter 4, I begin with a discussion of literary constructs in rabbinic works; the bulk of the chapter consists of an in-depth synoptic analysis of a parallel pair of Mishnah/Tosefta texts depicting the SAGES in their authoritative role. In chapter 5, I analyze the remaining thirteen pairs of Mishnah/Tosefta texts in my sample group. In chapter 6, I collate the readings of chapters 4 and 5 in order to discover patterns in how the two sets of texts, Mishnaic and Toseftan, represent the SAGES and their authority. In chapter 7, I distill the work of chapter 6 in order to present the literary construct of the SAGES held in common by the Mishnah and Tosefta and ways in which the two works differ in their literary construct of the SAGES. I conclude the thesis by offering a heuristic paradigm to explain the phenomena I have noted.

While the Mishnah and Tosefta are roughly synchronic works, having been redacted within decades of each other in the third century C.E., the body of tradition they worked with was produced by complex oral and, most likely, literary processes. Individual parallel units from Orders to tractates and down to individual disputes stand in a variety of diachronic relationships, as Schäfer observed in 1986. There is no certainty that all Mishnaic content

preceded the parallel Toseftan versions, even though the Mishnah was redacted first. In this thesis, I will address these diachronic relationships, including the activity of the redactors as they shaped the materials they received, where they are directly relevant to my analysis of individual passages.

Jacob Neusner defined synoptic works as “documents of a single canon that share sayings or stories in common” (Neusner 1986b, 111). As is commonly recognized, this applies to the Mishnah and Tosefta, which have in common an entire spectrum from word-for-word duplication to broad discussions of a common set of topics and loosely-related material. Neusner continued, “Studying such synoptic texts ‘synoptically’ focuses upon the character of the shared materials and upon the diverse modes of utilization, in two or more documents, of sayings or stories held in common” (ibid.). The parallel texts are read closely, first independently and then together, to reveal similarities and differences in structure, wording, and thought. Typically, the process of analysis causes further review of the texts and the surfacing of previously unnoticed similarities and differences. In chapter 2, I will review the work of scholars for whom the synoptic relationship of the Mishnah and Tosefta was so obvious that they consistently used some form of synoptic comparison in their study of these texts without overtly drawing attention to that fact.

Synoptic comparison has usually been employed with the presupposition that the Tosefta is a commentary on, or supplement to, the Mishnah. More recently, some scholars have employed a synoptic method to surface and demonstrate alternative models of the dependency relationships between the Mishnah and Tosefta, for example the notion that the Mishnah is a commentary, as a whole or in part, on an earlier version of the Tosefta. Scholars of both groups have this in common: a synoptic method is used as a tool to establish and build upon a model that focuses sharply on the diachronic relationships between the Mishnah and Tosefta as the key to unlocking their meaning.

Judith Hauptman claimed, for example, that the Mishnah did not need to explain matters fully but could assume that its readers would be familiar with extraneous material that spelled things out in greater detail (2000, 29). Hauptman (2005b) suggested that the extraneous material consisted of a commentary on an earlier Mishnah. This commentary was later supplemented and became our Tosefta. In order to recover the meaning and message of the Mishnah and Tosefta, one must adopt this paradigm of the diachronic relationship between the two works.

With Hauptman, I believe that only a synoptic approach is adequate to the task of acquiring a better understanding of the meaning and message of the Mishnah and Tosefta.

Clearly, reading the Mishnah or the Tosefta separately will lead to misunderstandings, small and large. However, Hauptman did not establish that there is a uniform diachronic relationship between the Mishnah that one can rely on when using her synoptic approach.

It is significant, though, that Hauptman, along with most scholars, adopted the assumption that reading the Mishnah and Tosefta synoptically in our time mirrors the way they were read in their own time. While there are clearly massive inter-textual associations between the two works—and these associations form the basis for a synoptic approach—I have found no scholarship to sustain the idea that they were viewed in that manner in the third century. In the current state of knowledge about tannaitic works and their oral environment, a more modest synoptic approach looks simply for a better understanding of the Mishnah and Tosefta while acknowledging the limits of this methodology.

Since there has never been a claim, much less a demonstration, that the Mishnah and Tosefta express different perspectives on major issues with which they are concerned, I employ a synoptic approach primarily to see if such a claim can be established and, if it can, to lay the groundwork for an explanation of these perspectives. My concern is how the Mishnah and Tosefta construe the authority of the SAGES, since halakhic authority was a critical concern for Tannaitic Judaism and the SAGES were clearly authoritative in some way. Thus arises my thesis question, “How do the Mishnah and Tosefta depict the authority of the SAGES as a group?” Do they portray that the SAGES in substantially the same way or do they differ? If they differ, how can this be explained? Thus, I adopt a synoptic approach in order to uncover diachronic relationships that affect meaning and to compare the views of the definitive redactions concerning the SAGES and their authority.

To accomplish these goals it is necessary to avoid the pitfall of comparing too little material, e.g., only one pair of parallel tractates such as Mishnah and Tosefta Parah. Considering the numerous possible relationships between parallel Mishnah and Tosefta tractates, one could not produce credible conclusions about the relationship between the whole of the Mishnah and Tosefta. On the other hand, the sheer volume of the Mishnah and Tosefta precludes a full analysis of these entire works in this thesis. In addition, such an analysis could fall prey to the methodological weakness of finding evidence spread throughout the works that supports the writer’s initial impressions, while ignoring contrary evidence. Therefore, I sought a middle course between one or two tractates on the one hand and the whole works on the other.

The Mishnah and Tosefta share material that is primarily halakhic in character, consisting of disputes about what is commanded of Jews, what they must do or not do, what

is permitted or not permitted, what is ritually pure or impure, etc. The shared material of particular concern to this thesis is neither the sayings of individual sages nor stories about them but the many disputes involving the SAGES. Given the very large number of disputes in the Mishnah and Tosefta, it is necessary to limit my research to a representative body of texts. I begin by limiting my scope to the parallel Orders of Mishnah and Tosefta Seder Moed, each compromising about one-sixth of its larger work. In this Order, the Tannaitic sages discuss how the festivals were practiced in the Temple and should be practiced in the synagogue and home. Several modern and contemporary works of scholarship have focused on tractates in this Order.¹⁴ Thus, choosing Seder Moed affords the opportunity to interact with recent scholarship that may relate to my thesis question. A search of physical and digital texts revealed that in Mishnah Seder Moed there are seventy-six disputes involving the SAGES; in Tosefta Seder Moed there are seventy-one. I reviewed all these disputes in order to develop an approach to my thesis question. Within the group I found that fourteen instances of particular disputes that occur in both the Mishnah and Tosefta. For the sake of clarity, **I use the term “SAGES parallels” for these fourteen pairs in order to distinguish them from parallel material in which the SAGES as a group do not appear in both parallel passages, and from passages in which the SAGES do appear, but for which there is no parallel passage. Individual disputes involving the SAGES, with or without parallel, will be termed “SAGES disputes.”**

The fourteen SAGES parallels offer accounts of the SAGES as pivotal figures in identical or nearly identical halakhic situations, using the same halakhic approaches, literary structure, and language as non-parallel SAGES disputes. Therefore, these parallels bear directly on the issue of how the Mishnah and Tosefta synoptically depict the SAGES’ authority and the reception of that authority by other sages, commoners, and by the redactors of the Mishnah and Tosefta themselves.

During the course of my research, I will avoid evaluating the verisimilitude of Mishnaic and Toseftan accounts of historical and sociological realities. Although historical or sociological information may undoubtedly be gleaned from these accounts, my thesis question asks about the accounts themselves: “How do the Mishnah and Tosefta depict the

14 For example, Cohen (1935) on M. Shabbat; Abraham Goldberg (1986) and Fonrobert (2004, 2005) on Eruvin; Bokser (1984), Bokser and Schiffman (1994), Elman (1994, 1999b), and Friedman (1999 and 2004b) on Pesachim; Rubenstein (1995) and Heger (1999) on Succot; the translator/commentators of the Kohlhammer *Rabbinische Texte* series on several tractates; and Lieberman (1962) on the whole of Seder Mo’ed.

authority of the SAGES as a group?” I want to learn how the sages of early of Judaism thought about issues of group authority in their social network. Therefore, I follow the lead of Peter Haas (1987), whose study of the *am ha'arets* (**common Jews**) in rabbinic texts demonstrated that analyzing the rabbinic use of literary constructs is a methodological tool that illumines aspects of rabbinic thinking that remain hidden if we attempt to deal with such groups on an historical level.

It is assumed that the rabbinic literary constructs of groups (e.g., the *am ha'arets* and the SAGES) has some connection with the actual groups. They also have characteristics that are clearly stereotypes (every member of the group sharing identical traits), produced in the trans-generational social network of sages and given expression in their oral and written traditions. The definitive redactions of the Mishnah and Tosefta may embody further developments of the literary construct.

CHAPTER ONE

THE TANNAITIC MILIEU: MISHNAIC AND TOSEFTAN MATERIAL IN THE HALAKHIC MIDRASHIM

Scholarship concerning the relationship between the Mishnah and Tosefta has a long history, extending back to early Rabbinic Judaism. Reviews of that scholarship almost always begin with the Babylonian Talmud (Bavli or B., which was redacted in Babylonia) and the Palestinian Talmud (Yerushalmi or Y., which was redacted in Late Roman Palestine), since both of these works appear as expansions of the Mishnah and also mention a “tosefta” and cite text that is identical, or nearly so, to text found in our Tosefta. As far as I am aware, no literature review has included a discussion of how Mishnaic and Toseftan material was viewed in the halakhic midrash collections, which preceded the Talmudim, having been definitively redacted a few decades after the Mishnah and at about the same time as the Tosefta.¹⁵

Evidence for the connection between the halakhic midrash collections is found in their inter-textual relationships, their common language, and the extent to which they attribute sayings to virtually the same body of sages. As Daniel Boyarin put it, “with regard to the tannaitic midrashim . . . , very good evidence that they are indeed what they claim to be, edited collections of tannaitic interpretations of the Torah” (1992, 457–58). The four halakhic midrash collections under consideration in this chapter—the Mekhilta de-Rabbi Ishmael, Sifra, Sifré to Numbers, and Sifré to Deuteronomy—often cite or quote Mishnaic and Toseftan material. How, then, do these works that emerged from Tannaitic Judaism construe the relationship between this Mishnaic and Toseftan material?

Sifra Citations of the Mishnah and Tosefta

The research for this chapter rests on Ezra Melamed’s study, *The Relationship between the Halakhic Midrashim and the Mishnah & Tosefta* [H], published in 1967, which brings

¹⁵ Questions have been raised about the timing of the redaction of some of these midrashim, especially of the Mekhilta. For my purposes, the formation and definitive redaction of these works are both in view. If one or more midrash collections were redacted later than the others, the period under consideration would be lengthened but the observations about important characteristics shared by these works would not be rendered invalid.

together all identifiable Mishnaic and Toseftan material found in the four halakhic midrash collections mentioned above. Melamed believed that both the Mishnah and Tosefta received what I term their definitive redactions before the halakhic midrashim, and that therefore these collections include material quoted from the completed Mishnah and the Tosefta, although he allowed for the possibility that some material from an earlier version of the Mishnah is also cited. Thus, according to Melamed, the halakhic midrashim have little to say about the Mishnah and Tosefta in the period of their formation. His primary concern lay elsewhere, in the editorial techniques used by the redactors of the halakhic midrashim in their use, and sometimes alteration, of material taken from the completed Mishnah and Tosefta. While not addressing the implicit views of the halakhic midrash collections on the relationship between the Mishnah and Tosefta, Melamed arranged the primary sources so clearly that implicit views begin to emerge as one begins to examine the material apart from Melamed's perspective.

Melamed set out to analyze every citation of the Mishnah and Tosefta (and Mishnah- and Tosefta-like material) in the halakhic midrashim, categorizing the citations according to introductory formula and source (e.g., our Mishnah, an earlier Mishnah, or our Tosefta), then examine in detail how the redactors (and transmitters, including scribes and copyists), used, arranged, and altered the material before them.¹⁶ About a third of Melamed's work (9–78) focuses on Mishnaic and Toseftan material cited in Sifra. Because Sifra has such a large number of such citations (319 from the Mishnah and 89 from the Tosefta), he also uses the Sifra material to develop a system of classification. Since I agree with Melamed's finding that the citation patterns are identical in all the halakhic midrash collections, and the Sifra has the largest body of such citations, I will use Sifra's pattern of citations to represent all four midrash collections.

Sifra is a verse-by-verse commentary on the book of Leviticus while the Mishnah and Tosefta are organized by topic and do not always follow the biblical sequence of verses. In addition, two or more tractates of the Mishnah and Tosefta may apply material from the same verses to their different topics. Therefore, at times the Sifra, in proceeding from one verse to the next, cites material from more than one tractate of the Mishnah and/or Tosefta. When

¹⁶ I am not aware of any challenge to the thoroughness of Melamed's work. It is true, as Alexander (2006, 64–72) pointed out, that Tannaitic parallels are not always evident on the linguistic surface. There are numerous conceptual parallels that, on deeper analysis, suggest either common origins or dependence of one passage on another. Melamed did not include such material because of its lack of verbal similitude and citation formulas.

arranged in this way, it is clear that the Mishnah and Tosefta do not always present their material in the same order as is found in the base text, Leviticus. When the cited Mishnaic or Toseftan material does not follow scriptural sequence, Sifra rearranges them to conform to that sequence. For example, in Parashat Emor Parashah 3, Sifra follows the order in Lev. 20:16-24; the order of Mishnah passages cited is M. Bekhorot 7:3, 7:6, 7:6, 7:2, 6:2, 6:2, 7:3, 7:5. The Mishnah citations are ordered to conform to Sifra's agenda of following Scripture word-by-word and verse-by-verse. I am not aware of a single instance of Sifra using the order found in a Mishnah/Tosefta tractate rather than the sequence of Scripture verses, as a framework for its discourse. As Apothaker wrote, "Sifra operates for its own purposes and with its own agenda completely apart from its relationship with Mishnah and Tosefta as documents. Its subject of inquiry is neither Mishnah nor Tosefta but . . . Scripture and its authority to validate rabbinic culture as depicted in Sifra" (2003, 32). This rearrangement of the Mishnah and Tosefta to accord with the sequence of Scripture verses demonstrates, at the very least, that the Sifra—unlike the later Talmudim—did not consider it important to preserve the order of the Mishnah and Tosefta in its own discourse.

Melamed did not examine this pervasive pattern of citation, but focused on individual citations. One of his most important observations was that the vast majority of Mishnaic and Toseftan material found in Sifra is introduced with a set of common citation formulas. He reviewed the citation patterns in the halakhic midrash collections, work by work. An analysis of these citation patterns yields crucial data about the relationship between Mishnaic and Toseftan material as contextualized in the halakhic midrashim.

Most citations formulas include some form of the root אמר ("say"). The most frequent is מכאן אמרו ("from here they said").¹⁷ Others are אע"פ שאמרו, מפני שאמרו, זה היא שאמרו. Less common are quotations supplied in response to questions such as כיצד and מנין and citations associated with words such as מלמד and להביא or with a sage's name, usually indicating that stating the quoted material is actually the goal of the midrashic discourse. There is also Mishnaic and Toseftan material embedded in the Sifra's discourse without a citation formula.

I will offer five examples of מכאן אמרו and other citations of Mishnaic and Toseftan material in a format designed to highlight synoptic relationships between Sifra, Mishnah, and Tosefta. In the Sifra texts, I have formatted each word to indicate parallels in the Mishnah or

17 Sometimes spelled מיכן אמרו or abbreviated מ"א. For ease of reference, I will only use מכאן אמרו in my discussion.

Tosefta. Material unique to the Sifra is set in regular type, colored gray [חזק]. Text that is found in our Mishnah is set in bold [חזק]. Text found in our Tosefta is underlined [חזק]. Text that Sifra has in common with *both* the Mishnah and Tosefta is bold and underlined [חזק]. (Slight variations in spelling and wording are considered the product of transmission rather than derivation from different sources.)

1. Sifra uses Mishnaic text—Sifra Parashah 96, Perek 6:8 uses the אמרו מכאן formula to cite Mishnah Zevachim 11:5-7, a Mishnah text that has no Toseftan parallel.

ספרא פרשת צו פרק ו.ח.

מיכן אמרו בגד שיצא חוץ לקלעים ניכנס ומכבסו במקום קדוש. ניטמא חוץ לקלעים קורעו ניכנס ומכבסו במקום קדוש. כלי חרס שיצא חוץ לקלעים ניכנס ושוברו במקום קדוש. ניטמא חוץ לקלעים נוקבו ניכנס ושוברין במקום קדוש. כלי נחשת שיצא חוץ לקלעים ניכנס ומורקו ושוטפו במקום קדוש. ניטמא חוץ לקלעים פוחתו נכנס ומורקו ושוטפו במקום קדוש: [Codex Assemami]

On this basis, they have ruled, “If a garment were brought outside the veils, it must be brought in *again* and washed in a holy place. If it became ritually impure outside the veils, it must be torn [outside] and brought in *again* and washed in a holy place. If a clay vessel were brought outside the veils, it must be brought in and broken in a holy place. If it became ritually impure outside the veils, a hole must be made in it; *then* it must be brought in and broken in a holy place. If a copper [or brass] vessel were brought outside the veils, it must be brought in, scrubbed and rinsed in a holy place. If it became ritually unclean outside the veils, it must be reduced [perhaps by melting?], brought in, scrubbed and rinsed in a holy place.”

This is the Mishnaic text:

משנה מסכת זבחים פרק יא.ה-ז

ה. בגד שיצא חוץ לקלעים, ניכנס ומכבסו במקום קדוש. ניטמא חוץ לקלעים קורעו [ני]כנס ומכבסו במקום קדוש.
ו. כלי חרס שיצא חוץ לקלעים ניכנס ושוברו במקום קדוש. ניטמא חוץ לקלעים נוקבו ניכנס ושוברו במקום קדוש:
ז. כלי נחשת שיצא חוץ לקלעים ניכנס ומורקו ושוטפו במקום קדוש. ניטמא חוץ לקלעים פוחתו ניכנס ומורקו ושוטפו במקום קדוש: [Kaufman]

If a garment were brought outside the veils, it must be brought in *again* and washed in a holy place. If it became ritually impure outside the veils, it must be torn [outside] and brought in *again* and washed in a holy place. If a clay vessel were brought outside the veils, it must be brought in and broken in a holy place. If it became ritually impure outside the veils, a hole must be made in it; *then* it must be brought in and broken in a holy place. If a copper [or brass] vessel were brought outside the veils, it must be brought in, scrubbed and rinsed in a holy place. If it became ritually unclean outside the veils, it must be reduced [perhaps by melting?], brought in, scrubbed and rinsed in a holy place.

The Mishnah text is quoted word-for-word in Sifra. This indicates that either this Mishnah text was already fixed at the time it was incorporated into Sifra or that the Sifra text was scribally conformed to the Mishnah at a later date.

2. Sifra uses Toseftan text—Here Sifra Parasha Kodoshim, Perek 8:3 uses the *מאכן אמרו* formula to cite Tosefta Demai 2:5, which has no Mishnaic parallel,

ספרא פרשת קדושים פרק ח

[כְּאַזְרַח מִכֶּם יִהְיֶה לְכֶם הַגֵּר] (ג) כְּאַזְרַח מִה אֲזַרְח שְׁקִיבֵל עָלָיו אֶת כָּל דְּבָרֵי הַתּוֹרָה אִף גֵּר שְׁקִיבֵל עָלָיו אֶת כָּל דְּבָרֵי תוֹרָה. מִיכָן אָמְרוּ גֵר שְׁקִיבֵל עָלָיו אֶת כָּל דְּבָרֵי תוֹרָה חוּץ מִדְּבַר אֶחָד אֵין מִקְבֵּלִין אוֹתוֹ. ר' יוֹסֵה בִּירְבִי יְהוּדָה אוֹי אִפִּילוּ דְּבַר קָטַן מִדִּקְדוּקֵי סוֹפְרִים: [Codex Assemani]

[“As the native among you shall be to you the proselyte” (Lev. 19:34).] Just as a native is one who has accepted responsibility for all the teachings of the Torah, so a proselyte is to be one who has accepted responsibility for all the words of the Torah. On this basis they have ruled: A proselyte who accepted responsibility for all the words of the Torah except for one thing – they do not accept him. R. Yose b. R. Judah says, “Even if it was the smallest matter among the details [contributed by] the scribes.”

This is the Toseftan text:

תוספתא דמיי ב.ה.

. . . גֵּר שְׁקִיבֵל עָלָיו כָּל דְּבָרֵי תוֹרָה חוּץ מִדְּבַר אֶחָד אֵין מִקְבֵּלִין אוֹתוֹ. ר' יוֹסֵה בִּירְבִי יְהוּדָה אוֹמֵר אִפִּילוּ דְּבַר קָטַן מִדִּקְדוּקֵי סוֹפְרִים: [Lieberman]

A proselyte who took upon himself all the obligations of the Torah except for one item— they do not accept him. R. Yose the son of R. Judah says, “Even [if it be] a minor item from among the stipulations of the scribes.”

Sifra cites the Toseftan text word-for-word, with the exception of the spelling of Rabbi Yose’s name. Like the citation of the Mishnah, this indicates that this Tosefta text was fixed at the time it was incorporated into Sifra or that the Sifra text was scribally conformed to the Tosefta at a later date.¹⁸

3. Sifra uses text found in both the Mishnah and the Tosefta—Sifra Parashah 96, Perek 8:6a uses the *מאכן אמרו* formula to cite material that is found in both M. Shekalim 8:6-7 and T. Shekalim 3:16.

¹⁸ If the Tosefta was redacted still later, it is also possible that it was scribally conformed to the wording found in Sifra.

ספרא פרשת צו פרק ח.ו.

מיכן אמרו **בשר קדשי קדשים שניטמא בין באב הטומאה בין ביולד הטומאה בין בפנים בין בחוץ בית שמי אומרים הכל ישרף בפנים חוץ משניטמא באב הטומאה בחוץ. ובית הלל אומרים הכל ישרף בחוץ חוץ שניטמא ביולד הטומאה בפנים** דברי ר' מאיר. ר' יהודה או' בית שמי אומרים הכל ישרף בפנים חוץ משניטמא ביולד הטומאה בחוץ ובית הלל אומ' הכל ישרף בחוץ חוץ משניטמא באב הטומאה בפנים. **רבי אליעזר או' את שניטמא באב הטומאה בין בפנים בין בחוץ ישרף בחוץ ושניטמא ביולד הטומאה בין בחוץ בין בפנים ישרף בפנים. ר' עקיבה או' את שניטמא בפנים בין באב הטומאה**
[Codex Assemani]

On this basis they have ruled, Meat of Most Holy Things which became ritually impure, whether from a generative source of ritual impurity or a derivative source of ritual impurity, whether inside or outside [the courtyard], Beit Shammai say “Everything must be burned inside, except that which became ritually impure from a generative source of ritual impurity *while* outside.” But Beit Hillel say, “Everything must be burned outside, except that which became ritually impure from a derivative source of ritual impurity *while* inside.” [These are] the words of R. Meir.

R. Judah says, “Beit Shammai say that everything must be burned inside, except that which became ritually impure from a derivative source of ritual impurity *while* outside,” but Beit Hillel say “Everything must be burned outside, except that which became ritually impure from a generative source of ritual impurity *while* inside.”

R. Eliezer says, “That which became ritually impure from a generative source of ritual impurity, whether inside or outside, must be burned outside, except that which became ritually pure from a derivative source of ritual impurity, whether inside or outside, must be burned inside.”

R. Aqiba says, “That which became ritually impure inside, whether from a generative source of ritual impurity or a derivative source of impurity, must be burned inside.”

This is the Mishnaic text:

משנה מסכת שקלים פרק ח.ו.ז

ו בשר קדשי קדשים שניטמא בין באב הטומאה בין בוולד הטומאה בין מבפנים בין מבחוץ, בית שמי או' הכל ישרף בפנים בפנים משניטמא באב הטומאה בחוץ ובית הלל אומ' הכל ישרף בחוץ משניטמא בוולד הטומאה בפנים.
ז ר' אליעזר או' את שניטמא באב הטומאה בין בפנים בין בחוץ ישרף בחוץ ואת שניטמא בוולד הטומאה ביו בחוץ בין בפנים ישרף בפנים. ר' עקיבה אומ' מקום טומאתו שם תהאמ' (sic) שריפתו [Kaufman]

Meat of Most Holy Things which became ritually impure, whether from a generative source of ritual impurity or a derivative source of ritual impurity, whether inside or outside [the courtyard], Beit Shammai say “Everything must be burned inside apart from that which became ritually impure from a generative source of impurity *while* outside.” But Beit Hillel say, “Everything must be burned outside apart from that which became ritually impure from a derivative source of ritual impurity *while* inside.”

R. Eliezer says, “That which became ritually impure from a generative source of ritual impurity, whether inside or outside, must be burned outside, and that which has become ritually impure from a derivative source of ritual impurity, whether outside or inside, must be burned inside.”

R. Aqiba says, “[In the] place [where it contracted] ritual impurity, there it must be burned.”

This is the Toseftan text:

תוספתא מסכת שקלים פרק ג.טז

בשר קדשי הקדשים שנטמא בין באב הטומאה בין בולד הטומאה, בין בפנים ובין מבחוץ, בית שמיי אוי הכל ישרף בפנים, חוץ משנטמא באב הטומאה בחוץ, ובית הלל אומי הכל ישרף בחוץ, חוץ משנטמא בולד הטומאה בפנים, ר' ליעזר אומי מה שנטמא באב הטומאה בין מבפנים בין בחוץ ישרף בחוץ. ושנטמא בולד הטומאה בין בחוץ בין בפנים ישרף בפנים, ר' יהודה אומי ר' ליעזר אומי כדברי בית שמיי. ר' עקיבא אוי כדברי בית הלל: [Lieberman]

Meat of Most Holy Things which became ritually impure, whether from a generative source of ritual impurity or a derivative source of ritual impurity, whether inside or outside [the courtyard], Beit Shammai say, “Everything must be burned inside, except that which has become ritually impure from a generative source of ritual impurity *while* outside.” But Beit Hillel say, “Everything must be burned outside, except that which has become ritually impure from a derivative source of impurity *while* inside.”

R. Leazar says, “What has become ritually impure from a derivative source of impurity, whether outside or inside, must be burned inside.”

R. Judah says that R. Leazar speaks according to the opinion of Beit Shammai.

R. Aqiba speaks according to the opinion of Beit Hillel [Lieberman].

The Sifra first cites the opinions of Beit Hillel and Beit Shammai as they appear in both our Mishnah and our Tosefta, indicating that this is the witness of R. Meir. The citation is very formulaic, with little variation among these three parallel texts. The Sifra continues by citing the witness of R. Judah, who advances another version of the opinions of Beit Hillel and Beit Shammai that is unattested in our Mishnah or Tosefta. Then comes the individual opinion of R. Eliezer, in wording all but identical to his opinion as found in our Mishnah. Our Tosefta transmits a variant of R. Eliezar’s opinion. Finally, the Sifra cites R. Aqiba’s opinion in a form similar to, but less decisive than, the one found in our Mishnah. The Tosefta asserts that R. Aqiba follows the opinion of Beit Hillel, which is not the case in the Sifra or the Mishnah.

4. Sifra weaves together differing Mishnah and Tosefta texts—In a number of passages Sifra weaves material found in our Mishnah and Tosefta with its own, resulting in subtle

composite passages. Melamed listed nineteen such passages (ibid., 62–64). Here Sifra Parashah Vayikra Dibbura Denidba, Parashah 7:8 uses material from M. Zevachim 6:4 and then T. Qorbanot [Zevachim] 7:3 with no citation language.¹⁹

ספרא פרשת ויקרא דיבורא דנדבה פרשתא ז. ח
כיצד הוא עושה עלה לכבש ופנה לסובב, באלו לקרן דרומית מזרחית, היה מולק את ראשה ממול עורפה ומבדיל ומוצ[י]א את דמה על קיר המזבח. ואם עשאה למטן מרגליו שלמזבח אפילו אמה אחת כשירה. רבי נחמיה ורבי אליעזר בן יעקב אומרים כל עצמה אינה נעשת אילא בראשו שלמזבח: [Codex Assemani]

How does he do it? He went up on the ramp and made a circuit around [the altar]; [when] he came to the southeastern corner, he would wring off its head at the neck and sever it, then drain its blood onto the side of the altar. And if he [drained it] downward even one cubit from the feet of the altar, it is valid. Rabbi Nehemiah and Rabbi Eliezer ben Jacob say, “All was done entirely only at the top of the altar.”

This is the Mishnaic text:

משנה מסכת זבחים פרק ו. ד.
...עולת העוף כיצד היתה נעש[י]ת, עלה בכבש ופנה לסבב, בא לו לקרן דרומית מזרחית, היה מולק את ראשה ממול עורפה ומבדיל, וממצה את דמה על קיר המזבח. [Kaufman]

How was the elevation offering of the bird prepared? He went up on the ramp and made a circuit around [the altar]; [when] he came to the southeastern corner, he would wring off its head at the neck and sever it, then drain its blood on the side of the altar.

This is the Toseftan text:

תוספתא מסכת קרבנות [זבחים] ז. ג.
עשאה... ממקום שעומד למטה אמה כשרה. ר' שמעון ור' יחנן בן ברוקה אומרים בראשו של מזבח היתה נעשית: ²⁰ [Zuckerman]

If he did it from the place where he stood and downward [by] one cubit, it is valid. R. Shimon and R. Yohanan ben Baroqah say, “It was done on the top of the altar.”

It is noticeable that the assertion that the sacrifice was performed at the top of the altar is attributed to different sages in the Sifra and Tosefta. R. Yohanan ben Beroqah was either a second generation Tanna or his fourth-generation grandson of the same name, while R. Shimon, R. Nehemiah, and R. Eliezer ben Jacob were third generation Tannaim. The discrepancy between Sifra and the Tosefta can be accounted for if these sages drew from the

¹⁹ כיצד is sometimes used as a question that transitions from uniquely Sifraic material to cited material. In this case, however, it is not used in this manner.

²⁰ With no emendations by Lieberman.

same tradition and then one or both redacted texts eventually presented revised versions of that tradition. However, even assuming common origins of passages in *all three* texts, it remains significant that Sifra, having received its definitive redaction after the Mishnah's, saw no need to mark off the Mishnaic text from material later incorporated into the Tosefta. There is no indication in this text that the early amoraic shapers of Sifra's definitive redaction attached any significance to the Mishnah/Tosefta distinction.²¹

5. Sifra weaves together several Mishnah and Tosefta texts—This is a second example of Sifra working diverse material into a fresh composition. Here Sifra Parashah Emor Parashat 1:7 uses material from M. Ketubot 4:4, T. Kiddushin 1:11, T. Sota 2:7, and T. Ketubot 4:1.

ספרא פרשת אמור פרשתא א.ז.
 . . . הבן אביו חייב בו מצוות למול ולפדותו וללמדו תורה ללמדו אומנות להשיא
 אשה מה שאין כן בבת. הבת אביה זכאי במציאתה במעשה ידיה ובהפר[ת] נדריה
 מה שאין כן בבן. . . . [Codex Assemani]

[This text is embedded in a series of distinctions such as father and mother, son and daughter, brother and sister.]

[Concerning his] son: his father is obligated concerning him [in these] commandments: to circumcise, to redeem [him if he is kidnapped], to teach him Torah, to teach him a trade, and to marry him off,²² [all of] which is not so in [the case of his] daughter. [Concerning his] daughter: her father is entitled to her earnings, the work of her hands, and to nullify her vows, which he is not [entitled to] in [the case of] the son.

This is the Mishnaic text:

משנה כתובות ד.ד.
 (האב זכאי בביתו בקדושיה בכסף בשטר ובביאה. וזכאי במציאתה ובמעשה ידיה
 ובהפר[ת] נדריה. ומקבל גטה. ואינו אוכל פרות בחייה. . . . [Kaufman]

[This text is found in an extended passage discussing the responsibilities and rights of a father concerning his daughter.]

The father has the prerogative in [the case of his] daughter concerning her betrothal with money, with a document, or with sexual intercourse, and he is entitled what she finds, the work of her hands, and to nullify her vows. And he receives [the money

21 I cannot be sure that when this Sifra passage gained its present form, the Mishnah and Tosefta already existed in something like their current form. However, it is clear that in the definitive redaction, the redactors saw no need to identify quotes as Mishnaic. My point is that, apart from Scripture, documentary boundaries have no significance in Sifra: only the tradition as a whole is significant.

22 Lit. "to cause him to wed a woman."

stipulated in] her document of divorce.²³ But he does not eat from the usufruct [of her fields] during her lifetime.

This is the Toseftan text:

תוספתא קדושין פרק א.יא
...איזו היא מצות האב על הבן, למולו, ולפדותו, וללמדו תורה, וללמדו אומנות,
ולהשיאו אשה... ר' יהודה א' כל שאין מלמד את בנו אומנות מלמדו ליסטות:²⁴
[Lieberman]

[This text is found in a passage that explores the obligations of fathers and sons toward each other.]

What commandment is incumbent on a father concerning [his] son? To circumcise him, to redeem him [if taken captive], to teach him Torah, to teach him a trade, and to marry him off . . . R. Judah says, Every [father] who does not teach his son a trade, it is as if he teaches him to steal.

This is the second Toseftan text:

תוספתא סוטה פרק ב.ז
האיש זכיי בבתו ובקדושיה, ובשטר, ובביאה. וזכאי במציאתה, ובמעשה ידיה,
ובהפר נדריה, מה שאין כן באישה. [Lieberman]

[This text is found at the end of a passage that concerns a married woman's infidelity and is followed by comparisons of men and women vis-à-vis other matters.]

The father has the prerogative in [the case of his] daughter concerning her betrothal [with money], with a document, or with sexual intercourse, and he is entitled to what she finds, the work of her hands, and to nullify her vows, [all of] which is not so in [the case of] his wife.

This is the third Toseftan text:

תוספתא כתובות ד.א
יפה כח הבעל, שהבעל אוכל פירות בחייה, מה שאי' כן באב.

[This text is found in a passage comparing the relative power of husband and father.]

Greater is the power of the husband, for the husband eats of the usufruct [of her fields] during her lifetime, which is not so for the father.

Sifra cogently and concisely compares a father's responsibilities and rights concerning his sons with those concerning his daughters. However, while it is fuller than any of the Mishnaic or Toseftan passages, it is not complete, failing to include some material that

²³ That is, if the divorce takes place or she became a widow before full marriage took place (e.g., see M. Ketubot 4:2).

²⁴ The first printing has מלמדו.

is found in the redacted Mishnah—“The father has the prerogative in [the case of his] daughter concerning her betrothal with money, with a document, or with sexual intercourse . . . he receives [the money stipulated in] her document of divorce. But he does not eat from the usufruct [of her fields] during her lifetime” (M. Ketubot 4:4)—as well as unique material from the Tosefta—“R. Judah says, ‘Every[father] who does not teach his son a trade, it is as if he teaches him to steal (T. Kiddushin 1:11).’ ”

Judith Hauptman discussed the relationship of the Mishnah and Tosefta passages (2005b, 157–64). She asserted that the Mishnah redactor cut, pasted, and modified the Tosefta texts about the responsibilities and rights of a father concerning his daughter to produce a text (M. Ketubot 4:4) that lists all these in one place. Even though the Mishnah gives the appearance of coherence and cogency, it is more clearly understood in light of the Toseftan sources (ibid, 159).

Unfortunately, Hauptman did not include the Sifra text in her discussion. If the Mishnah text can be characterized as a cut, pasted, and modified version of the Tosefta passages concerning father and daughter, even more so the Sifra, which also includes T. Kiddushin 1:11 about father and son, which is omitted by the Mishnah. By adding the Sifra passage and the additional Tosefta text to Hauptman’s discussion, we see a somewhat different overall picture. Taken together, the five texts from the three works exemplify the creativity and editorial freedom that may arise from a combination of oral performance, intermediate redaction, and definitive redaction in a social network that did not insist on uniform expression.²⁵

The Sifra passage in example 5 can be seen as a more complex example of the same type of process used in example 4. Sifra makes sophisticated use of Mishnaic and Toseftan material without citation formulas, making no distinction among its sources. Whether the texts depend on a common tradition and/or demonstrate intertextual dependencies, it is again clear that shortly after the close of the Tannaitic period and the redaction of the Mishnah, Sifra’s redactors felt no need to distinguish the material now found in our Mishnah in any way.

²⁵ See Jaffee (2001, chap. 6, esp. 111–24), “Composing the Tannaitic Oral-Literary Tradition,” in which Jaffee analyzes a Mishnah/Tosefta parallel, showing how these two works shaped a common anterior oral performative tradition from which they both drew.

It is noteworthy that when Sifra uses citation formulas, it cites both Mishnaic and Toseftan material with the same introductory language—מכאן אמרו.²⁶ This characteristic is most striking when it draws both Mishnaic and Toseftan material into a single passage prefaced by מכאן אמרו. This is common in Sifra. Thus, if we had no Mishnah or Tosefta texts in our hands today, nothing in Sifra would give us a clue that there were two such works, whether in formation or in definitive redactions. The importance of this observation should not be underestimated. Sifra routinely identifies human sources (the houses or sages who advanced various views) but shows no interest in identifying the work or works from which material has been drawn. For Sifra, both Mishnaic and Toseftan material seem to have shared one status.

In Sifra, Mishnaic and Toseftan material is cited either (1) to authorize the midrashic interpretation or elaboration of Scripture, or (2) as the goal of the midrashic discourse. In the case of citations that authorize the midrash, it would have been assumed that the community of sages was familiar with the cited material, in oral or written form, and accepted its authoritative nature. Citing unknown or non-authoritative material to support an argument would have made no sense. In the case of cited material as the goal of the midrash, it is also assumed that the community of sages was familiar with the citation, though perhaps there existed some question about its source or meaning, thus perhaps making its authority less certain, requiring a scriptural support, which Sifra supplied. In both types of citation, no distinctions are made between Mishnaic and Toseftan material, indicating that they both served authoritatively in the first type and required justification in the second type.

There is another pattern evident in Sifra citations: Mishnaic material is cited proportionally far more often than Toseftan. Melamed lists 319 Sifra citations of Mishnaic material and 89 of Toseftan. Granted that some citations are mixed, we can still approximate the quantitative relationship between the Sifra's Mishnaic and Toseftan citations. Mishnaic material is cited about 3.6 times more often than Toseftan. The disproportion is, however, much greater than this statistic indicates. Since the Tosefta is arguably three or four times

26 Such distinctions (e.g., between the Mishnah and baraitot, traditions “outside” the Mishnah) were not made until the Amoraic period. We do not find in the halakhic midrashim the equivalent of the Aramaic תניא and תנו רבנן, etc. that are used in the Bavli to identify baraitot. The lone exception is in the first printed editions of the Mekhilta, which have תנו רבנן at B'Hodesh Parashah 3; the cited material, and series of three questions about sources, is not found in any other tannaitic text.

larger than the Mishnah,²⁷ one would expect the opposite, that Toseftan material would be cited three or four times *more* often than the Mishnah. Since the proportion of citations is weighted toward Mishnaic material to the Toseftan is 3.6 to 1, rather than 1 to 3 or 4, the Toseftan material is actually cited less than 10 per cent as often as one would expect.

How can this underrepresentation of Toseftan material be explained? It could be that Toseftan material was considered less important than Mishnaic. This would, of course, undermine the perspective I have developed that Sifra did not distinguish between Mishnaic and Toseftan material and did not prioritize the Mishnah. However, if Sifra considered Mishnaic material more important or authoritative than the Toseftan, it is difficult to explain why it made no effort to distinguish the two kinds of material.

I suggest that another scenario is more likely: Sifra (both the pre-redactional traditions represented in it, and the way it was shaped in its definitive redaction) was simply more familiar with Mishnaic material than with Toseftan, or more likely to use it, because the Mishnah had been in circulation for several decades, whether in written or oral form is not certain as a well-edited compendium, while the Tosefta was either newly, or not yet, redacted. This would account for the underrepresentation of Toseftan material in the Sifra. If this is so, it is an early sign of the later tendency of this oral culture to rely on compendia, written or oral, as works of reference and study aids.

Other Halakhic Midrash Collections

Melamed's analysis of Sifré to Deuteronomy (1967, 79–93), the Mekhilta de-Rabbi Ishmael (ibid, 103–23), and Sifré Numbers (ibid, 123–41), shows that they are consistent with Sifra in the way they cite Mishnaic and Toseftan material. As in Sifra, Toseftan material is also much underrepresented in the other midrash collections.²⁸ Here are the comparative statistics for the four major halakhic midrash collections.

27 “T is 4 times the size of M” (Stemberger 1996, 154); “The Tosefta is also at least three times as large as the Mishna” (Goldberg 1987b, 283); The Tosefta is “approximately three times as long” as the Mishnah” (Mandel 2006, 318).

28 There is also no appreciable difference in pattern between collections traditionally attributed to R. Ishmael and his school (Mekhilta 10 per cent and Sifré Numbers 5 per cent) and those attributed to R. Aqiba and his school (Sifra 10 per cent and Sifré Deuteronomy 4 per cent).

Table 1 – Citations of the Mishnah and Tosefta in Halakhic Midrashim

	Mishnah Citations	Tosefta Citations	Proportion of M to T Citations	% of expected T Citations
Mekhilta	60	20	3 to 1	@ 10%
Sifra	319	89	3.6 to 1	@ 10%
Sifré Numbers	69	11	6.3 to 1	@ 5%
Sifré Deuteronomy	157	18	8.3 to 1	@ 4%

This underrepresentation of Toseftan material has not been observed previously. As noted above, it may be explained by the availability and convenience of a redacted Mishnah, whether in written or oral form, to the redactors of the halakhic midrash collections.

Like Sifra, the other halakhic midrash collections cite and incorporate material found in our Mishnah and Tosefta. Where citation formulas are used, they introduce both Mishnaic and Toseftan material. The most common is מכאן אמר followed by other forms of the root אמר and an assortment of lesser-used formulas. None of the halakhic midrash collections distinguish between Mishnaic and Toseftan material by the manner in which they cite or use them. Like Sifra, the other midrash collections sometimes combine Mishnaic and Toseftan materials in composite passages without identifying markers. As in the case of Sifra, without texts of the Mishnah and Tosefta in our hands, we would have no way to distinguish between Mishnaic and Toseftan materials and no indication that two separate bodies of material ever existed.

Given that the writing down “of an initially oral tradition introduces into the history of tradition a break that cannot be overemphasized” (Stemberger 1996, 40), the question of when the Mishnah and other third century works were produced in written form is of great importance. However, in the absence of sufficient evidence to establish when they were written down—or, more importantly, when they were circulated in writing—it should not be assumed that the halakhic midrash collections knew the Mishnah and Tosefta as written documents. Given the earlier redaction of the Mishnah, it would seem that its circulation in written form would have signaled the break in the tradition that Stemberger describes. It can safely be said, however, that if the halakhic midrash collections knew the Mishnah as a written work, they were unaware of the break that had been introduced. For them, the Mishnah was an oral or written compendium of traditions rather than a uniquely authoritative

work. There was apparently no advantage to be gained by mentioning the Mishnah as a source.

In conclusion, the earliest textual witnesses to the relationship between the Mishnah and Tosefta tell us that the Jewish sages who redacted the halakhic midrash collections in the mid- to late-third century C.E. did not see Mishnaic and Toseftan material as such but simply as part of the larger tradition. If they understood the Mishnah and Tosefta to have distinct identities, they did not attribute any significance to those identities.

Further Considerations

The relationship I have posited between the halakhic midrash collections and the Mishnah and Tosefta is challenged by the work of David Weiss Halivni, Jacob Neusner, and Shamma Friedman.

There is a longstanding dispute as to which form is older: midrash or mishnah. David Weiss Halivni argued for the primacy of the midrashic form,²⁹ extending this also to the primacy of midrashic over Mishnaic texts. Viewing the Mishnaic form as “abridged Midrash” (Halivni 1986, 52), Halivni wrote that the

dependency of the Mishnah on Midrashei Halakhah is manifold. The Mishnah quotes Midrashei Halakhah, sometimes verbatim . . . paraphrases them, and even abbreviates them in such a manner that at times a given phrase in the Mishnah is unintelligible when read without its source in Midrashei Halakhah. It is difficult to ascertain whether the author of the Mishnah assumed that Mishnah would be studied in

29 David Weiss Halivni (especially in *Midrash, Mishnah, and Gemara* 1986) is among those who have argued for the primacy of “the simple halakhic Midrash, in contrast to the comparatively late complex Midrash (ibid, 38). It stands to reason that discussion precedes and undergirds fixed law. It is also understandable that a culture focused on the Scriptures would base law on the Scriptures and learn law together with the underlying scriptural support. Thus, the form of midrash halakhah, which presents law in the form of scriptural commentary, must have preceded the Mishnaic form, laws expressed without scriptural support or rationale. According to Halivni, “the change from Midrashic to Mishnaic form did not take place until the destruction of the Temple in 70 CE.” Only the pressure of external circumstances provoked the sages to reduce halakhah to easily memorized Mishnaic form. Halivni wrote that “initially the Mishnah consisted entirely of fixed laws; the nonapodictic material, including Scriptural as well as logical motives, entered the Mishnah later, except, perhaps, for the very simple ones which may be old, having survived the change from Midrashic to Mishnaic form because the main impetus for the change – facilitating memorization—did not apply to them” (ibid, 57). The more complex midrashic or logical materials in our Mishnah entered later. But the hegemony of the Mishnaic form came to an end shortly after the comprehensive redaction of the Mishnah, when the midrashic form, embodying justified law, reasserted itself.

On the other hand, some scholars have claimed that “halakhah was not originally derived from Scripture, nor taught within the framework of exegesis” (Stemberger 1996, 127) and thus could not have originated in midrashim, however simple. Later, the midrashic form was created to link halakhah to specific Scriptures.

conjunction with Midrashei Halakhah or erred in thinking that a given phrase was clear enough; whereas, in fact, it was clear to him only because he had the Midrashei Halakhah before him (ibid, 53).

However, as Halivni recognized, the presence of so many Mishnaic parallels in the halakhic midrash collections presents a problem for his assertion of the primacy of the midrashic form. Ignoring other citation formulas, he addressed only the *מכאן אמרו* passages in the halakhic midrashim, noting that in the *מכאן אמרו* passages there are an (unspecified) number of “differences in the manuscripts concerning the presence of such passages” and a “few instances where there is evidence that the *mikan omru* passages are late” (ibid, 135, n. 48).³⁰ Although he admitted that it cannot be assumed a priori that all such manuscript variations represent scribal additions, “[c]hanges through addition are much more likely to occur than changes through omission, especially when the addition comes from such an authoritative book as the Mishnah. Few scribes would dare to omit a passage in the Midrashei Halakhah that has its parallel in the Mishnah, whereas many would do the reverse; that is, add passages to the Midrashei Halakhah that are found in the Mishnah” (ibid.).

It does not follow from Halivni’s remarks about the existence of some scribal insertions that all, most, or even many of the hundreds of *מכאן אמרו* passages are actually scribal insertions that were made to highlight material that also appeared in the Mishnah. More significantly, Halivni’s thesis is undermined by his failure to account for the numerous uses of *מכאן אמרו* (and other citation formulas) to introduce Toseftan and mixed Mishnaic/Toseftan material.³¹ Surely the scribes who were familiar with “such an authoritative book as the Mishnah” (ibid.) would not have undermined its authority by introducing non-Mishnaic insertions with the same citation formulas that were also used to introduce Mishnaic material. Taking into account the Toseftan *מכאן אמרו* passages would, in my opinion, have forced Halivni to reconsider his assertion that scribes may have engaged in a common practice of inserting (only) authoritative Mishnaic material in the halakhic midrash

30 Halivni did not specify what he meant by “late” (135, n. 48). If he meant “medieval,” then the motives that he presumed underlay the scribal addition of *מכאן אמרו* + Mishnah passage (in order to bolster the midrash with Mishnaic authority) would not explain the presence of *מכאן אמרו* + Tosefta passages, since the Tosefta did not share the Mishnah’s authoritative status during that period.

³¹ Halivni only examined citations that are introduced by *מכאן אמרו* in the halakhic midrash collections, as if only these parallels (and not those introduced with other citational formulas or introductory language) threatened his overall thesis that midrashic material found in the Mishnah depends on earlier midrash halakhah. Based on Melamed’s work and my examination of numerous passages introduced with other citation formulas, I find no pattern that would privilege *מכאן אמרו* in this way. In my view, this artificial exclusion of all overt parallels not introduced by *מכאן אמרו* seriously undermines Halivni’s observations about Mishnah/midrash relationships.

collections. Although it is easily conceivable that later scribes added some מכאן אמרו passages (introducing Mishnaic or Toseftan citations), only a detailed examination of all such occurrences (in context and in the manuscript evidence) could offer any hope of determining the number and significance of such additions. Pending such an examination, it can be observed that only a massive program of emendation could account for the number of scribal additions required to verify Halivni's theory. Halivni's silence about evidence for, and the significance of, such a program is another weakness in his argument. Thus, it is difficult to avoid the conclusion that Halivni's explanation of the presence of so many Mishnaic parallels in the halakhic midrash collections was a forced attempt to bolster his assertion of the primacy of the midrashic form.³² Apart from some later scribal additions, the vast majority of instances in which the halakhic midrashim introduce Mishnaic or Toseftan material with citation formulas (מכאן אמרו and others, whether or not they employ the root אמר) should be presumed to be genuine citations.

In *Uniting the Dual Torah: Sifra and the Problem of the Mishnah* (1990), Jacob Neusner sought to demonstrate that Sifra self-consciously presents itself as a critique of, and an alternative to, the Mishnah.³³ In Neusner's view, this critique of the Mishnah is clearly seen in Sifra's decision to use Leviticus as its base text rather than adopt a Mishnaic topical organization (1990, 78), as well as the Sifra's systematic demolition of the logic that sustains the Mishnah (ibid, 1).³⁴ Neusner based his claims on the nature of the relationship between Sifra and the Mishnah largely on his analysis of several rhetorical devices and formulas used by Sifra (1994a, 273, 286–87).

³² Moreover, even were Halivni's thesis demonstrable, it would not in itself reveal whether a particular midrash—or even an entire midrash collection—was composed before or after the Mishnah as a whole.

³³ Ronen Reichman (1998) claimed that a number of parallel texts show the reverse relationship, attempting to demonstrate that the redactor(s) of the Mishnah used a completed Sifra, a thesis that would support Halivni's paradigm. Critiquing Reichman's dissertation upon which the book is based, Stemberger (1997) rejected the majority of Reichman's analyses. Borner-Klein (2000) criticized Reichman's selective and unconvincing use of a limited number of texts. Thus, Reichman's conclusion that the Mishnah is dependent on Sifra is clearly overstated. However, if even a few of Reichman's analyses are correct, we would see once again that global statements about the relationship between Tannaitic works are questionable at best. Stemberger (2000) argued that Reichman had failed to consider various other possibilities such as the presence of traditions common to both the Mishnah and Sifra and "oral exchange between the rabbis engaged in both projects" (ibid, 214). As Stemberger summarized, "Sifra has undergone several stages of redaction extending over a long period; the redactors of the Mishnah certainly used early stages of Sifra (here I would agree in general lines, although not in detail, with D. W. Halivni) but later stages of Sifra clearly knew the text of the Mishnah and extensively quoted it" (ibid, 214).

³⁴ See also Basser (1990).

Neusner's analysis has been criticized by Howard Apothaker (2003, 364–67), who claimed that Neusner overemphasized the frequency and importance of these formulas, since they do not pervade Sifra and are quite sparse in some of its sections. According to Apothaker, this irregular pattern casts doubt on Neusner's analysis and his assertion that these formulas are crucial to understanding Sifra's relationship to the Mishnah.³⁵ Apothaker's work focused on the substantial concluding section of Sifra, *Dibbura deSinai*, which is based on Leviticus 25–27. For Apothaker, Sifra is not a reactive work, but operates for its own purposes and with its own agenda. Its subject of inquiry is not the Mishnah but Scripture and Scripture's validation of rabbinic culture as it is depicted in Sifra. Where that depiction intersects with the description of rabbinic culture in Mishnaic or Toseftan material, Sifra has something to say, framed according to its own agenda (2003, 32). Where it does not so intersect, it does not relate to the Mishnah or Tosefta. Apothaker also concluded that Neusner had underestimated the importance of other rhetorical characteristics used extensively in Sifra (ibid, 364–67). Finally, Apothaker (ibid.) and Harris (1995, 270, n. 36 and 273, n. 55) both claimed that Neusner misread several aspects of Sifra's rhetoric, thus distorting its relationship to the Mishnaic material it contains.³⁶

If Neusner's thesis that Sifra is a response to the Mishnah as a work were correct, one would be hard pressed to explain why Sifra cites Toseftan material in the same manner that it cites the Mishnah—that is, with the same citational formulas and introductory language,

35 Apothaker pointed out that, in the material he studied (*Sifra Dibbura deSinai*), the interpretation of Scripture precedes *מכאן אמרו* and almost always supplies the premise upon which cited material depends. "The premise is certainly more 'important' than applications that depend on it. Even more significant for our purposes, the citation of that premise is unique to Sifra" (2003, 398–99). One can imagine that in some cases, the premise was supplied in order to give a scriptural foundation to the cited material. However, it is at least as easy to read the interpretive material as the genuine foundation (both logically and chronologically) of the cited material. It is fair to say that we cannot conclude that all interpretive material *preceding* *מכאן אמרו* is always older, but neither can we assume that all the *cited* material is older. The chances are that both relationships exist, but to what relative degree is yet to be determined.

36 For example, Neusner claimed that Sifra uses the phrase *הלא דין הוא* ("Is it not logical?") as a major vehicle for its critique of the Mishnah. However, it seems more reasonable that the point in these passages is the sufficiency of Scripture rather than the deficiency of the Mishnaic form or logic. Apothaker commented that "In its hundreds of units *Sifra Dibbura deSinai* contains at most nine examples" of this formula" (2003, 365). Apothaker may have inadvertently underrepresenting the occurrence of the phrase in Sifra as a whole (it occurs about 150 times, a large percentage of which are in the first two parashiot). "The purpose for the use of the rhetoric is to demonstrate Scripture's non-superfluity" (ibid.). It is only one of many devices Sifra uses to "express that manifest purpose" (ibid.). If it is true, as I believe, that Neusner misread this formula and failed to account for other rhetorical devices that do not support his thesis, his entire paradigm of the relationship between Sifra and "the Mishnah" is undermined.

making no distinction between them. If Smith is critiquing Jones, why does he include material written by Schwartz mentioning that fact? Also, why would Sifra combine Mishnaic and Toseftan material (why would Smith combine Jonesian and Schwartzian material) in composites and larger blocks of material without in some way indicating that the Toseftan (Schwartzian) material was not central to its concerns? Since Neusner strongly advocated treating rabbinic works as highly distinct from one another, given that the authorship of each work sought to accomplish distinct redactional goals, his failure to account for Sifra's lack of differentiation between Mishnaic and Toseftan material is startling.

Another factor that complicates any analysis of dependency between the Mishnah (or Tosefta) and the halakhic midrashim is uncertainty about the pre-history of the halakhic midrashim.³⁷ If Stemberger was correct, the Mishnah and Sifra influenced and drew from each other, as well as from other sources, over a lengthy period of textual formation (2000, 214; see below). To depict the Sifra as a critique of the Mishnah oversimplifies the production of these texts.

In an unpublished study (2004), Shamma Friedman also took issue with the notion that the Mishnah reached maturity before material that entered the halakhic midrash collections even began to be formed. While Melamed (1967, 182) asserted that where a midrash halakhah has material in common with the Mishnah, the midrash halakhah is nearly always later, having incorporating material from the already-completed Mishnah, Friedman questioned what he called the "whole document approach,"³⁸ noting that if even a small number of counterexamples can be found, they would

37 Like the Mishnah and Tosefta, the redactional identity of the halakhic midrashim has been challenged. As I explained in the Introduction, I agree with Neusner that each of these works has its own redactional identity with distinct characteristics. At the same time—as Neusner's critics have pointed out—these works all include earlier material that was not necessarily reworked to reflect a strictly unified outlook or worldview. Tannaitic works "are not the product of a single author but of whole communities working over generations . . . [And thus] we do not know for sure whether a given citation is contemporary with the closure of the document or not, and the likelihood that it is older than that is at least as great" (Boyarin 1992, 456). In addition, tannaitic works as we have them today are expressions of an oral/literary tradition that remained active and open for some period of time even after they received their comprehensive redaction, and therefore it would not be unreasonable to expect to find some post-tannaitic material in them. Finally, our critical texts do not reflect precisely the texts of the original works (whether the text of the definitive redaction or of the work when it was closed). Neusner was encouraged by Finkelstein's work on the Sifra concluding that "what we have is what those original redactors gave us, more or less, and that variations in contents contributed by later copyists proved trivial" (Neusner 1990, 3). Even so, this does not demonstrate that the redactors intentionally refashioned all, or even most, of the material they used.

38 This refers to Melamed's view that the halakhic midrashim, as whole documents, are almost in their entirety later than the Mishnah and Tosefta, and thus the halakhic midrashim cite the

serve as an immediate refutation of the absolute validity of the regnant rules [that there is a whole document chronology: Mishnah to Tosefta to halakhic midrash collections]. The nature of [these] texts does not seem to jibe with the whole document approach. Indeed, each text seems to exhibit stratification, old materials embedded in the new, new materials added to the old. If the Mishnah had available to it old midrashim which did not survive in our corpus of halakhic midrashim, then other derashot in the Mishnah, which do appear in our halakhic midrashim, could also conceivably be part of the old midrashic traditions inherited *both* by the Mishnah and the existing midrashim. Why posit that a derashah fully integrated within the style and context of the Sifra is a quote from the Mishnah? It would rather appear to be an example of old midrashic traditions which were available to both.

Friedman provided several such counter-examples. Having made his case, however, he mistakenly stated that citations prefaced by *מכאן אמר* are indeed midrashic citations of the Mishnah.³⁹ He did not mention other citation formulas or that Mishnaic and Toseftan citations are not distinguished, a fact that undermines the black-and-white claim that the midrash collections cite the Mishnah.

Conclusion

Neither Halivni's emphasis on the priority of midrash, nor Neusner's thesis about Sifra and Mishnah, nor Friedman's counter examples undermine the evidence uncovered in Melamed's work that the citation formulas and the citations found in the halakhic midrash collections are (apart from a modest number of scribal additions) integral to those works. These formulas are used indiscriminately to cite what we can now identify as Mishnaic, Toseftan, and mixed material without distinguishing their sources in any way. This is difficult to explain if the Mishnah had already achieved a status that made Mishnaic material worth marking. As far as I can see, the Mishnah (or proto-Mishnah) had no such status vis-à-vis the Tosefta (or proto-Tosefta) during the Tannaitic period and at least up to the time of the definitive redactions of the halakhic midrash collections. It was important to identify a tradition with a named sage such as R. Meir or R. Yose but not to identify the Mishnah or Tosefta as sources. The

already-completed Mishnah (and the Tosefta), but the Mishnah and Tosefta never cite the midrash collections. Midrashic material in the Mishnah and Tosefta that is without parallel in the midrash collections must derive from earlier midrashim that did not survive.

39 Thus Friedman joins Halivni in making a methodological distinction between *מכאן אמר* and other citation formulas. Though I am not ready to concede this distinction, my thesis in this chapter—that the halakhic midrashim make no distinction between Mishnaic and Toseftan material—still holds even if we take only the approximately one hundred *מכאן אמר* citations in the halakhic midrash collections into account.

absence of any distinguishing marks assigned specifically to Mishnaic and/or Toseftan material in the halakhic midrash collections supports that claim.

My findings agree with the work of Alexander (1998 and 2006), who presented evidence that traditions found in the Mishnah and Tosefta (as well as Sifra and, by inference, the halakhic midrash collections generally) were first viewed as “equally valid performative versions of a broader legal tradition” (2006, 76) rather than as fixed texts with special authority. Thus, these traditions were authoritative, and could be cited with *מכאן אמרו* and other formulas, not because they were to be found in a certain work (Mishnah, Tosefta, etc.), but because they were part of the larger body of tradition with which the rabbis of late Tannaitic and early Amoraic periods were familiar. They did not claim to epitomize the tradition or to replace it. Once again, since the tradents and/or redactors of the halakhic midrashim did not see fit to distinguish between Mishnaic and Toseftan material in any way, it is reasonable to conclude that they did not see the significance of such a distinction. They did not view Mishnaic and Toseftan materials as separate works but as two expressions of a larger tradition. Since the halakhic midrash collections do not treat the Mishnah and Tosefta as discreet works, they do not approach them synoptically.

A dramatic change took place in the Amoraic period. “Many of the hermeneutical assumptions that rabbinic exegetes made about biblical scripture were now made with respect to the Mishnaic materials. Likewise, many of the exegetical strategies that the rabbis employed in the study of biblical scripture were now used in the study of Mishnaic texts” (Alexander 2006, 78). In addition to establishing the Mishnah as a distinct, authoritative work and relegating other tannaitic traditions to a lesser status, the Palestinian and Babylonian Talmudim express a great deal about the Mishnah/Tosefta relationship in the way they handle Mishnaic and Toseftan (or Tosefta-like) material. These issues will be explored in chapter 2.

CHAPTER TWO

THE MISHNAH AND TOSEFTA RELATIONSHIP VIEWED FROM THE TALMUDIC ERA TO THE PRESENT

The Talmudim

Reviews of the literature on the relationship between the Mishnah and Tosefta typically begin not with the tannaitic materials discussed in chapter 1, but with **the Talmudim—the Yerushalmi, which was redacted in Palestine ca. 400 C.E., and the Bavli, which was redacted in Babylonia during the sixth century C.E. or possibly a bit later.** Both Talmudim depend on the definitively redacted Mishnah (in two marginally different versions) in structure and content.⁴⁰ Although all material that the Amoraic period inherited from the Tannaitic period was considered authoritative in a general way, the Talmudim placed the Mishnah at the center of their discourse and thus accorded it a higher status than other tannaitic works. However, it is unclear how long it took for the structural status of the Mishnah to translate into clearly greater authority. The transition of the Mishnah from study-text to authoritative text may well have been a centuries-long process, as proposed by Alexander (2006).⁴¹ Even so, this authority is difficult to pin down because the Talmudim relate to Mishnaic material in a number of subtly different ways. For example, Fisch (1997) has shown how the Bavli sometimes finesses the authority of the Mishnah by reinterpreting it in a forced manner in order to achieve harmony between Mishnaic and other traditions, whether tannaitic or amoraic.

The Yerushalmi and Bavli both contain a small number of references to a “tosefta” (addition) or an “ancient tosefta.” Stemberger’s discussion of the interpretive history of the word tosefta in B. Sanhedrin 86a (1996, 151–152) highlighted the uncertainty of its relationship to our Tosefta. These and other occurrences of the word “tosefta” in the Talmudim are inconclusive for our purposes since none can be tied unambiguously to our Tosefta.

⁴⁰ The Yerushalmi relates to thirty-nine and the Bavli to thirty-six and a half of the Mishnah’s sixty-three tractates. The reasons for the apparent incompleteness of these works, and the reasons they often do not comment on the same Mishnah tractates, need not concern us here.

⁴¹ Alexander (2006, 77–81 and 115–16).

As Alberdina Houtman put it, “In the Amoraic period, there was no elaborated theory about the relationship between the Mishnah and the Tosefta” (1997b, 7). The talmudic sages had no interest in discussing the relationship between the Mishnah and Tosefta as works. Instead, they considered received tannaitic oral/literary tradition to be one fabric, though they framed their halakhic discussion in terms of the Mishnah, which was the work that most coherently (though far from completely) expressed tannaitic halakhah. The Yerushalmi and, especially, the Bavli are characterized by the intellectual pursuit of unity in the tradition. Their primary interests were to clarify law, reconcile the tensions in the tradition (sometimes giving priority to non-Mishnaic material), and draw out the deeper implications of the tradition that included the Mishnah and **baraitot** (sg., **baraita, a purportedly tannaitic text not found in the Mishnah**, including Tosefta-like texts,⁴² and material found in the halakhic midrash collections).

The talmudic sages did not discuss the inconsistency of receiving the entire tannaitic tradition as authoritative while according a significant measure of primacy to the Mishnah. Yet the Talmudim implicitly express a great deal about the Mishnah/Tosefta relationship in the way they handle Mishnaic and Toseftan (or Tosefta-like) material. Therefore, I will begin with a brief review of how the Talmudim treat these materials.⁴³

During the Amoraic period, the Mishnah gained structural priority as the “central text in the rabbinic curriculum of sacred study.”⁴⁴ Conceivably, a mishnah (**“Mishnah” refers to the entire work while “mishnah” refers to a discrete text within that work.**) portion was recited, followed by a complex oral performance by one or more sages and, to some degree, their disciples, during which other tannaitic material was introduced and discussed. These discussions were redacted, orally or in writing, and passed on to the next generation. The entire body of such discussions was preserved within the Mishnaic framework of Six Orders, and presumably reworked in various ways before it was passed along, eventually coming into the hands of the **Stammaim, the final shapers of the Bavli**, in the sixth century C.E., who gave it its definitive redaction. All this while, individual disputes retained the same overall shape as the oral performance: mishnah + gemara (the discussion), the next mishnah +

42 It is unclear whether Tosefta-like material is, on a case-by-case basis, simply a transmissional variant of the Tosefta or a traditional parallel to the Tosefta, both having drawn from earlier sources.

43 My observations about Tosefta-like material in the Talmudim apply also to material from the midrash halakhah found there.

44 Alexander (2006, 174).

gemara, and so on,⁴⁵ interspersed with artificial disputes fashioned in the late Amoraic and/or Stammatitic periods.

Efforts were made by the Amoraim and the Stammaim to reconcile the Mishnah and baraitot, even when they first juxtaposed them in apparent discord, based on the fundamental assumption that they were all part of one authoritative halakhic fabric. Baraitot were regularly brought into the discourse with no indication that the mishnah automatically trumped them. Priority was occasionally given to non-Mishnaic material. However, the Bavli's procedure is normally to reinterpret the conflicting mishnah and baraita in order to bring the two into harmony. When the baraita is reinterpreted, the implicit priority of the Mishnah is evident. However, when a mishnah is reinterpreted in order to conform to a baraita (or, even more significantly, though infrequently, to an amoraic saying), the mishnah retains formal priority while, in fact, giving way to the baraita or amoraic saying.

On occasion, a clear conflict between a mishnah and a baraita is noted, for example at B. Yevamot 83a-b). Rab said, "Our mishnah cannot be maintained in the presence of the following baraita." After hearing Rab's argument, Shmuel responds that "The baraita cannot be maintained in the face of our mishnah." The sages continue to argue whether to accept the mishnah or the baraita, not on the basis of authority, but of logic. Another example is found in B. Eruvin 36b–37b, where the sages struggle to clarify and reconcile a mishnah and several baraitot without coming to a firm resolution. Once again, the attempted clarification is based on reasoned discourse rather than authority.

The talmudic sages approached Mishnaic and Toseftan (or Tosefta-like) material synoptically – that is, they compared and contrasted related texts in order to define halakhah. Their methodology reflects Beck's first procedure, "seeing things in their togetherness" (Beck 1939, 338), which the Talmudim use to portray the halakhah as a coherent and comprehensive system. Although the sages often challenged inconsistencies or contradictions in the material, their challenges were normally rhetorical devices used to stimulate discussion. There was no serious consideration given to the possibility that the Mishnah and other tannaitic materials may express systematically divergent perspectives.

The sages of the Yerushalmi were less likely than those of the Bavli to introduce non-Mishnaic tannaitic material with a formula (such as תנו רבנן or תניא). Instead, they simply wove the material into their discourse. Y. Pesachim 31b deals with the parallel passages M.

45 The dynamics referenced in this paragraph are at the core of Jaffee's understanding of oral-literary culture from Second Temple Judaism to Late Roman Palestine (Jaffee, 2001).

Pesachim 4:9 and T. Pisha 3:19-22, which we will examine in detail in chapter 4. In the case of the SAGES' disapproval of the practice of the citizens of Jericho allowing the poor to eat the fruit of trees that had been dedicated for use in the Temple, the Yerushalmi brings in Toseftan material that seems to explain the Jerichoans' actions. In the Toseftan text the SAGES' disapproval arises from a lack of information or understanding about the circumstances of the original dedication. But the Yerushalmi fashions an extensive discourse to support the superiority of the SAGES' halakhic understanding to that of the Jerichoans, at the same time removing the tension between the Toseftan and Mishnaic version, to its own satisfaction at least.⁴⁶

Y. Sanhedrin 2a begins with a discussion of M. Sanhedrin 1:1, which concerns the number of judges required in various kinds of cases (three, except in capital cases, where twenty-three are required). During the discussion, M. Avot 4:8 ("Do not judge all by yourself, for only One judges by Himself") is used to support the principle of multiple judges. A baraita is introduced to the effect that litigants may agree to be judged by an individual. The Yerushalmi then discusses the case of Rabbi Hiyya, who seated a disciple with him so as not to judge alone. Presumably, the litigants did not agree to the case being heard by a lone judge. A Toseftan baraita is brought in to challenge this practice—a father and son or a רב and his disciple are treated as one person. Thus, it appears that Hiyya was actually judging alone. The Yerushalmi solves this problem by classifying R. Hiyya as a חבר (which is a term for, at best, a scholar of lower rank than a חכם or a זקן)⁴⁷ rather than a רב, in which case his disciple counts as a second person. Since Hiyya is called a רב at least thirty-four times in the Yerushalmi, this explanation appears to be a forced way of harmonizing the tannaitic traditions it cites.

Y. Berachot 14a attempts to clarify a mishnah by introducing several baraitot. The mishnah is: "In a place where [the SAGES] say to lengthen [a blessing], it is not permitted to abbreviate it; [in a place where the SAGES say] to [say a] brief [blessing], it is not permitted to lengthen it" (m. Berachot 1:4). The first baraita determines that only a few specified blessings may be lengthened, while other specified blessings may not. The gemara notes that there is a problem with the baraita: it can be understood as permitting the lengthening of all blessings not specifically forbidden to be lengthened, while actually listing only a few that may be lengthened. The gemara then introduces a second baraita stating that he who lengthens

46 See Bokser and Schiffman (1994, 183-92).

47 See Jastrow (1903, 421-22).

blessings is blameworthy, while he who keeps them brief is praised. The Yerushalmi concludes from the second baraita that the first cannot be a general rule, thus undermining what seems to be the clear intent of the first baraita. It does not address the fact that the first baraita permits certain blessings to be lengthened, a practice that the second calls “blameworthy.”

The general tendency of Yerushalmi’s sages was to harmonize tannaitic texts as best they could. I assume, however, that they could not simply ignore baraitot which, while problematic, were presumably well-known in the network of sages. In fact, the problematic aspects of some baraitot may have *required* them to deal with them. Even when they were unable to resolve these problems, they did not abandon the underlying premise that the entire tradition it has received is coherent and authoritative, however difficult it may be at times to demonstrate its unity.

Similar uses of the Mishnah and baraitot can be found in the Bavli, but the Bavli is much more dynamic in its treatment of tannaitic texts, which are juxtaposed with one another not only in order to harmonize the traditions it has received but also to bring out halakhic subtleties and implications by the challenge and response method.⁴⁸ Also, the Bavli’s **sugyot** (sg., **sugya: a self-contained talmudic passage dealing with a defined portion of the Mishnah, related baraitot, and talmudic discussion**) are usually more complex than those of the Yerushalmi. A complete classification of the uses of baraitot in the Bavli is beyond the scope of this thesis; however, a few examples will suffice to illustrate the variety of relationships between the Mishnah and other tannaitic material.

After the Bavli comments on a portion of the Mishnah, it usually brings in baraitot⁴⁹ in a very deliberate manner (using citation formulas such as תניא and תנו רבנן) to surface halakhic issues and to advance or resolve disputes. For example, at B. Nazir 23a, the cited mishnah (M. Nazir 4:3) discusses a woman whose husband, unknown to her, has nullified her nazirite vow; she violates the vow but is not subject to any sort of punishment. Presumably

48 Kraemer (1990) called this process “argumentation,” claiming that it is characteristic of the third generation of **Amoraim (sages of the Amoraic period)** and became the exclusive focus of the Stammaim and the definitive redaction of the Bavli.

49 As I will discuss below, I take a cautiously agnostic approach toward the existence of something resembling “our Tosefta” in the Tannaitic period, prior to its definitive redaction in the mid- to late third century C.E. When I use terms such as “toseftan” or “Tosefta-like” materials, or even simply “Tosefta,” I am referring to non-Mishnaic, non-midrashic material that is similar to material now found in our Tosefta that may or may not have circulated as isolated units or composites of modest or even considerable size.

the reasoning is that she was no longer under the vow (even though she was unaware of that fact), and therefore is not liable for the penalty for violating her vow. But a single sage, R. Yehudah, says that she must be punished for violating her vow. The Bavli then brings in an anonymous baraita and one by R. Aqiba to support R. Yehudah's opinion. Finally, the Bavli delves into the relationship between intent and culpability, but does not return to resolve the tension between the anonymous mishnah on the one hand, and R. Yehuda, the anonymous baraita, and R. Aqiba on the other.

At other times, a baraita is brought in order to clarify the underlying rationale for the Mishnaic ruling. For example, in B. Shevuot 6b, the baraita offers a rationale for the mishnah's ruling; the gemara attacks the baraita with a series of ten challenges and resolutions before it finally clarifies the baraita's rationale for the Mishnaic ruling. Without the baraita and the discourse it provokes, the mishnah would remain unsupported. This demonstrates that the Bavli's sages did not accept the Mishnah's authority without reflection; they engaged in rational discourse, involving a baraita, to support it. When they go out of their way to support the Mishnah's ruling, the otherwise *sui generis* authority of the Mishnah is subtly undermined.⁵⁰

Sometimes a baraita becomes the focus of a substantial portion of a sugya. In B. Shabbat 68b R. Yohanan and Reish Lakish claim that, unlike the cases mentioned in the Mishnah (concerning a person who knew the essence of Shabbat but forgot and transgressed it many times), the Jewish child brought up in captivity is exempt from the penalty of violating Shabbat. They base their opinion on a baraita. An exploration of the baraita's case, an exceptional case not discussed in the Mishnah, becomes the focus of the Bavli's discourse.

These are a few of the many hundreds of sugyot in which we can see the Bavli's sages' struggle with ambiguities and tensions in the tradition. It is clear from the tenor of talmudic discourse that they viewed all the tannaitic material with which they were familiar as authoritative, according the Mishnah a unique, yet circumscribed, priority.⁵¹ They were not at all averse to questioning and probing the tradition, including the Mishnah, in order to bring clarity, resolve difficulties, and expose deeper principles that explain what they considered to

⁵⁰ Fisch (1997) devotes the bulk of *Rational Rabbis* to support his view that sugyot like this are anti-traditional, since they shift the basis for halakhah from Mishnah (tradition) to reason.

⁵¹ There are times when the verbal accuracy of a cited text is debated, but not the authority of the correct text.

be only surface tensions between received texts. Despite these efforts, there are hundreds of disputes in which inconsistencies in the material are not resolved.⁵²

It is important to note that many *baraitot* are not found in our Tosefta; they are similar to the Tosefta and may have been drawn from a Tosefta-like tradition. Other *baraitot* cannot be identified with the Tosefta at all. The inclusion of these two kinds of *baraitot* indicates that the talmudic rabbis knew a tradition that was broader than our Mishnah and our Tosefta. Although it is unknown whether these *baraitot* were transmitted orally or in writing, it is likely that they derived from the oral cultural context in which the Mishnah and Tosefta were formed.

David Kraemer assumed a direct connection between the Mishnah's place as "the central curriculum of study" (2006, 313) and its canonical authority. In his view, however, the Amoraim later reopened the canon, challenging the Mishnah's authority by bringing in the *baraitot* as equal players in the halakhic arena. These *baraitot*

were presumably excluded from the Mishnah for a reason (if the Mishnah is a lawcode, then their exclusion would indicate their rejection as law; if it is a canonical study curriculum, then their exclusion would be indicative of the estimation that they are not canonical). The Talmuds' recovery of these teachings therefore represent a challenge to the Mishnah's authority—a reopening of the Mishnah's canon or a broadening of the Mishnah's earlier narrowing of options of the law. It is not uncommon for these *baraitot* to become the focus of Talmudic discussion in precisely the same fashion as the Mishnah, and either Talmud—but particularly the Bavli—might prefer the rulings of the *baraitot* to those of the Mishnah. Hence, while it is in some sense correct to say that the Mishnah was authoritative in the eyes of the Sages of the Talmud, it is essential to recognize that its authority was a much compromised one (ibid, 314).

According to Kraemer, the introduction of *baraitot* by the Amoraim arose from their questioning of the Mishnah's authority rather than an attempt to find coherence in the broader received tradition. I find it doubtful that the Amoraim brought in *baraitot* in order to challenge the Mishnah's status; this would seem like cutting off the branch it was sitting on. While they clearly questioned the Mishnah at times, and at times reinterpreted it in order to bring coherence to the tradition, the Mishnah's authority was hardly "much compromised" by the Bavli's sages' use of *baraitot*.

Menahem Fisch (1997) offered a more cogent explanation of the anti-traditionalist aspect of the Talmud. Fisch showed how the Bavli, when it reinterprets the tannaitic tradition (whether the Mishnah or *baraitot*) does so either to bring harmony within that tradition or to

⁵² See Jacobs (1981).

subsume it under amoraic material considered to be more reasonable. At other times, a specific halakhah is left unchanged, but its basis is shifted from tradition to reason. While the tradition itself is not overthrown, this move undermines the notion that the authority of the tradition is self-evident and self-authenticating. B. Hagiga 3b is a prime example of this move; the rabbis use deductive reasoning to clarify certain halakhic rulings when they could simply accept them on the basis of tradition. Their decision not to accept the tradition on its face angers the traditionalist R. Eliezer b. Hyrcanos, who all too clearly perceives that the fundamental issue is not the specific halakhah itself but the theoretical basis for it, whether tradition or reason. Fisch continued by claiming that

[i]f the study of Torah is construed, as it often is, as rote treatment of a body of scriptural exegesis and especially halakhic rulings that have been handed down to Moses at Sinai, then it indeed leaves little room for the type of self-doubting troubleshooting I have been describing. But although these texts are often regarded as formative of a culture uncritically bound by its traditions, I wish to show that they are framed to a significant extent as long and sustained arguments against blindly following tradition. My aim in what follows is to locate and retrieve this undogmatic, reflective, self-doubting voice of talmudic culture.

Antitraditionalism is the (lamentably inelegant) label I have reserved for the position for which this voice speaks. Antitraditionalists take the teachings of their forebears in utmost seriousness, but do so, contrary to their traditionalist adversaries, with a view not to following them indiscriminately, so much as to seriously putting them to the test. The antitraditionalist voice is, in other words, the voice of a rabbinic elite aspiring to teach future rabbinic elites to reason rationally about the contents of their legacies in the same way that open-minded and self-doubting agents were shown, in the previous section, to act rationally, when striving knowingly to improve upon the systems on which they work. (43)

Fisch asserted that the Bavli, as shaped by the **Stam (used to refer either to an individual or, as a collective singular, to the Stammaim)** retains the formal status of the Mishnah (and the baraitot), while in many instances reevaluating and reshaping the tannaitic tradition in the light of amoraic material and reason. Unlike Kraemer, who asserted that the Bavli challenges the status of the Mishnah, Fisch contended that the Bavli shifts the methodology from interpreting and applying the Mishnah and the larger tradition to the Bavli's own rational give-and-take, and especially the analytic process of the Stam. In this transition, the Bavli functionally accords the Mishnah a greater degree of authority than the rest of the tradition, in part because it usually finds a rational basis for the halakhah of the Mishnah. However, a greater degree of authority does not translate into the sui generis authority espoused by R. Eliezer b. Hyrcanos. While Kraemer theorized that the Bavli introduces baraitot in order to rectify a perceived flaw in the Mishnah's redaction, Fisch suggested that the Bavli introduces baraitot in order to rectify a perceived flaw in the basis for

the Mishnah's authority by establishing a rational basis for it. In Fisch's view, the entire tradition was subject to the rationality of the later rabbis.

If the Talmudim do not accept the Mishnah's status without question, how can one account for the formal status of the Mishnah in the Talmudim? One explanation flows from the fact that the Mishnah was the first compendium of the oral tradition to be circulated widely in the rabbinic network. Although the Tosefta and halakhic midrashim followed, the Mishnah had a head start of several decades. The Mishnah preserved the overall halakhic structure that was common in the network of sages and also expressed the tradition with relative clarity, terseness, and mnemonic characteristics that made it very useful as a reference work and study-text, although we cannot say that its redactors intended it as such. These characteristics explain, at least to a large degree, why amoraic discourse is based on the Mishnah. It is understandable that this use of the Mishnah would eventually translate into special status and authority. This is the position of Elizabeth Alexander, who claimed that the Mishnah was not considered authoritative in the Tannaitic period but became authoritative over time "as the result of a devoted community's reading and interpretive practices" (2006, 7).

While the redaction and circulation of the Mishnah did not incite a negative reaction, it had the unintended long-term consequence of producing a rift in the tradition itself. In the Talmudim, we see the first clear distinction, not so much between the Mishnah and the Tosefta as between the Mishnah and the larger tradition of which it was an expression. The talmudic rabbis' struggle to unite the tradition actually makes the distinction more evident.

The talmudic view of these matters has determined the course of traditional scholarship. We can see this clearly in work of the **Tosefists (medieval, primarily French and German, commentators on the Bavli)**, whose work (collectively called Tosefot) is now found on the outside margin of the printed Talmud page.⁵³ Although the Tosefists were interested in issues from textual criticism to correcting the work of earlier commentators, perhaps their main contribution is their attempt to weave the Bavli—including the embedded Mishnah and baraitot—and later works such as Rashi's commentary, into a unified whole. They sought to accomplish this by clarifying issues within sugyot and resolving apparent contradictions between sugyot, whether in the same or different tractates. The Bavli's view of

⁵³ A basic introduction to the work of the Tosefists can be found in Perlmutter (1996).

a unified tradition was not challenged until the nineteenth century *Wissenschaft des Judentums*.⁵⁴

The Diachronic Relationship between the Mishnah and Tosefta

Like the talmudic rabbis, Sherira Gaon (10th century C.E.) saw the tradition as a single fabric. Yet, he clearly viewed the Mishnah and Tosefta synoptically as discreet works, becoming the first scholar to employ what Beck would later describe as the synoptic – procedure of “seeing together” (Beck 1939, 338). Sherira offered the first, albeit brief, explanation of their relationship. He repeated the traditional ascription of the Tosefta to R. Hiyya, asserting that he was motivated by the terse nature of the Mishnah to write a supplementary work intended to elucidate it. This seemed to be a reasonable explanation of the work, both because the word “Tosefta” means “supplement” or “addition” and because the Tosefta does indeed offer a large amount of extra-Mishnaic material. Since Sherira's time, traditional scholarship on the Mishnah and Tosefta has been informed by Sherira's explanation of their relationship.

With some exceptions, academic scholarship has also followed Sherira. As Stemmerger observed, “T almost always has been regarded as supplementing M, having originated shortly after the latter” (1992, 152). Many late twentieth-century scholars continued to hold the traditional view that the Tosefta supplements the Mishnah. For example, Cohen (1983) claimed that “There is no doubt that Tosefta is basically a commentary on the Mishnah” (56); A. Goldberg (1987) stated that “*Tosefta* means ‘addition’, and this is what it is: an addition, a complement to the Mishna” (ibid, 283); and Jacob Neusner called the Tosefta “the Mishnah's first commentary, first amplification, and first extension—that is, the initial Talmud” (1992, xi).

However, the view that “T. supplements M.” has not remained unchallenged. For example, in the early twentieth century Zuckerman observed that there was a large amount of material that did not fit Sherira's model. He suggested a complex view of the relationship between the Mishnah, Tosefta, Yerushalmi, and Bavli that has not received much acceptance. However, the research of Zuckerman and others brought to light a number of facts that call

⁵⁴ The “Scientific Study of Judaism” was an academic movement that investigated Jewish texts and culture using critical tools of its time.

into question the straightforward view that the Tosefta is simply a supplement to, or a commentary on, the Mishnah.

Saul Lieberman produced a critical edition of, and commentaries on, more than three orders of the Tosefta. As has often been noted, he did not write a general introduction to the Tosefta and did not explicitly express his thoughts on the relationship between the Mishnah and Tosefta. However, others built on his scholarship and some claimed to discern his views in the nuances of his commentary on the Tosefta, *Tosefta Kifshuta* (1955–1973). For example, Shamma Friedman (see below) built on Lieberman (and Epstein) in his attempt to demonstrate the dependence of Mishnah Pesachim on Tosefta Pischa.

By the late twentieth century, the traditional view was being challenged by scholars who all approached the Mishnah and Tosefta synoptically. They came to new and diverse conclusions about the diachronic relationship between these works and ways in which they depend on each other. As cited more fully in the thesis Introduction, Peter Schäfer summarized the state of affairs that followed:

Although it can be shown that for the main part of the material, the Tosefta presupposed the Mishnah, and is to be understood as its very first commentary, this result cannot be applied to all tractates. There appear to be Mishnah tractates which presuppose the Tosefta, and above all there are Tosefta tractates which identify it as an independent “work” vis-à-vis the Mishnah, in which the Tosefta does not refer to the Mishnah, at least not to the one extant today. Finally certain Tosefta tractates suggest that they appeal to another (earlier?) Mishnah than the one which became normative through the final redaction.

. . . Even on the level of the individual tractate, one constant factor determining the relation will not always emerge, but the individual tractate, too, will contain different material which, within the same tractate, requires different models of the relation between Mishnah and Tosefta (1986, 147–49).

Stemberger summarized the ways in which the relationship between the Mishnah and Tosefta has been construed, either as whole works or in parallel passages, in modern scholarship [my numbers] (1996, 152):

- 1) T agrees verbatim with M or varies only slightly.
- 2) T offers authors’ names for sentences which are anonymous in M, or augments M by additional glosses and discussions.
- 3) T functions like a commentary on unquoted M material.
- 4) T offers additional substance without direct reference to material in common with M (especially more haggadic and midrashic material).
- 5) T contradicts M in halakhah or tradents’ names.
- 6) The *arrangement* of material parallel to M is largely the same in T, but also frequently different. T often seems to have the more original arrangement as well as the more primitive form of the halakhah itself (S. Friedman).

- 7) The *style* of T is not as succinctly formulated and polished as that of M. Mnemonic traits are present, but are not as important as in M. It seems that, unlike M, T was not formulated so as to be memorized (J. Neusner).

Stemberger continued, “[A] global assessment of the relationship between T and M is therefore impossible, and one must begin by examining the individual tractates of T in their own light” (ibid, 154). The different relationships between the various parallel tractates of the Mishnah and Tosefta “must probably be due to the differing origins of the various tractates and orders of T. An even more detailed comparison would probably no longer permit a unified assessment even of individual tractates” (ibid, 155). A case in point is Alberdina Houtman’s study of Mishnah/Tosefta tractates Berakhot and Shevi’it (1997). Houtman work supported the notion that even within individual tractates there exist different kinds of relationship between Mishnah and Tosefta.

Meanwhile, interdisciplinary studies focused on identity, gender, and culture criticism have noted localized differences between the halakhah of the Mishnah and Tosefta. At the same time, formal issues continue to dominate the scholarly study of these works. The historically dominant view, that the Mishnah and Tosefta as wholes (though not necessarily in minor, localized instances) are virtually identical in their stance toward issues of halakhic importance, has remained essentially unchallenged.⁵⁵

The primary concern of this thesis is the way the Mishnah and Tosefta view the authority of the SAGES. Scholarship that is primarily concerned with solving the mystery of the formal relationship between the two works has produced tools that are useful in understanding their perspectives. However, the perspectives themselves, not the tools, are the subject of this thesis.

Judith Hauptman and Shamma Friedman returned to simpler—though not traditional—paradigms for the Mishnah/Tosefta relationship. They are among the scholars who have seen the redaction of the Mishnah and Tosefta as in some way interactive. Jacob Neusner, for example, wrote that “[i]n the beginning were completed units of tradition available to both M. and T. Of course, the larger part of these completed units was taken for M. To T. were assigned other such units—we do not know what proportion of the whole” (1986c, 6). Neusner proposed a complex redactional scheme in which the Mishnah and

⁵⁵ But see below for some exceptions.

Tosefta developed in continued relationship with each other.⁵⁶ The formation of the Mishnah and Tosefta into two separate-but-related works was, in his view, a highly intentional project. However, Neusner did not explain how the process of redaction produced a Tosefta that is, as he often asserted, a commentary on the Mishnah (e.g. 1992, xi). By using the passive “were assigned,” Neusner avoided focusing on the process whereby this assigning took place, and the question of evidence for such an assignment; he did explain how the editorial project was actually carried out.

A. Goldberg (1987b, 285–86) presented the development of Mishnah and Tosefta as a layered redactional process. The first chronological layer of Mishnah was commented on by the first of Tosefta, the second layer of Mishnah by the second of Tosefta, etc., until the Mishnah was completed and then, later, the final layer of Tosefta. In Goldberg’s view, “the text of the Tosefta is very closely interwoven with that of the Mishnah, to such an extent that they may almost be considered one literary work” (ibid, 284). He rejected any notion of disharmony between the two.

Reena Zeidman also rejected the notion that Tosefta was a simple response to the Mishnah. While accepting a later date for Tosefta’s redaction, Zeidman claimed that each “is indebted to the other and contributes to the structure of both texts; the material that each one provides assumes the form of material on the same subject, summaries, generalizing statements or conclusions” (1999, 95). Thus, Zeidman saw the development of the Mishnah and Tosefta as somewhat less structured than Goldberg did.

Although scholars have routinely used a synoptic approaches to deepen their understanding of the texts, Judith Hauptman asserted that the full meaning and message of the Mishnah is accessible *only* by a synoptic approach to the Mishnah and Tosefta that relies on a very specific model of their development and redaction. Hauptman noted “the phenomenon of a mishnah making an incomprehensible statement and ‘relying’ on [a fuller version] elsewhere is order for the reader to understand it” (2000, 33). She explains that the Mishnah did not need to spell everything out but could assume previously existing tradition that spelled things out in greater detail (ibid, 29).

The lynchpin of Hauptman’s approach, which she developed in *Rereading the Mishnah* (2005a), is that the Tosefta served largely as a source for, rather than a commentary on, an earlier form of the Mishnah. The earlier Mishnah and its commentary then continued

56 Elman (1987, 132–33) called Neusner’s model “interactive redaction . . . [an] almost symbiotic redactional scheme.”

to develop as works-in-progress, until the Mishnah's redactor finalized the first process.⁵⁷ Hauptman's second major premise is that what I call the definitive redaction of the Mishnah includes material based on the developed versions of the earlier Mishnah and its commentary. Her third major premise is that the definitive redactor(s) of the Mishnah did not include all relevant material from that commentary, assuming that those who used the Mishnah would read it synoptically with its source material that was included in the developing work that became our Tosefta. The redactor assumed that the Mishnah's students would have access to this work in the course of their studies.

In Hauptman's view, the definitive redaction of the Mishnah includes three kinds of material: some from the earlier Mishnah, some from its commentary, and then a final layer that includes some reworking of the first two layers and as well as new material. Likewise, the definitive redaction of the Tosefta consists primarily of a commentary on the earlier Mishnah, which then developed over time, and a final redactional layer that includes material that is dependent on the definitive redaction of the Mishnah. Hauptman did not take account of the work of Schäfer, Houtman, and others, who resist the idea of a global structural paradigm into which Mishnah and Tosefta neatly fit. Since she covered a relatively small number of Mishnah and Tosefta texts, her claim that Mishnah passages based on the Tosefta comprise "a vast network" of Mishnah texts (*ibid*, 255) remains unproven, a fact that Hauptman herself recognized (*ibid*, 257).

Hauptman's readings, though not always convincing, were generally less forced than those which rested on the assumption that the Tosefta comments on the Mishnah in every case. As she wrote, "As studies of this sort proliferate, it will become possible to grasp better the meaning and message of the Mishnah and the Tosefta and the nature of their interrelationship. Just as separating the anonymous voice of the gemara from the amoraic and tannaitic passages continues to give rise to new insight into talmudic discourse, so too, this model of the interrelationship of these two tannaitic works will yield more accurate comprehension of both" (*ibid*, 264). While the hand of the Mishnaic and Toseftan redactors may not be as obvious as is the hand of the Stam in the Bavli, Hauptman's approach

⁵⁷ Hauptman acknowledged the additional layer found in the Tosefta. However, her work focuses on the Mishnah

successfully exposed ways in which the Mishnah and Tosefta express the tradition differently and must be read synoptically in order to be more fully understood.⁵⁸

By 1999, Shamma Friedman had come to a preliminary conclusion that the dependence of the Mishnah on the Tosefta is not the exception but the rule, suggesting further study to determine whether the pattern is pervasive (Friedman 1999, 100). In 2002, he followed up with a book-length study of twenty-two Mishnah/Tosefta parallels in “Pesach Rishon” (the first ten chapters of Mishnah Pesachim and Tosefta Pisha). Using a synoptic approach, he presented concrete evidence that in this parallel material the Mishnah is essentially dependent on, and subsequent to, material found in the Tosefta.

Meanwhile, Neusner (1999b, 92) reprised his oft-repeated paradigm of the three-fold relationship between Mishnah and Tosefta: (1) the Tosefta cites the Mishnah and contains a secondary discussion; (2) the Tosefta passage does not cite Mishnah verbatim, but depends on it; (3) the Toseftan material stands independent of the Mishnah. He commented that “a small fraction of the Tosefta’s contents can have reached final formulation prior to the closure of the Mishnah” (91). Oddly, Neusner (1986b) had previously posited a complex redactional relationship between the Mishnah and Tosefta so that “It cannot be shown . . . that T. is consistently later than M” (ibid., 4). However, when comparing material in categories (1) and (2), he demonstrated a strong bias toward construing the Tosefta as utterly dependent on the Mishnah. Although Neusner did not claim that all Toseftan material originated or was redacted after the redaction of the Mishnah, when comparing Mishnah and Tosefta Parah line-by-line, he consistently asserted the primacy of Mishnah where the two have common textual material: the Tosefta always depends on the Mishnah (e.g., ibid., 79–84 and, more extensively, *A History of the Mishnaic Law of Purities* in twenty-two volumes, 1974–1977). Based on the research of Martin Jaffee (2001) in M. and T. Parah chapter 3, as well as my independent findings in Mishnah and Tosefta Parah, especially chapter 4, I am convinced that the relationship is much more nuanced, and it seems that, at least in this tractate, both Mishnah and Tosefta draw on previous material in an overlapping manner; neither one is dependent on the other.⁵⁹

Elizabeth Alexander used an “oral conceptual lens” (2006, 9) through which to view early rabbinic work. She argued that the Mishnah, along with other works that took shape in

⁵⁸ I will examine Hauptman’s view of halakhic and aggadic differences between the Mishnah and Tosefta in the section below on “Discord between the Mishnah and Tosefta.”

⁵⁹ Unpublished paper, “Some Preliminary Observations on Mishnah and Tosefta Parah as Literary Documents,” March 2002.

the Tannaitic period, was created in an environment shaped by both oral and literary forces. In this environment, no one version of a textual parallel was considered more authentic or authoritative than any other. The nature of oral texts not only allowed for, but encouraged, multiple versions. Concerning the Mishnah and Tosefta, “At some point in their early transmissional history, these traditions were not imagined as definitive or authoritative, but as equally valid performative versions of a broader legal tradition” (Alexander 2006, 74). Given a mid- to late-third century C.E. definitive redaction of the Tosefta, these two works and their constituent disputes were not viewed as fixed and perhaps competing redactions of the larger tradition but accounts of the fluid oral performances Alexander described.

Alexander isolated “nonlinear” and “non-literal” aspects of tannaitic parallels (ibid, 35-76). Like multiple performances of oral folk tales, parallel Mishnaic and Toseftan texts tell the “same” story (or rather make the same halakhic point) by using a variety of well-known options available in the tradition. Mishnah and Tosefta parallels use equivalent “overarching structural frameworks,” but elaborate those structures differently. The Tosefta presents a more detailed legal framework, thus assuming less knowledge on the part of the hearer/reader. Meanwhile, the Mishnah elaborates the debate itself, assuming more background knowledge. Alexander cautiously speculated that these differences may represent different pedagogical settings. These texts also use common “fixed phrases” (such as “he swears and collects” in Mishnah Shevuot 7:1 ff. and Tosefta Shevuot 6:1 ff.). Finally, these works have the same “underlying conceptual concerns,” that is, abstract principles which they express in different surface language and even through the use of different legal concepts that, in the end, make the same point. Thus, the Mishnah and Tosefta draw on a shared storehouse of legal concepts and language.

I follow scholars such as Schäfer, Houtman, and others who proposed that the structural relationship between the Mishnah and Tosefta is highly complex and unpredictable from tractate to tractate and even on the sub-tractate level. This assertion supports the view that our Mishnah and Tosefta are a part of a larger body of tannaitic tradition and, on the local level, point to relationships that can only be accounted for by multifarious interactions of Mishnaic and Toseftan material in the matrix of a still larger oral tradition at various stages of oral performance, text production, redaction, and transmission. Therefore, when I analyze the fourteen pairs of SAGES disputes in chapters 4 and 5, I will approach them, as best I can, without presuppositions about the priority or dependence of either text in the parallel.

Discord between the Mishnah and Tosefta

The traditional view, also common among academic scholars, is that there is no little or no substantial discord between the Mishnah and Tosefta. Typical of these is A. Goldberg, who, as noted, asserted that the Mishnah and Tosefta “may almost be considered one literary work” (1987b, 284). Neusner also envisions the Tosefta as so dependent on the Mishnah that it expresses “no viewpoint other than that of the Mishnah’s counterpart materials, clarified, refined, and improved” (Neusner 1992, xix).

However, other scholars have observed various kinds of tension or discord between the Mishnah and Tosefta, such as (1) textual tensions in parallel passages; (2) tensions over specific practices and social perspectives; and (3) tension between the works as a whole.

(1) Textual Tensions in Parallel Passages

Jacob Epstein (1957) noted that there are often inconsistencies between Mishnaic and Toseftan texts. Epstein did not attribute these inconsistencies to ideological tensions in the community of sages. Rather, he developed an elaborate theory to explain them on the basis of divergent paths of transmission and redaction in Palestine and Babylonia.

Judith Hauptman saw the redactors’ work in many of the discrepancies in Mishnah/Tosefta parallels. For example, she pointed out that the parallel passages M. Bezaḥ 2:1 and T. Yom Tov 2:4 are in clear conflict (2005, 87, 93–94). The mishnah asserts that Beit Shammai says, “Two dishes,” while Beit Hillel says “One dish.” They agree that fish with egg on it counts as two dishes. The Tosefta, however, repeats R. Simon b. Eleazar’s tradition that Beit Shammai and Beit Hillel agree on “two dishes” but disagree about whether fish with egg on it is one dish (Beit Shammai) or two (Beit Hillel). In Hauptman’s view, the later Mishnaic text, redacted after the Toseftan text, rejects R. Simon b. Eleazar’s view.

Shamma Friedman maintained that discrepancies between the Mishnah and Tosefta are due to different redactional approaches. Rabbi, the redactor of the Mishnah, abridged, clarified, and explained the halakhah existing in his time by using the sources he had before him (Friedman 2002, 73–74). In Friedman’s view, the Tosefta is more “earthy and anthropological” in its approach, describing essentially how things worked, while the Mishnah is more abstract and formal (1999, 106). However, Friedman conceded that the redactional process often resulted in a Mishnah text within which there is

a certain amount of friction or conflict between the new segments and the remaining sections of the original text. Commonly the editor refrains from a fuller, more

invasive, reformation, allowing the recipient of the text to further apply the editor's position to pertinent additional details. The recipient must, however, guard against arriving at deductions from the new stylistic combination which go beyond the intention of the editor. The best control in such a situation is the comparison of the new text with its sources, in order to determine what the specific alteration was, and what was its specific purpose. (ibid, 103)

In other words, in Friedman's view, the redactor relied on the sources before him in order to abridge, clarify, and explain the halakhah, but did not entirely smooth out discrepancies in the sources, instead relying on those who received the text to understand his redactional approach. Friedman did not explain what motivated the Mishnah's redactor(s) to refrain from a "more invasive" reworking in some texts while being quite invasive in others.

In their discussions of Mishnah Pesachim 10 and the parallel Tosefta Pisha 10, Friedman and Hauptman did not construe the redactional process in the same way. Friedman envisioned Rabbi collating and digesting (though not always fine-tuning) the sources. For Hauptman, the differences in these parallel texts are the result of "innovations of the rabbis, in particular the redactor of the Mishnah" (2005, 60), who has added numerous practices not mentioned in the earlier Tosefta, practices that formed the first recognizable evidence for what has become the Passover Haggadah.

In my view, given the propensity of the sages to discuss, debate, and dissent, it is highly unlikely that halakhic innovations in such common and important rituals as Passover observance would have been received passively by sages who were not involved in making them up. Hauptman and Friedman did not take this dynamic into account. Below, I will review David Weiss Halivni's creative solution to this problem.

(2) Tensions over Specific Practices and Social Perspectives

A number of scholars have noted that the Mishnah and Tosefta express some differences in social attitudes on issues such as gender, economics, social status, mourning, and so on. I will give a few examples.

Judith Hauptman observed that the ruling in T. Yebamot 8:4–6 differs from the declaration in M. Yebamot 6:6 that only men are obligated to have children. The Tosefta maintains an "egalitarian requirement" (2005, 135) that women, too, are legally bound to have offspring. Although this point of view is rejected by the Mishnah and ultimately by the Bavli, the debate on the topic preserved in B. Yebamot 65b indicates the ongoing presence of a minority opinion favoring a literal reading of Gen. 1:28 and insisting that the

commandment to be fruitful and increase applied to both men and women. Similarly, on the topics of learning and communal prayer, Hauptman argued that some alternative strands, more supportive of women's intellectual and spiritual abilities and needs, weave through traditions originating in Eretz Israel.

Seth Schwartz (2001, 236) noted a number of differences between the Mishnaic and Toseftan passages concerning the use of the proceeds from the sale of ritual objects. In M. Megillah 3:1, synagogue proceeds may be used to buy an ark, proceeds from an ark to buy mantles (wrappings for Torah scrolls), proceeds from mantles to buy study books, and proceeds from study books to buy a Torah scroll. Through the rhetorical device of placing the synagogue at the lowest rung of value and the Torah scroll at the highest in this fixed order, the Mishnah indicates relative levels of sanctity. Interestingly, M. Megillah 3:2–3 then proceeds to focus entirely on the synagogue, its sale, and its status, rhetorically signaling the synagogue's great importance.⁶⁰ Meanwhile, the Tosefta (at T. Megillah 2:12) subverts the Mishnah's fixed order by asserting that if those who collected the funds for an item of higher sanctity made an agreement that proceeds from its sale can be used for any purpose; restrictions (as recorded in the Mishnah) do not apply. In this context, the fixed order in the Mishnah may be seen as a fallback position that applies only if the collectors and donors do not agree on an alternate stipulation. Thus, the Mishnah's straightforward statement of a fixed order is undermined by the Tosefta's assertion that the expressed intent of the collectors and donors is the ruling principle, a concept not found in the mishnah.⁶¹

David Kraemer noted that the Tosefta records more mourning customs than does the Mishnah as well as more diverse burial customs. "Jews are evidently understood to lay their deceased to rest in a variety of ways, and the teachers behind the text see no reason to insist upon one custom above another" (Kraemer 2000, 39). The deceased may be buried naked or clothed, and buried in a coffin of wood or stone on a paved floor, a marble slab, or the ground. The burial niche may be sealed with one stone, several stones, or a pile of smaller stones (T. Ahilot 2:3, 3:9–10, and 15:8). The Tosefta records these alternatives virtually without comment, thereby rhetorically indicating its acceptance of them all.

⁶⁰ This "mixed message" could be real, the result of the Mishnah conflating two sources, or simply an impression gained by the juxtaposition of the three mishnahs.

⁶¹ I have given Schwartz's reading of the two passages. In the alternative, the Mishnah may be seen as establishing a fixed order that undermines the Tosefta's notion of expressed intent; or we may simply be looking at two traditions that have an undetermined level of consciousness of each other.

I have offered only a few examples of differences that scholars have noted between the Mishnah and Tosefta's stance on specific issues and practices. However, I am not aware of any systematic comparisons of the Mishnah and Tosefta that reveal consistently dissonant attitudes toward larger issues such as gender and social status. In this thesis, I examine whether such a difference exists (at least in Seder Moed), in the Mishnah's and Tosefta's construal of the authority of the SAGES.

(3) Tension between the Works as a Whole

Some scholars have noted broader ideational differences between the Mishnah and Tosefta, though to this point none have published systematic research that would support their thesis.

In various works between 1874 and 1912, M. S. Zuckermann recognized broader differences between the Mishnah and Tosefta, but his attribution of these differences to redactional and socio-geographical differences between Palestine and Babylonia were so complex and far-fetched that "the baby was thrown out with the bath water." Other scholars did not follow up on this aspect of his work.

More attention has been given to David Weiss Halivni's 1981 article, "The Reception of Rabbi Judah's Mishnah." Noting that the Mishnah and Tosefta sometimes take divergent halakhic approaches, he asks, "What prompted them [R. Hiyya and R. Hoshiaia, traditionally viewed as the Tosefta's redactors] to add so extensively to R. Judah's Mishnah, and often to reverse its codificatory decisions [by reducing anonymous, authoritative material to the status of an individual opinion]? I can think of only one answer: they were dissatisfied with R. Judah's codificatory decisions and with his selections (they deemed them too abridged), and dissatisfaction brings opposition" (207). Halivni's construal of the Mishnah as a self-consciously produced halakhic code is, of course, open to question. Halivni did not publish primary research to support his thesis, but seems to have relied on descriptions of the work of R. Hiyya and R. Hoshiaia found in the Bavli. Even these examples do not indicate Toseftan differences with the Mishnah on broad halakhic issues but only over localized differences. Halivni's "one answer" to his own question is ultimately unpersuasive.

Stuart Cohen (1990, 196–97) referenced Halivni's article and attempted to buttress it with socio-political arguments. He asserted that R. Judah's scholarship was not of the highest level; some of the younger sages were so dissatisfied with his work that they thought it necessary to assemble and/or preserve a more comprehensive alternative, the Tosefta. For his part, in order to get the Mishnah accepted as an authoritative work, R. Judah had to use his

political clout as head of the Jewish community in Palestine. His opponents had no such clout. While Cohen's comment on Judah's inferior scholarship may rest on the loose ends (or, as Friedman put it, the Mishnah's internal "friction or conflict") that others have also observed, he seems to ignore the much greater shortcomings of the Tosefta as a coherent work. Thus, one wonders which sages had a greater ability than R. Judah to digest, clarify, and explain the tradition. Finally, while R. Judah may have used political clout to advance his scholarly work, there does not seem to be any evidence to that effect.

Alberdina Houtman wrote a detailed study of Mishnah/Tosefta tractates *Berakhot* and *Shevi'it*, concluding in each case with a comparison of the tractates: which one comments on, reformulates, or augments the other, their use of biblical references, anecdotal material, differences of vocabulary, variant readings in the manuscripts, and matters such as arrangement, completeness, and so on. All these are the kind of formal or structural relations that have occupied many scholars of the Mishnah/Tosefta relationship. Houtman saw both works "not [as] random confluences of traditional material but careful compositions" (1997b, 221). She affirms with Halivni that the Tosefta was probably the product of discontent.

Was the Mishnah so incomprehensible that there was almost immediately a need for further elucidation? How can we explain the existence of material in the Tosefta that does not even have a direct bearing on the Mishnah? . . . The only plausible explanation, in my view, is discontent . . . Perhaps such discontentment was primarily directed against the mere existence of an 'official' compilation in writing. Or perhaps it was the choice of material and the way it had been edited that raised opposition. Those who objected probably decided to assemble an alternative collection of material that had been eliminated, abbreviated, or reformulated by the editor(s) of the Mishnah . . . [W]here the Mishnah usually restricted itself to legal decisions, the Tosefta added the account of the processes that had led to them and the discussions they aroused. In this sense, the two corpora constitute a perfect pair, the Tosefta being the companion to the Mishnah. However, at the same time, one could say that the Tosefta is the Mishnah's opponent, if indeed it was the product of discontent. This is the twofold character of the Tosefta: sometimes it is helpful, at other times it is critical. (ibid, 234–35)

In Houtman's model, the redactors of the Mishnah sought to establish an authoritative text that consisted of the essence of the halakhah (ibid, 236–37). The Tosefta's primary opposition to the Mishnah concerned matters such as its abridgement and exclusion of authentic traditions rather than over substantial issues of halakhah. Houtman's thesis is vulnerable when one takes into account the large amount of halakhah in the halakhic midrash collections that is referenced neither in the Mishnah nor in the Tosefta.⁶² Thus, one can claim

⁶² This is evident in the five Sifra passages discussed in chapter 1.

our Tosefta includes much material not found in the Mishnah, but not that the redactors of the Tosefta attempted to include all traditions that were not included in the Mishnah.

I disagree that “the only plausible reason [for the redaction of the Tosefta] is discontent.” If the redactors and those who received the Mishnah saw it as a compilation of oral traditions (whether itself oral or written, we do not know) that made no claim to unique authority or comprehensiveness, then there would have been little reason for the kind of discontent Houtman (and Halivni) described. Since there are no such claims of authority or comprehensiveness in the Mishnah itself and no Toseftan record of complaints against the Mishnah in this regard, I find such explanations of the dynamics of the Mishnah and Tosefta to be weak.

Judith Hauptman conjectured that if the diachronic relationship(s) between the Mishnah and Tosefta can be ascertained, and one work is found to be more liberal or conservative than the other, a combination of these two discoveries would indicate that early Rabbinic Judaism was moving in either a liberal or conservative direction (2000, 14). However, Hauptman’s subsequent work moved away from the idea that either work is halakhically more liberal or conservative (that is, lenient or stringent) than the other. The Mishnah is more lenient than the Tosefta in allowing ownership of dogs in Israel (2005, 34–36 on M. and T. Bava Qamma). But the Mishnah is more stringent than the Tosefta in compelling (rather than recommending) husbands who become physically impaired to divorce their wives (ibid, 36–40 on M. and T. Ketubot). The Mishnah is more lenient than the Tosefta in allowing for proportional rather than full assessment of certain kinds of damages (ibid, 64–74 on M. and T. Bava Qamma). But the Mishnah is more stringent than the Tosefta by forbidding cooking on a festival for consumption after the festival, a practice permitted by the Tosefta in certain circumstances (ibid, 86–97 on M. Betzah and T. Yom Tov). Examples could be multiplied. Thus, whatever the differences between the Mishnah and Tosefta as works, they are not on a lenient-stringent or liberal-conservative continuum.

I suggest that modern scholarship of the Mishnah/Tosefta relationship, while focusing on the formal relationship between these works, has not engaged in systematic research into what may prove to be divergent halakhic perspectives of the Mishnah and Tosefta. The remainder of this thesis will explore how the Mishnah and Tosefta portray the SAGES and construe their authority in order to determine whether or not they diverge in these crucial matters.

CHAPTER THREE

TANNAITIC DISPUTE FORMS

This chapter introduces a typology of forms of Tannaitic dispute that will be employed to label and characterize every dispute found in the texts to be examined in the analytic work of chapters 4 and 5 and synthetic work of chapters 6 and 7. It concludes with a synoptic analysis of parallel Mishnah/Tosefta texts concerning the status of minority opinions.

Varieties of Tannaitic Dispute

My research focuses on disputes⁶³ because they are the context in which the Mishnah and Tosefta portray the SAGES and their authority. Towner (1983, 47) described the varieties of halakhic discourse as follows.

Even though no complete catalogue of the stereotyped patterns of discourse found in early halakhic literature has been made, more than one hundred can readily be identified. These patterns are absolutely ubiquitous [sic]. They cut across the literary genres of Mishnah and Midrash, as well as the entire range of subject matter with which these literatures deal. Furthermore, teachings attributed to authorities ranging in time from Hillel and Shammai down to the contemporaries of Rabbi, as well as unattributed teachings, are expressed in the same repertoire of halakhic patterns; in short, the patterns and formulae appear to have neither chronological, topical, nor individual affinities.

As a form (or collection of forms) of halakhic discourse, the halakhic dispute is pervasive in every order and tractate of the Mishnah (with the exception of tractate Avot) and the Tosefta. A study of disputes that involve the SAGES should reveal the way the Mishnah and Tosefta construe them and their authority.

Jacob Neusner exposed the underlying dynamic of the dispute in his observation that “Nearly all disputes which dominate and characterize the rhetoric of the Mishnah derive from bringing diverse legal principles into juxtaposition and conflict” (1981, 266). This description, which applies to the Tosefta as well, seems tautological—after all, by their very

⁶³ I use the term “dispute” somewhat broadly to include not only the vast majority of passages that are straightforward debates and arguments but also a small number of passages in which there are disagreements over halakhic issues that are not processed in the setting of a strict debate or argument.

nature, disputes involve juxtaposition and conflict—but his comment contains a significant insight. Neusner's point was that the dispute is not the only possible manifestation of divergent legal principles in a system or culture. Disparate legal materials are not always brought together to highlight and explore their differences because the impetus to uncover inherent tensions in the legal system may be lacking. In tannaitic discourse, on the other hand, the presence of conflicting legal materials is pervasive.

Neusner's observation that disputes involve both juxtaposition *and* conflict among diverse viewpoints highlights the two primary moves of Mishnaic and Toseftan disputes. In the tannaitic context, even the simplest juxtaposition of views, the simplest dispute form, involves some measure of conflict. On the most basic level, conflicting views are recorded. Often the conflict is unpacked to a degree, at times by the SAGES and one or individual, named sages and even over a period of several generations. Some disputes were resolved by the time of the Mishnah and Tosefta's definitive redactions while others had not reached resolution.

Do tannaitic disputes reflect actual argumentation or have they been significantly reshaped or even constructed? Menahem Kahana (2005) carefully examined three tannaitic disputes for signs of editorial intervention. He observed that often the constituent elements of tannaitic disputes originated in other contexts and were stitched together with new redactional material, producing seams that are evident upon close analysis. Redactional activity most likely took place during the entire chain of transmission, from the inception of each piece of tradition to the agenda-driven activity of the definitive redactors.⁶⁴ Kahana summarizes his research,

העיון בדרך עיצובה של שלוש המחלוקות לימד שאין לראות בהן פרוטוקולים
מלאים ומדויקים של דיוני החכמים, אף לא תיעוד ניטרלי וחסר פניות של עיקרי
הווכוח, אלא הצגה מגמתית של המשא והמתן כמוביל להכרעה המפורשת או
הרמוזה בו.

This study in the way the three disputes were fashioned has taught us that we should not see in them complete and accurate minutes of the sages' deliberations, not even a

64 For our purposes, it is not important to know how or when each individual dispute arose (e.g., as minutes of actual tannaitic debate or as constructs produced in the process of oral/literary transmission or during the definitive redaction). It is enough to observe that disputes appear in every identifiable historical period of the Mishnah (from pre-70 CE to the generation of Judah Hanasi) and Tosefta, as well as in the halakhic midrashim. Many of these disputes were reshaped in the process of transmission as later sages added their opinions or otherwise reframed the material. However, even though the definitive redactions contain diverse cultural perspectives, as Boyarin points out, it is also reasonable to conclude, as Neusner does, that redactors played a significant role in distinctively shaping each work.

neutral and undistorted documentation of the main dispute, but an agenda-driven presentation of the give-and-take meant to lead to the explicit or implied decision (80).

It should not be concluded, however, that the Mishnah and Tosefta contain only terse, highly formulaic redactions of tannaitic disputes. At times the discourse is expansive, marked by extended reasoning (rather than terse assertions) and also true-to-life comments that do not serve a strict halakhic function. An example of this kind of dispute is found in T. Nedarim 6:5, which I quote in full.

- A. A deceased childless brother's widow awaiting levirate marriage, whether with a single levir or with two levirs—
- B. R. Eliezer says, "He annuls her vows."
- C. R. Joshua says, "That is the case with one, but not with two."
- D. R. 'Aqiba says, "That is the case neither with one nor with two" [M. Nedarim 10:6A–D].
- E. Said R. Eliezer, "Now in the case of a woman in whom I have no part before she enters my domain, once she enters my domain, she is wholly in my power [so that I may annul her vows], in the case of a woman in whom I have some part before she comes into my domain [in that the woman cannot marry anyone other than the levir in the event that her childless husband dies], once she enters my domain, is it not logical that she should be wholly in my power [so that I may annul her vows]?"
- F. Said to him R. 'Aqiba, "No. If you have so stated matters in the case of a woman in whom I have no part before she comes into my domain, while once she enters my domain, she is wholly within my power, the fact is that, just as I have no part in her, so others have no part in her."
- G. "But will you say the same of a woman in whom I have a part before she enters into my domain, and who, once she enters my domain, is wholly within my power? For just as I have a part in her, so others [= other Levirs at that point] have a part in her."
- H. Said to him R. Joshua, "Aqiba, your argument applies to a case of two levirs. What will you reply in the case of one levir?"
- I. He said to him, "Just as you have not made a distinction for us between a case in which there is a single levir and one in which there are two levirs,
- J. "or in a case in which he bespoke the widow and one in which he did not bespeak the widow,
- K. "so in the case of vows and oaths you should make no distinction."
- L. He said to him, "It would have been too bad for you had you been around in the time of R. Elaezar b. Arakh and given an answer of this sort!"
- M. He said to R. Eliezer, "The case of an immersion pool will prove the matter as I see it. It raises things which have become unclean from their status of uncleanness, but it does not rescue things which are clean from becoming unclean."
- N. R. Eliezer went and offered a different mode of argument, which is as follows: "No. If in a situation in which he cannot annul his own vows once he has made them, lo, he has the power to annul his own vows before he has made them [by declaring them null in advance,] in a situation in which he may annul

the vows of his wife once she has made them, is it not logical that he should be able to annul the vows of his wife before she makes them?”

O. They said to him, “Now if he is able to annul his own vows before he makes them, it is also true that if he wanted to confirm his vows [by actually making them], he also does confirm them.”

“But may he annul the vows of his wife before she actually vows? For if he wanted to confirm them [before she makes them], he has not got the power to do so.”

Even though this Toseftan passage is formulaic, each sage is permitted a broader range of expression and complexity of argument than in most tannaitic disputes. While 6:5 A.–D. (which also appears in the Mishnah), is typically brief, each sage using great economy of words to express his halakhic opinion, beginning at 6:5 E., the sages use complex arguments and banter back and forth. The comment at L. is particularly telling: “It would have been too bad for you had you been around in the time of R. Eleazar b. ‘Arakh and given an answer of this sort!” This is not an argument but a put-down. Yet R. ‘Aqiba is not lured into trading barbs with R. Joshua. Instead, he addresses the halakhic issues from another angle. The entire passage shows evidence of redaction since the argument is laid out very carefully, but E.—O. is still more lifelike than the first four lines, A.–D.

It must be conceded that even the more extended and true-to-life Mishnaic or Toseftan disputes cannot be word-for-word accounts of actual disputes. Recorded tannaitic debates are normally brief summaries that communicate the essence of disputes. Opinions have been boiled down into terse assertions that are set in a formal structure. As Kahana pointed out, extraneous material has sometimes been introduced in order to further the redactors’ agenda or—in my view—to clarify the dispute. Small amounts of additional material have been authored and interpolated for the sake of clarity. The purpose and result of these interventions is a text that is concentrated (though more so in the Mishnah than in the Tosefta), teachable, and suited for memorization.

Kraemer (2006, 306) wrote that “the culture constructed by the mishnaic sages is a culture of dispute, one in which alternative opinions might be quoted, although some general rule might say that they are irrelevant in practice . . . One might even say that the lack of clear direction is consonant with the Mishnah’s intent, since rules for adjudication, even where they exist, are rarely quoted and almost never explicitly applied. It is more important for the Mishnah in such cases that the disputes be preserved. The variety of views, apparently, is meant to be studied and explored.”

Kraemer’s fundamental observation—that the tannaitic sages inherited a culture of dispute—is certainly correct. I am aware of no scholarly opinion asserting that the redactor(s)

of the Mishnah originated the dispute form, though they were apparently very adept at condensing and sharpening existing disputes. The presence of disputes in every historical level of tannaitic discourse leads one to conclude that dispute forms were the characteristic way the social network of sages transmitted its disputes. As long as such altered or manufactured disputes reflected the values of the social network of sages, it is easy to imagine that they were accepted for what they are: not the ipsissima verba of rabbinic disputes but representations of much more extensive oral argumentation and amalgamations of opinions that were known in the network of sages.

Following Neusner, it is clear that halakhic disputes are the tannaitic expression of divergent legal principles in structured conflict. However other religious and legal cultures handle such conflict, the tannaitic impulse was to express conflict openly. This is the foremost reason why the Mishnah should not be considered a legal code. Although disputes precede the setting of legal norms, legal codes, at least as we know them, record law that is the product of tradition, the outcome of dispute, or the ruling of governing authorities. Disputes were the Tannaim's way of representing their deliberations rather than a codification of norms.

Categories of Dispute

In the remainder of this chapter, I will lay out a basic typology of tannaitic disputes that will be used in the discussion of parallel disputes in the remainder of this thesis. For this purpose, I delineate three primary varieties of dispute: (1) unresolved disputes involving named sages; (2) disputes resolved with anonymous material; and (3) disputes involving the SAGES.

(1) Unresolved Disputes Involving Named Sages

(1A) *Simple unresolved disputes involving named sages*

These disputes are expressed as simple disagreements in the form "X says A, but Y says non-A"; reasons for the opposing opinions are not spelled out. There is no development of positions, merely the stating of opinions. No authority decides between the opinions.⁶⁵

⁶⁵ I do not include the Hebrew texts in this chapter, as the purpose here is simply to present varieties of dispute apart from exegesis.

M. Berakhot 2:3 C.–E.

- C. If he recited [the Shema] but did not enunciate the letters—
- D. R. Yose says, “He fulfilled his obligation.”
- E. R. Juday says, “He did not fulfill his obligation.”

T. Berakhot 8:5 A.–B.

- A. The House of Shammai say, “[The order of blessings at the conclusion of the Sabbath is] lamp, meal, spices, and *havdalah*.”
- B. The House of Hillel say, “Lamp, spices, meal, and *havdalah*.”

T. Menahot 9:20 A–D

- A. What is invalid in the case of the candelabrum is valid in the case of the trumpet. What is invalid in the case of the trumpet is valid in the case of the candelabrum.
- B. [One made] of tin, lead, assiterum, or of metal—
- C. Rabbi [Judah haNasi] declares invalid.
- D. And R. Yose bar Judah declares valid.

The literary structures or contexts of these disputes do not give any indication that one opinion is privileged over another. They remain in tension. In such disputes, the authority that the individual sages exercise in judicial or teaching settings has no bearing on the ultimate disposition of the dispute. Even though a sage be of great repute as a judge or scholar, his opinion is no more authoritative than that of any other sage in the context of disputes.

(1B) *Unresolved disputes involving named sages that continue for several steps*

These disputes are more complex than those in the previous category; there is some give-and-take between the individual sages. Their positions are developed more fully. Even so, no authority decides between the opinions.

M. Parah 9:4

- A. He who forms the intention concerning purification water [saying he plans] to drink it—
- B. R. Eliezer says, “He has rendered it unfit [by mere intent].”
- C. R. Joshua says, “[He only renders it unfit] when he will turn it up [in order to actually to drink. But mere intent does not spoil the water.]”
- D. Said R. Yose, “Under what circumstances? In the case of water which is not [yet] mixed.”
- E. But in the case of water which is [in fact] mixed—
- F. R. Eliezer says, “When he will turn it up.”
- G. R. Joshua says, “When he will drink it.”
- H. “And if he poured it into his throat [without actually touching the flask to his mouth], it is fit.”

T. Kelim Bava Batra 6:8

- A. [A piece of cloth] less than three-by-three [hand-breadths] which one arranged to stop up a hole in a bathhouse, or to empty out a pot, or to wipe off the millstones—
- B. R. Joshua says, “ ‘[If] it is kept in readiness, it is unclean,’ ” [according to] the words of R. Meir.
- C. R. Judah says, “R. Eliezer says, ‘Whether it is kept in readiness or not kept in readiness, it is unclean.’ ”
- D. “R. Joshua says, ‘Whether it is kept in readiness or not kept in readiness, it is clean.’ ”
- E. “R. Aqiba says, ‘[If] it is kept in readiness, it is unclean, and [if] it is not kept in readiness, it is clean.’ ”

As in category 1A, there are no structural or contextual clues to tell us which opinion prevails. Even though the positions of the individual sages has been developed more fully than in category 1A, because the reasons for the opposing opinions are not spelled out, the underlying structure and the outcome remains the same: viewpoints are juxtaposed but none is privileged.

(1C) Disputes involving named sages that include supporting rationales

In this category, the inclusion of supporting arguments made by individual sages exposes the underlying structure of their opinions and thus develops their positions more fully than in Type 1A and 1B disputes. No authoritative voice enters to resolve the dispute. However, in this category, some disputes are considered to be resolved if the rationale underlying a supporting argument is used to support an authoritative ruling in a similar dispute elsewhere in the tannaitic corpus.

T. Kelim Bava Metzia 8:4

- E. [If the frame of the bed and the cradle] is tied with ropes and does not have legs—
- F. R. Meir and R. Judah declare unclean.
- G. R. Yose and R. Simeon declare clean, for one does not make use of the object itself.

In this passage, the issue is whether bed materials (the frame and cradle of the bed), that have become ritually unclean remain so under the conditions specified in D. The opinion held by both R. Meir and R. Judah—that they remain unclean—is stated without explanation. The opinion of R. Yose and R. Simeon—that they are now ritually clean—is supported by the rationale that, under these circumstances, the remaining portions of the bed are no longer used as a bed. Taken as a singular assertion, this does not seem to be a convincing argument.

From the perspective of literary structure, the position of R. Yose and R. Simeon's opinion and its rationale at the conclusion of the dispute gives it stronger valence lacking in the middle position of R. Meir and R. Judah's opinion, which is also weakened by the lack of a rationale. However, taken in its broader Toseftan (and tannaitic) context, the rationale introduced by R. Yose and R. Simeon is decisive if its underlying assertion (that the item is no longer used as a bed) is true. This is because beds are included among "utensils" (כלים), which, when no longer suitable for the use for which they were made, are not susceptible to, and do not carry, uncleanness. Such items are, in fact, no longer considered כלים (see M. Kelim 3:3—מפני שבטל שם כלי מעליו: "they cancel the name 'vessel' from it").

Because of the terseness of D. and E., it seems at first that this is a dispute along the lines of category 1B. However, it turns out to be an argument about the application of an accepted halakhic principle to this particular subject. Since R. Meir and R. Judah do not respond to the rationale of R. Yose and R. Simeon, the latter have won the dispute. It turns out, then, that this is not an undecided dispute, but one that only appears to be undecided when taken out of its larger context. The following dispute does remain unresolved:

M. Bava Metzia 3:7

- A. He who deposits produce with his fellow –
- B. lo, this one [the one who guarded the deposit, when he returns it] may exact reductions [from the owner due to natural depletion of the produce]:
- C. (1) for wheat and rice, nine *qabs* and a half for a *kor*;
- D. (2) for barley and durra, nine *qabs* to a *qor*;
- E. (3) for spelt and linseed, three *seahs* to a *qor*.
- F. All is relative to the quantity, all is relative to the time [it has been kept].
- G. Said R. Yohanan b. Nuri, "But what difference [does that make] to the mice? Will they not eat [the same] whether from a large quantity or small?"
- H. "But he may not exact from the owner the stated reductions
- I. except from a single *kor* alone."
- J. R. Judah says, "If it was a large volume of produce, he may not exact from the owner the stated reductions,
- K. "for it increases [in bulk during storage]."

Note that when the initial opinion of a dispute is anonymous, as here, subsequent tradition assigns it to "Tanna Qamma" ("the first Tanna" in the dispute).⁶⁶ Thus, tradition assigns it to an individual sage. It is reasonable to assume that opinions are sometimes passed on without attribution, the speaker's name having been lost, or for some reason his name is not recorded. However, since most opinions are attributed to individual sages or to the

⁶⁶ There are various opinions about the identity of Tanna Qamma, based in part on what tractate he appears in; this issue is not of concern to our thesis.

SAGES, there would have to have been a strong rationale for intentionally removing a sage's name from his opinion. It seems more likely that anonymous opinions (in contrast with anonymous glosses) represent the consensus on a particular matter. Although the opinion may have originated with a single sage, that origin plays no role in the dispute. The anonymous opinion is a baseline for the rest of the discourse.

The dispute in M. Bava Metzia 3:7 rests on the premise that the quantity of produce held by a guardian decreases over time, perhaps being eaten by rodents. The guardian pays a standard rate for the depletion, based on quantity and time. R. Yohanan maintains that quantity is irrelevant, since mice (apparently the main source of produce depletion) will eat the same amount, regardless of the quantity of produce. R. Yehudah claims that losses are not deducted because the size of a large amount of produce will increase during storage anyway.

R. Yehudah's opinion and its underlying rationale seem weak because they rest on a possibility, rather than a probability or certainty, that the size of a large amount of produce increases during storage. Later commentators conjecture that the produce may have puffed up with moisture or been mixed with other produce, so that its precise quantity can no longer be measured (see Kehati, 1994d, Bava Metzia, 54). R. Yohanan, however, has a reasonable point: it should not be assumed that mice will eat more from a larger quantity of produce than of a small quantity.

As things stand, this dispute is unresolved. There is also nothing in the surrounding disputes that would help determine the outcome. Therefore, the anonymous opinion and R. Yohanan's seem to stand on equal footing while R. Yehuda's opinion awaits firm evidence that a large quantity of produce increases over time.

(2) Disputes Resolved with Anonymous Material

A significant amount of Mishnaic and Toseftan material is not attributed to named sages or to the SAGES as a group. In the context of the sages' social network, the insertion of such material may have been a daring move. Those who added anonymous material needed both a highly nuanced sense of what was acceptable to the network and a willingness to take the risk that newly minted material might be rejected. Thus, even though one cannot discount the presence of constructed material, the acceptance of both Mishnah and Tosefta (to

differing degrees, to be sure) indicates that the halakhah of these works was not noticeably affected by the insertion of such material in their definitive redaction.⁶⁷

Anonymous material is often found in blocks (e.g, M. Ketubot 1:1-5) and forms the framework of much Mishnaic and Toseftan discourse. For example, M. Yevamot, a lengthy tractate, is composed of substantial blocks of anonymous material interspersed with individual sages' dissent or their elucidation and elaboration of the anonymous material. In the first four chapters of M. Yevamot there are 289 steps of discourse (in Neusner's outline), only seven of which consist of individual sages' opinions, and thirty-six are small blocks of dispute. This is by no means a scientific sampling of the Mishnah, but simply intended to show the influential role that anonymous material can play in its discourse.⁶⁸

A full chapter, M. Eruvin 1, may be taken as an example of the way anonymous material sometimes serves as the framework of tannaitic discourse. I have put the words of named sages and the SAGES in *italic* typeface to distinguish them from anonymous text.⁶⁹

m. Eruvin 1

- 1.1 A. [The crossbeam above] an alley entry which is higher than twenty cubits must be diminished [in height].
R. Judah says, "It is not necessary."
And [the alley entry] of a breadth [wider] than ten cubits must be diminished [in breadth].
And if it has the shape of a doorway,
even though it is wider than ten cubits
it is not necessary to diminish it.
- 1:2 A. The validation of an alley entry [for carrying objects on the Sabbath],
the House of Shammai say, "[It must have] a sidepost and a crossbeam."
And the House of Hillel say, "A sidepost or a crossbeam."
R. Eliezer says, "Two sideposts."

⁶⁷ Halivni (1981) asserts that this sort of editorial intervention in the tradition was rejected by at least some of Rabbi Judah's contemporaries, who produced the Mishnah as an alternative expression of the tradition. This view has not found much acceptance. See Kraemer (2006, 311–12).

⁶⁸ By its very nature, anonymous material does not indicate its origins. Instead of investigating those origins, it would appear to be more fruitful to examine how anonymous materials function in our texts.

⁶⁹ As noted above, when the initial opinion of a dispute is anonymous, as here, subsequent tradition assigns it to "Tanna Qamma" ("the first Tanna" in the dispute). In other words, tradition assigns it to an individual sage. It is reasonable to surmise that opinions were sometimes passed on without attribution, the speaker's name having been lost. However, since the vast majority of opinions are attributed to individual sages or to the SAGES, so there must have to have been a strong rationale for *intentionally* removing a sage's name from his opinion. It seems more likely that the lack of attribution signals a lost attribution, an earlier consensus being reexamined, or interpolations by a redactor or redactors of a preliminary or definitive redaction.

In the name of R. Ishmael and a certain disciple before R. Aqiba, "The house of Shammai and the House of Hillel did not dispute concerning an alley entry which is less than four cubits wide, that it [is validated] either by a sidepost or by a crossbeam.

Concerning what did they dispute?

Concerning one which is broader than four cubits, up to ten cubits.

For: The House of Shammai say, "A sidepost and a crossbeam."

And the House of Hillel say, "A sidepost or a crossbeam."

Said Aqiba, "Concerning both this case and that case did they dispute."

- 1:3 A. The crossbeam of which they⁷⁰ spoke—[it should be] wide [enough] to hold a half-brick.
 And the half-brick is the half of a brick of three hand-breadths.
 It is sufficient for the crossbeam to be a hand-breath wide, [enough] to hold a half-brick lengthwise.
- 1:4 A. It [the crossbeam] should be wide enough a half-brick,
 B. and strong enough to hold a half-brick.
 C. *R. Judah says, "[It should be] wide enough [to hold a half-brick] even though it is not sufficiently strong.*
- 1:5 A. "[If] it was of straw or reeds, they regard it as if it were made with metal."
 B. [If it was] curved, they regard it as if it were straight.
 C. [If it was] round, they regard it as if it were square.
 D. Whatever is three handbreadths in circumference is a handbreath in width.
- 1:6 A. The side-posts of which they spoke—their height must be ten handbreadths.
 B. And their breadth and thickness may be in any measure at all.
 C. *R. Yose says, "Their breadth must be three handbreaths."*
- 1:7 A. With any sort of material do they make sideposts.
 B. and even something which is animate.
 C. *And R. Yose prohibits [using an animate object].*
 D. And it [something animate used to cover up the entrance of a tomb] imparts uncleanness as a sealing stone.
 E. *But R. Meir declares it clean [when used for that purpose].*
 F. And they write on it writs of divorce for women.
 G. *And R. Yose the Galilean declares it unclean [when used for that purpose].*
- 1:8 A. A caravan which encamped in a valley, and which [the travellers] surrounded with a fence made out of cattle yokes –
 B. they carry [things] about in it
 C. on condition that the fence be ten handbreaths high,
 D. and there not be breaks [in the fence] larger than the built-up parts.
 E. Any break [in the fence] which is about ten cubits wide is permitted,

⁷⁰ The third person affix י- (in שָׁמַיִם) may refer to the SAGES of 1.2 or to an idealized "they," as in 1:5A., B., C., etc.

- F. because it is tantamount to a doorway.
- G. [But a break in the fence] which is larger than that it is? prohibited.

- 1:9 A. They surround [the camp] with three ropes one above the other.
- B. On condition that there not be between one rope and the next [a distance of] three handbreadths.
- C. The size of the ropes must be so that their thickness is more than a handbreadth.
- D. so that the whole will be ten handbreadths high.

- 1:10 A. They surround [the camp] with reeds,
- B. on condition that there not be between one reed and the next three handbreadths [of empty space],
- C. *“And they spoke specifically of the case of a caravan [at rest],” the words of R. Judah.*
- D. *And the SAGES say, “They spoke of a caravan only because of prevailing conditions.”*
- E. *“Any partition which is not of warp and woof is no partition,” the words of R. Yose b. R. Judah.*
- F. *And the SAGES say, “One of the two [is sufficient].”*
- G. Four matters did they declare exempt [from liability] in a [military] camp:
 - (1) They gather wood from any location.
 - (2) And they are exempt from the requirement of washing hands [before eating]:
 - (3) and from the laws concerning doubtfully tithed produce;
 - (4) and from the requirement to prepare an eruv [to join several tents together so that things may be carried between tents on the Sabbath].

The sages named in this passage flourished in the first three tannaitic generations. Apart from 1:2, which is a self-contained unit with both attributed and anonymous text, the elimination of words attributed to named sages (and to the SAGES) would not affect the coherence of the chapter at all. Likewise, the additional elimination of 1:2 would not affect the chapter’s coherence. Here is the way M. Eruvin reads without 1:2 and attributed opinions:

- 1:1 A. [The crossbeam above] an alley entry which is higher than twenty cubits must be diminished [in height].
 - C. And [the alley entry] of a breadth [wider] than ten cubits must be diminished [in breadth].
 - D. And if it has the shape of a doorway,
 - E. even though it is wider than ten cubits
 - F. it is not necessary to diminish it.
- 1:3 A. The crossbeam of which they spoke—[it should be] wide [enough] to hold a half-brick.
 - B. And the half-brick is the half of a brick of three hand-breadths.
 - C. It is sufficient for the crossbeam to be a hand-breath wide, [enough] to hold a half-brick lengthwise.

- 1:4 A. It [the crossbeam] should be wide enough a half-brick,

- B. and strong enough to hold a half-brick.
- 1.5 A. “[If] it was of straw or reeds, they regard it as if it were made with metal.”
 B. [If it was] curved, they regard it as if it were straight.
 C. [If it was] round, they regard it as if it were square.
 D. Whatever is three handbreadths in circumference is a handbreath in width.
- 1:6 A. The side-posts of which they spoke—their height must be ten handbreadths.
 B. And their breadth and thickness may be in any measure at all.
- 1:7 A. With any sort of material do they make sideposts.
 B. and even something which is animate.
 D. And it [something animate used to cover up the entrance of a tomb] imparts uncleanness as a sealing stone.
 F. And they write on it writs of divorce for women.
- 1:8 A. A caravan which encamped in a valley, and which [the travellers] surrounded with a fence made out of cattle yokes –
 B. they carry [things] about in it
 C. on condition that the fence be ten handbreaths high,
 D. and there not be breaks [in the fence] larger than the built-up parts.
 E. Any break [in the fence] which is about ten cubits wide is permitted,
 F. because it is tantamount to a doorway.
 G. [But a break in the fence] which is larger than that it prohibited.
- 1.9 A. They surround [the camp] with three ropes one above the other.
 B. On condition that there not be between one rope and the next [a distance of] three handbreadths.
 C. The size of the ropes must be so that their thickness is more than a handbreadth.
 D. so that the whole will be ten handbreadths high.
- 1:10 A. They surround [the camp] with reeds,
 B. on condition that there not be between one reed and the next three handbreadths [of empty space],
 ...
 G. Four matters did they declare exempt [from liability] in a [military] camp:
 (1) They gather wood from any location.
 (2) And they are exempt from the requirement of washing hands [before eating]:
 (3) and from the laws concerning doubtfully tithed produce;
 (4) and from the requirement to prepare an eruv [to join several tents together so that things may be carried between tents on the Sabbath].

The passage as we have it in our Mishnah shows several marks of redaction. Following the methodology of Kahane (2005), it is not difficult to identify rough redactional transitions (for example, at 1:8 A. where a new subject is introduced suddenly.). Some

attributed material seems to naturally follow the preceding units of discourse (e.g., 1:2, 1:4 C. and 1:6 C.), since they each comment on the issue at hand. Other material is clearly jarring (see 1:10 C.–D., an insertion, after which E.–F. awkwardly resumes the interrupted topic and 1:10 G., which appends material that does not play any part in the previous dispute).

We cannot be certain that all this editorial activity took place at the time of the Mishnah's definitive redaction. Nevertheless, however the Mishnah reached its definitive form, it is clear that the anonymous text carries the discourse, moving the discussion from one issue to the next, even if awkwardly at times. Anonymous rulings are clearly authoritative in this passage (see 1:1 A, C.–F.; 1:3 A.–1:4 B.; 1:5 A.–1:6 B.; 1:7 A., etc.), as are rulings of the SAGES, though dissenting opinions are recorded. The flow of narrative is carried by the anonymous assertions rather than by the opinions of the named sages.⁷¹

Two more examples will suffice to demonstrate the authority of anonymous opinions. The first is not a dispute, but is offered as an instance of the authority of entirely anonymous text.

M. Kelim 23:1

- A. The ball, the shoe last, the amulet, and the phylacteries, which were torn—
- B. he who touches them is unclean.
- C. [But he who touches] that which is in them is clean.
- D. The saddle which was torn—
- E. he who touches what is in it is unclean, because the stitching connects it [the cover to the stuffing].

This anonymous text carries no hint of uncertainty or dissent. At E., it offers a rationale for one of its statements. It appears that this rationale is offered as an explanation rather than a counterthrust excerpted from a dispute. Therefore, we can conclude that, in the definitive redaction of the Mishnah, this passage was considered authoritative.

The genesis of passages like this is unclear. Does it represent an authoritative response to halakhic questions posed to sages? Is this uniformity the result of a dispute that, after a process of oral and literary transmission, is now entirely free from argumentation? The explanation offered at E. may be a response to a lost question or dissent. At a minimum, it arose from a concern for clarity. It is the only portion of the passage that offers a departure from the bland and uniform assertion of halakhah.

⁷¹ The anonymous framework of M. Eruvin 1 and a large number of other passages do not support the idea that the first anonymous opinion is that of a specific "Tanna Qamma." It is more likely that the anonymous framework is an extended passage of traditional material, augmented by attributed statements that elaborate on a halakhic dispute.

The next example contains a simple dissent.

T. Ahalot 18:14

- A. He who goes from Akko to Kezib, on his right, to the east—the road is unsusceptible [to ritual uncleanness] on account of the land of the peoples and is liable for tithes and the law of the seventh year until it is clarified that it is free of those obligations. On the left, westward, the road is unclean on account of the land of the peoples, and it is free of tithes and of the law governing the seventh year until it will be made certain that it is liable—
- B. up to Kezib.
- C. R. Ishmael b. R. Yose says in the name of his father, “Up to Lebanon.”

The anonymous Tosefta justifies its rulings by referring to established understandings of borderlands that touch on both Israel and non-Jewish nations. R. Ishmael’s dissent only concerns the area of the ruling’s application. Based on this passage alone, the substance of the ruling is clear but the extent of its application is not. However, further down the page, R. Ishmael also dissents from a decision of a group of three named sages concerning another aspect of the ritual status of borderlands. He explains that he fears punishment from the highest court if he agrees with the ruling of the three. The reason for this fear is not clarified. However, because R. Ishmael offers no reasoned basis for his dissent, his dissent loses force and the authority of anonymous rulings is reinforced.

(3) Disputes Involving the SAGES

The last broad category of disputes, those involving the SAGES as a group, is the focus of this dissertation. They fall naturally into three subgroups, (3A) disputes that are resolved and concluded by the SAGES, with or without an explanatory gloss; (3B) disputes in which the SAGES’ opinion is followed by a record of simple dissent by individual sages; and (3C) disputes in which the SAGES’ sui generis authority is destabilized in some way. Numerous examples of these disputes in the Mishnah and Tosefta will be analyzed in chapters 4 and 5 to establish how the two works broadly depict the SAGES’ authority in the context of these disputes.

(3A) Disputes resolved (and concluded) by the SAGES

The disputes in this category are authoritatively concluded by the SAGES with what amounts to a halakhic ruling.

M. Moed Katan 3:6

- A. R. Eliezer says, “After the Temple was destroyed, Pentecost was deemed equivalent to the Sabbath.
- B. Rabban Gamaliel says, “The New Year and the Day of Atonement are deemed equivalent to festivals.”
- C. But the SAGES say, “The rule is in accord with the opinion neither of this one nor of that one.
- D. “But Pentecost is deemed equivalent to a festival, and the New Year and the Day of Atonement are deemed equivalent to the Sabbath.”

This passage follows anonymous, authoritative material concerning the mourning practices on holy days. R. Eliezer and Rabban Gamaliel indicate that changes in these practices took place after the destruction of the Temple, an event that in itself spurs mourning. Without explanation, the SAGES agree with the principle that the destruction of the Temple brought about change in mourning practices, overruling the opinions of both R. Eliezer and Rabban Gamaliel.

In the phrase “But the SAGES say . . .,” the Hebrew underlying “but” is ו, which may also be translated as “and.” I translate it adversatively when the SAGES clearly differ from the preceding opinion.

T. Menahot 2:16

- F. [He who takes] a handful of meal-offering to leave it and its residue for the next day, or to take them outside [the courtyard]—
- G. it is valid.
- H. And R. Judah declares invalid.
- I. R. Eleazar says, “R. Eliezer declares invalid, and R. Joshua declares valid.”
- J. Said to him R. Judah, “Now if one left a handful for the next day, he does not render it invalid.”
- K. But the SAGES say, “This and this are valid.”

The Tosefta seems to depict individual sages trying to resurrect a dispute that had been settled by the anonymous text. The SAGES settle the dispute by reaffirming the anonymous halakhah.

At times, the SAGES’ opinion is glossed anonymously or by individual sages without any divergence from the SAGES’ opinion. The SAGES’ opinion is taken as authoritative and merely extended in application or expression.

M. Zevachim 2.4

- A.-F. [This is anonymous text that R. Judah’s general rule from which he will differ at. G.-H.]
- H. If the [improper] thought about the place precedes the [improper] thought about the time, it is invalid, but he is not [liable] to cutting off.
- I. But the SAGES [supporting the anonymous text] say, “This and that are [both] invalid. And he is not liable to cutting off.”

- J. [If the thought] to eat about half an olive[‘s bulk] and to burn about half an olive[‘s bulk], it is valid,
- K. for eating and burning are not combined.

The SAGES overrule R. Judah. The anonymous gloss at J.-K. limits the applicability of the SAGES’ rule, not because it disagrees with it but out of concern that their ruling might be applied incorrectly by wrongly combining eaten and burnt quantities of sacrificial flesh to meet the minimum amount (an olive’s bulk) required for transgression.

In all these disputes, the authority of the SAGES appears to be *sui generis*. They prevail because of their unique authority to close off discussion. A large majority of disputes involving the SAGES, in both the Mishnah and Tosefta, are Type 3A disputes.

(3B) *The SAGES’ ruling is followed by an individual dissent*

In this category, individual, named sages dissent from the SAGES’ opinion.

M. Kelim 28:7

- A. “Three-by-three [fingerbreadths] concerning which they spoke—
- B. “is exclusive of the hem.” [These are] the words of R. Simeon.
- C. But the SAGES say, “Three-by-three [fingerbreadths] exactly.”
- D. If one patched it by one of its sides, it is not a connector.
- E. [If one patched it] from two sides, this opposite that, it is a connector.
- F. If one made it like a *gamma*—
- G. R. Aqiba declares it unclean.
- H. But the SAGES declare it clean.
- I. Said R. Judah, “Under what circumstances? In connection with a cloak.
- J. “But in connection with a shirt, [if it is patched] from above, it is a connector. [If patched] from below, it is not a connector.”

The dispute concerns cloths in general. In the case of a connector, ritual uncleanness is transmitted; where there is not a connector, uncleanness is not transmitted and the cloth remains clean. At H., the SAGES declare the garment patched like a *gamma* to be clean. They deem the patch not to be a connector. R. Judah disagrees in the case of a shirt that is patched from above. This is not a gloss but a dissent.

T. Peah 4.12

- A. “As regards] one who says, ‘I shall not be supported by others’—
- B. “they act considerately toward him, and support him by giving [to him] as a loan, and [if he cannot repay] they convert it to a gift.” [These are] the words of R. Meir.
- C. But the SAGES say, “They give [it] as a gift, and [if he refuses] they convert it to a loan.”
- D. R. Simeon says, “They say to him, ‘Bring us some collateral,’ in order to allow him to take the money.”

The SAGES differ with R. Meir. R. Simeon offers a third way. On its surface, this appears to undermine the authority of the SAGES. However, such dissent is apparently recorded for posterity rather than to indicate any indeterminacy in the outcome.⁷²

(3C) *The SAGES' sui generis authority is weakened*

T. Temurah 3:3-4

- 3 A. "[He who says,], 'This beast is a thank-offering, what it produces is a burnt offering,' 'This beast is a peace-offering, what it will produce is a sin-offering,' lo, this [offering] is the offspring of a thank-offering, the offspring of peace-offerings," the words of R. Meir.
 B. And the SAGES say, "His words are confirmed."
 C. R. Yose says, "Let one investigate the matter. If he said, 'It was to this which I intended, but one cannot state two names at once,' his words are confirmed.
 D. "If he said, 'I designated the first and then I went and designated the second,' his latter statement is null."
- 4 A. R. Meir concedes to the SAGES that [if he said,] "That which this beast will produce is a burnt-offering, and it itself is a thank-offering," "That which this beast will produce is a sin-offering, and it is a peace-offering," that his words are confirmed.
 B. The SAGES concede to R. Meir in the case of one who says, "This beast is instead of these two animal-offerings," "... instead of two animal-offerings which I owe," that his latter statement is null.

This part of the tractate Temurah deals with the exchange or substitution of non-consecrated for consecrated items, based on Leviticus 27:10–27, 33. Such exchanges are based, in part, on the specific wording pronounced by the offerer when making the substitution. In this circumstance, the SAGES make a clear ruling at B. R. Yose points out a weakness in the SAGES' ruling—they have ruled too broadly; the matter requires further investigation and categorization. R. Yose's opinion is expressed at length, leaving us with the impression that, contextually, it is not a simple dissent but a clarification of the overall issues. What follows seems to be excerpted from a lengthier dispute between R. Meir and the SAGES. R. Meir concedes that the SAGES are right if the one offering the sacrifice reverses the clauses cited by the SAGES. The SAGES in turn concede that R. Meir is correct in another set of circumstances.

⁷² See "Two Disputes on the Status of Minority Opinions" on pages 93-96.

The interplay between the SAGES and individual sages in this Tosefta passage is instructive. R. Yose is allowed to adjust the SAGES' opinion. R. Meir and the SAGES seem to operate on a somewhat equal footing, each willing to concede to the other when logic requires it. The SAGES do not attempt to steamroll R. Meir, but engage him on the issues. It is clear that in this passage the SAGES do not operate with unequivocal authority. The discourse appears to elevate rationality over *sui generis* authority.

T. Tevul Yom 2:12

- A. A round cake of figs, on the edge of which liquids fell—
- B. “Lo, one removes up to three finger-breadths near the full [thickness of] the edge,” the words of R. Judah.
- C. But the SAGES say, “One removes from it only the edge on which the liquids fell alone.”
- D. Said Rabbi, “The opinion of R. Judah seems best in the case of a cake of figs which one did not pulverize, and the opinion of the SAGES seems best in the case of a cake of figs which one pulverized [into bits].”

The moist edge of the cake of figs can convey ritual uncleanness to the whole cake if the edge comes into contact with something ritually unclean. In order to avoid that possibility, part of the edge is removed. R. Judah and the SAGES disagree on the amount of the cake that should (or may) be removed. Rabbi (Yehuda Hanasi) weighs the two opinions and determines that the opinion of R. Judah seems best in one circumstance and the SAGES in another.

We observe that Rabbi places the opinions of R. Judah and the SAGES on an equal footing. Rather than making the assumption that the SAGES' opinion automatically prevails over R. Judah, he has apparently evaluated the two opinions on their merits, concluding that they are each correct in a certain circumstance. By subjecting the opinion of the SAGES to his assessment, Rabbi has undermined their *sui generis* authority. By placing the opinions of R. Judah and the SAGES on an equal footing, Rabbi has assumed the stance of arbiter over their opinions. This undermines the *sui generis* authority of the SAGES in a second way: their opinion is subject to the assessment of an arbiter who assumes that his acumen is greater than that of the SAGES.

Two Disputes on the Status of Minority Opinions

Scholars such as Menachem Fisch (1997), Moshe Halbertal (1997), and Daniel Boyarin (2004) are representative of the many scholars who have studied the programmatic statements in M. Eduyot 1.5–6 and T. Eduyot 1.4 concerning the status of majority rulings

and individual dissent, and discussed the relationship of those statements to the larger purposes of the Mishnah and Tosefta. If these statements were a conscious attempt by the redactors of the Mishnah and Tosefta to represent the overall stance of the respective works, my understanding of SAGES disputes with dissents could be called into question. On the other hand, if they are understood as variant texts that were incorporated into the Mishnah and Tosefta without regard for the overall halakhic approach of those works, my approach remains unaffected. Here are the two texts:

משנה עדיות א

(ה) ולמה מזכירין דברי יחיד בין המרובין הואיל ואין הלכה אלא כדברי המרובין
שאם
יראה בית דין את דברי היחיד ויסמוך עליו שאין בית דין יכול לבטל דברי בית דין
חבירו עד שיהא גדול ממנו בחכמה ובמנין. היה גדול ממנו בחכמה אבל לא במנין,
במנין אבל לא בחכמה, אינו יכול לבטל את דבריו עד שיהא גדול ממנו בחכמה
ובמנין :
(ו) אמר יהודה אמ כן למה מזכירין את דברי היחיד בין המרובין לבטלן, שאם יאמר
האדם כך אני מקובל יאמרו לו מדברי איש פלי שמעתה: [Kaufman]

Mishnah Eduyot 1:5-6

For what purpose is the opinion of an individual recorded along with that of the majority, since the halakhah is only according to the opinion of the majority? So that if a court considers the words of the individual [preferable], it may rely on them. [But] a court may not nullify the opinion of a fellow court unless it exceeds [its fellow court] in wisdom and in number. [If it exceeds it] in wisdom but not in number, [or] in number but not in wisdom, it may not nullify its opinion until it exceeds it in wisdom and in number.

R. Judah says, "If so, is the opinion of an individual is recorded with that of the many [seemingly] to no purpose? [No, the purpose is] that if a person should say: 'Thus have I received,' one may say to him: 'You have heard according to the words of So-and-so'[and individual rather than the majority]. "

תוספתא עדיות א

(ד) לעולם הלכה כדברי המרובין [לא הוזכרו דברי היחיד בין המרובין אלא לבטלן.
ר' יהודה אומ' לא הוזכרו דברי יחיד בין המרובים]⁷³ אלא שמא תיצרך להן שאה
ויסמכו עליהן. וחכמי אומ' לא הוזכרו דברי יחיד בין המרובין אלא מתוך שזה אומ'
טמא וזה אומ' טהור וזה אומ' טמא⁷⁴ כדברי ר' אליעזר שמעתה :
[Based on Zuckerman]

T. Eduyot 1:4 The halakhah always follows the majority opinion [and the opinion of the individual is recorded with that of the majority only so as to nullify it]. R. Judah

73 Codex Erfurt includes the bracketed material, lacking in the usually preferable Codex Vienna, which offers a very truncated version of this passage.

74 Zuckerman includes Erfurt's אומ' טהור וזה אומ' טמא.

says, “The opinion of an individual is recorded along with that of the majority only so that, if the times necessitate it, they may rely upon it.” But the SAGES say, “They record the opinion of the individual along with that of the majority only so that if this one says “It is ritually unclean” and that one says, “It is ritually clean,” one may respond *to him*, “You have heard ‘It is ritually unclean’ according to the opinion of R. Eliezer, [which we do not follow, as it is merely an individual’s opinion].”

Fisch approached these texts in pursuit of his larger purpose of tracking what he termed traditionalist and anti-traditionalist tendencies in rabbinic literature. He observed that both Mishnah and Tosefta Eduyot, while listing numerous halakhic rulings, are “also and perhaps mainly about the process and procedures of issuing such rulings. . . . In fact, by not grounding itself in a particular historical context, the Mishnah, more than the Tosefta, implies that such a treatment of halakhic traditions should not be viewed as an isolated episode but as the everlasting norm” (1997, 71–72).

Fisch noted the common observation that the two texts present different perspectives on the halakhic process. The Mishnah retains minority views so that they may later be “relied on” if necessary. R. Judah dissents, claiming that minority views are retained so as to be excluded permanently.⁷⁵ The Tosefta reverses the attributions and therefore casts the halakhic process in a different light. Here, the anonymous text nullifies individual opinions permanently, while R. Judah asserts that they are retained for future use. Thus, in Fisch’s view, according to the Mishnah, the halakhic process remains open even after the majority has spoken. Fisch termed this view “anti-traditionalist”. According to the Toseftan passage, majority rulings stand forever, a posture that Fisch labeled “traditionalist.”

Fisch then grappled with the implications of his own analysis. “To conclude solely on the basis of the two texts examined so far [M. Eduyot 1.5–6 and T. Eduyot 1.4] that there exists a general ideological incongruity between the editorial policy of the Mishnah and Tosefta would be rashly to overgeneralize. And I have no intention of doing so. Still, it is impossible to ignore the consistent and compelling *local* differences between their respective accounts of the decision-making procedures” (ibid., 77). Yet on the next page, Fisch asserted “at least in the texts so far examined, the Tosefta and Mishnah represent and embody significantly different philosophies of halakhic development. It is also reasonable to assume that they reflect schools of thought that existed at least at the time of their composition” (ibid,

75 The paradoxical nature of R. Judah’s opinion has often been noted. If, as he asserts, individual opinions are retained so as to be excluded permanently, then *his* view (being the opinion of an individual) is excluded and, by inference, affirms the majority is correct in retaining minority views.

78). We can see Fisch caught between scholarly caution and a sense that there are indeed different perspectives on the halakhic process at work in the Mishnah and Tosefta, with the result that he equivocates on his own cautions about overgeneralizing.

Commenting on Fisch's analysis, Boyarin noted "it seems to me that the distinctions Fisch makes between the Mishna and the Tosefta are not conclusive, and in each case the Mishna can be read as showing the same set of views as the Tosefta."⁷⁶ Much of Fisch's argumentation is based on attractive but not finally compelling arguments *e silentio*" (2004, 309; 10, n. 31), and his leap from noting local textual differences to assuming "schools of thought" is without basis.

Publishing the same year as Fisch, Moshe Halbertal saw in these two texts a "debate over whether the Mishnah is a flexible law code . . . or a closed code" (1997, 52). He stated that, in M. Eduyot 1:5, "the opinion that perceives the Mishnah as a flexible code was presented as a majority opinion" by "the editor of the Mishnah" (ibid.). "In the Tosefta, the view that the Mishnah is a flexible code is attributed to R. Yehudah and thus stated as the minority opinion" (ibid.). The dichotomy "inflexible/flexible" parallels Fisch's "traditionalist/anti-traditionalist."

I suspect that Boyarin would also have seen Halbertal's arguments as *e silentio* Halbertal's assertions that the texts represent the views of the editors of the Mishnah and Tosefta about the nature of the Mishnah. The dispute is not about textual authority but the authority of the majority of a group of sages and the handling of dissent. The suggestion that the texts represent either the views of the editors or of the works in which they are found assumes a higher level of redactional unity than has yet been demonstrated to be true. The statement that the texts represent the views of the editors is something to be demonstrated, not assumed.

Even so, the differences that Fisch and Halbertal noted cannot be ignored. At a minimum, the statements in tractate Eduyot about majority and minority opinions are two versions of a piece of oral-literary tradition, perhaps the outcome of two divergent oral performances that are now embedded in the Mishnah and Tosefta. At most, these statements represent two tannaitic perspectives, one that the ruling of a majority of sages cannot be overturned and another that majority rulings are open to be revisited. In either case, authority resides in a majority of sages rather than in a work (the Mishnah).

⁷⁶ Boyarin does not explain this puzzling remark. Though Fisch's overall conclusions are shaky, his analysis of the differences between the two Eduyot texts seems compelling.

Read separately, the two Eduyot texts apply to different situations. The Mishnah text speaks about a disagreement of sages (not SAGES) in a court setting. The issue is the *application* of halakhah to the case before the court rather than the *determination* of halakhah in a dispute among sages. The court, a **beit din (a court with at least three sages sitting as judges)** is ruling on a situation that requires the application of existing halakhah. Another court may rely on the minority opinion and overturn the verdict, though only under strict circumstances. Taken by itself, the Tosefta seems to be describing a typical Type 3B dispute with a recorded dissent. If this is so, then “the majority” is equivalent to “the SAGES.”

However, when read together, the texts cannot refer to halakhah disputes, since the Mishnah clearly refers to a court. It is possible to see the Toseftan text in a court setting, in which case the issue is the application of halakhah and not a dispute about the halakhah itself.

In chapter 4, I will use a synoptic method to compare and contrast the Mishnah’s and Tosefta’s treatment of a particular dispute that involves the SAGES. I will then use that approach in chapter 5 to compare and contrast thirteen additional pairs of disputes that portray the SAGES’ use of authority to resolve and conclude the disputes.

CHAPTER 4

ANALYSIS OF A SAGES PARALLEL

As I noted in chapter 3, disputes “derive from bringing diverse legal principles into juxtaposition and conflict” (Neusner 1981, 266). In the Mishnah and Tosefta, the agents who bring legal principles into juxtaposition and argue for them are individual sages and the SAGES. Before assessing the role of the SAGES in the disputes of Mishnah and Tosefta Seder Moed, it will be helpful to ask, “Who were the SAGES?” since the term is not defined in the Mishnah or Tosefta. The bulk of this chapter is then devoted to an in-depth synoptic analysis of a parallel pair of Mishnah/Tosefta texts concerning the SAGES and their authority,

The SAGES as a Literary Construct

In his article on “The *Am Ha’Arets* as Literary Character” (1987), Peter Haas focused on the use of *am ha’arets* as a literary term (while not denying that there were such people) in early rabbinic literature. He demonstrated that analyzing the rabbinic fashioning of literary constructs is a methodological tool that illumines aspects of rabbinic thinking that remain hidden if we simply consider rabbinic writings on an historical level. In this thesis I follow Haas, treating the SAGES as a literary construct though not as pure fiction, since at times the sages functioned as groups in the Tannaitic period.

Having studied the use of the term “the SAGES” in early rabbinic works produced in Late Roman Palestine, Catherine Hezser concluded that “[t]he emphasis on the opinion of [the SAGES] . . . is a literary construct which cannot be taken as a trustworthy description of reality. . . . [they] may represent no more than the opinion of the specific group of Mishnah editors with whom other rabbis disagreed” (1997: 242). Following Haas and Hezser, my purpose is to see how the SAGES are depicted in the context of disputes recorded in the sample group taken from Mishnah and Tosefta Seder Moed. Just as the *am ha’arets* appear in contexts having to do with proper (or improper) Judaic behavior” (Haas 1987:139), we can already see from the representative examples in chapter 3 that the SAGES appear in contexts having to do with authority in matters of halakhah. Just as “the *am ha’arets*... symbolize the type of person who is unethical, that is, who does not conform to the behavior or character-patterns which the rabbinic authorship of each text wants to advocate” (ibid.), the SAGES

symbolize those who determine, and advocate for, specific behaviors that are seen as being in accord with the Torah.

Another aspect of Haas' methodology is the assertion that "Thus far from being a description of an actual social group, the rabbinic *am ha'arets*, though fashioned out of historical material, is the creation of an author's mind and reflects in a clear, albeit inverse way the image that author has of the good life" (ibid, 140). Likewise, though fashioned out of historical material, the term "the SAGES" as it appears in the Mishnah and Tosefta (among other works) is a literary construct that depicts an authoritative body in the social network of sages.

However there are also differences in the ways these concepts are constructed. Concerning the *am ha'arets*, Haas showed that "[t]he Mishnah as a document, then, has assigned a remarkably consistent meaning to the term" (ibid, 147) as 24 of the Mishnah's 26 entries depict the group as "one who does not conform to the Mishnaic laws of purity or tithing" (ibid.). The meaning of the SAGES is not as clear. As Hezser (1997, 133) concluded:

Modern scholarship has not been able to solve the mystery of the [the SAGES]... There is also no good reason to believe that [the SAGES'] opinion represented the majority view. The M. never explicitly says that [the SAGES] were the majority of all rabbis. The term [the SAGES] appears in the plural, to be sure, but the plural need not comprise more than two rabbis.

The range of possible meanings of SAGES is quite large: from a small number of local sages to the unanimous social network of sages. It is not even clear that the SAGES who are depicted resolving Tannaitic disputes were always or necessarily of the same generation as the original disputants.

The implications of these different understandings are significant. Taking one extreme, a few local sages, depicted as the SAGES in the Mishnah, may have influenced the entire network of sages. At the other extreme, if (or where) the SAGES refers to the entire network of sages, a significant process of discussion in the entire network would have been required to lead to such near or complete unanimity of all living sages. Unfortunately, as Hezser pointed out (ibid.), there seems to be no way of determining if the meaning of the SAGES is consistent (and if so, which meaning applies) or, if there is no such consistency, where along this spectrum any specific occurrence of the term SAGES stands.

Although the make-up of the SAGES is unclear, their function is well-defined: in Tannaitic debates, the SAGES function as an authoritative body in the context of disputes with

individual sages.⁷⁷ Once embodied in tannaitic works, the opinions of the SAGES carried a special valence that individual sages' opinions could achieve only after due deliberation by the talmudic sages who examined their opinions in following centuries.

Concerning the relationship between the SAGES and individual named sages, Hezser observed that “[a]lready in the Mishnah there is a noticeable tendency on the side of the editors to present rabbis as unanimous. As already mentioned above, individual sages’ opinions are often presented as exceptions from the view of a plurality of [the SAGES]. . . Besides granting superiority to [the SAGES’] view and criticizing those who disagree with it, the Mishnah editors create the impression of agreement amongst many, if not all sages by elevating particular individual teachings to the status of *halakhah* in the sense of commonly agreed upon law...” (Hezser 1997, 245). “By contrasting an individual opinion with that of the SAGES or by attaching to an individual opinion phrases such as *שלא ברצון חכמים* (“which is not with the approval of the SAGES”) and *ואין חכמים מודים לו* (“and SAGES do not agree with him”) the redactors of the Mishnah create the impression that SAGES were unanimous about certain issues with the exception of those whose differing opinions they transmit” (ibid, 241). There no example of a ruling of SAGES being opposed by a significant number of individual sages. Either that level of opposition did not take place or it has not been transmitted to us. Even though we lack sufficient information to define the SAGES socially, it seems reasonable to assume that, in order for a group of sages to bear enough authority to resolve a debate over halakhic standards, they must have consisted of more than a simple majority of the sages in a given setting. In a social network tied together largely by relationships and word of mouth, such a bare majority would hardly have sufficed to establish halakhic standards for everyone. It is far easier to imagine that a substantial majority of sages collectively overruled a small number of dissenters.

In the definitively redacted Mishnah and Tosefta Seder Moed, a large majority of SAGES disputes are resolved by the opinions or rulings of the SAGES with no recorded dissent (Type 3A). There are a much smaller number of such rulings with the dissent of one or two sages (Type 3B). I will tabulate the precise numbers of these types of dispute in chapter 6. The overall impression these create is that the SAGES had great authority; their views ordinarily did not provoke dissent and, when they did, very few sages dissented. These passages, taken as a whole, comprise the most significant expression of the tannaitic literary

⁷⁷ See Hezser’s discussion of this phenomenon (1997, 240-45)

construct of the SAGES. However, the SAGES are also depicted in the Mishnah and Tosefta as a group, not only vis-à-vis individual named sages or in the context of disputes, but occasionally in other contexts.

In M. Sheviit 10:9, the SAGES' opinion of individual behavior is important: "One who repays a debt [cancelled] by the Sabbath year, the SAGES are pleased with him" and in M. Pesachim 4:8, "the SAGES reproved [the men of Jericho]." In M. Menahot 12:4, the SAGES regulate certain actions of individuals: "[Concerning the minimum measure of impurity that will contaminate oil,] they said to him, 'Are sixty mixed together, and sixty-one not mixed together? He said to them, 'So it is in all measures [prescribed by] the SAGES.'" In T. Ketubot 1:1, "And from the time of danger [Bar Kokhba's war] and thereafter, they began the custom of marrying her on Thursday, and the SAGES did not stop them." The Mishnah seems to imply that the SAGES could have stopped them, but chose not to. In T. Arakhin 2:4, the SAGES gave orders concerning Temple repairs where one would expect priests to be involved. In T. Eduyot 1:1, "the SAGES [or, the sages] came together in the vineyard of Yavneh," It is unclear whether the sages mentioned here should be considered an instance of the literary construction "the SAGES" or a group of specific individual sages who, it is claimed, initiated the organization of teachings.

As with SAGES involved in halakhic disputes, there remains an ambiguity about the composition of the SAGES as a group in these examples taken from non-dispute situations. It is clear, however, that the SAGES are viewed in all these settings as authoritative in the way that individual sages are not. Some of these examples may be echoes of actual incidents involving several sages acting as a group.

Haas concluded, "What I have tried to do here is indicate that a literary approach to the am ha'arets leads us into the core of rabbinic thinking about right and wrong, and so about the character of the good life to which Jews are called" (1987, 152-53). Likewise, a literary approach to the use of the SAGES in Mishnah and Tosefta Seder Moed leads us into the core of Mishnaic and Toseftan thinking about the authority of the SAGES. However, in order to follow this approach, the constructed meaning of the term the SAGES must first be considered from another perspective.

In the Introduction, I described how Jacob Neusner sought to secure the redactional identity of rabbinic works by highlighting traits that are distinctive to each work, traits he attributed to their redactor. However, as Boyarin observed, tannaitic works "are not the product of [only] a single author but of whole communities working over generations. . . ." (Boyarin 1992, 456). "Neusner can only see a single socio-cultural formation as harmonious

and undifferentiated, while in fact . . . [n]o document except the most simple ever consists of ‘a single continuous and harmonious statement’ ” (ibid, 458, citing Neusner 1990, 184). This conception of tannaitic works is very much in line with Vaughn and Rothney’s definition of culture as “systems of symbols and meanings that even their creators contest, that lack fixed boundaries, that are constantly in flux, and that interact and compete with one another” (2006, 14). These symbols and meanings are concretized in the material and immaterial productions of a society including, but not limited to, beliefs, institutions, arts, dress, language, law, religion and ritual.

Whatever the source of the construct “the SAGES,” its ubiquitous presence in all literary productions of the Tannaitic period points beyond the Mishnah and Tosefta to antecedent traditions with their oral repeaters, scribes, and redactors, and thus to the broader social network, with its sages of course playing a prominent role. Thus, Boyarin’s paradigm accounts for broader cultural voices in tannaitic works than Neusner recognized, voices that do not necessarily conform to the program of their redactors, but represent disparate elements and currents in the broader tannaitic social network.

Beyond these expected cultural inconsistencies, the social networks of early sages encouraged debate and embraced dissent as an essential part of its discursive fabric. Their traditions can therefore be expected to display not only areas of consensus—shared values—but also argumentation and dissent. The redactors of the Mishnah and Tosefta selected, shaped, and supplemented these traditions. Thus, we should not be surprised if a synoptic comparison of the Mishnaic and Toseftan views of the SAGES reveals both consensus and variety.

Since cultures have not only multiple voices but also shared values, “communities working over generations” produce works that share characteristics and values across documentary lines. They reflect not only the variety that existed in the culture that produced them but also broad areas of trans-generational cultural consensus.⁷⁸ It is our understanding, then, that the literary construction of the term “the SAGES” had a pre-history in generations of oral teaching and transmission, possibly supported with written notes that preceded the definitive redactions of the Mishnah and Tosefta. The redactors inherited the term as a cultural artifact embedded in traditional material. This perspective is supported by a

⁷⁸ Neusner was the only major scholar to insist that redaction almost entirely erased the pre-history of Rabbinic works, claiming that the definitive redactors utterly reshaped the material they inherited in order to express their world view, in the process eliminating the oral or written pre-history of these works.

consideration of the reception of the redacted Mishnah and Tosefta by the larger social network.⁷⁹ It is difficult to believe that the larger social network, specifically sages who were not directly involved in these redactions, would have accepted a usage of the term “the SAGES” that differed significantly from cultural norms. Even had the redactors consciously or unintentionally shaped or revised ideas about the SAGES, their depiction of them would necessarily have shared a large degree of commonality with notions already present in the social network.

On the other hand, redaction affects meaning, and the existence of the Mishnah and Tosefta as two distinct redactions of traditional material must be considered. Although some redactional activity must have taken place from the inception of each piece of oral/literary tradition, it is in the definitive redactions, with their attempt to bring together large amounts of material, that the values and characteristics embodied in received traditions were most susceptible to large-scale, agenda-driven editorial activity. Even at the most basic level, simply bringing together, structuring, and formulating traditional material into large-scale works such as the Mishnah and Tosefta would have affected meaning.

Therefore, it must be allowed that the Mishnah and Tosefta did not merely convey traditional concepts but may also have introduced innovations in the use of traditional terms. At the same time, these innovations were not so massive that they would provoke rejection by sages who were not directly involved in the redactions. Innovation must have been balanced with shared concepts already present in the network of sages. Thus, the Mishnaic and Toseftan depiction of the SAGES and their authority *must* reflect a consensus and *may* also reflect a variety that either existed in the network or was, at least partly, the result of careful innovation.

Because I do not have access to the oral cultural context in which and for which the Mishnah and Tosefta were shaped, I can only address the written texts that I have before me. In the course of my analysis of these texts, I will on occasion make limited comments on the possible role of antecedent traditions, written or oral. I acknowledge that my comments there will be speculative.

79 As Alexander noted, “following the Mishnah’s compilation, it became a central text in the rabbinic curriculum of sacred study. One manifestation of this curricular centrality is the fact that the Mishnah serves as the skeletal structure around which the two Talmudim are organized” (2006, 174). The material in the Tosefta was of lesser, but still substantial, importance.

In this chapter, I undertake an extended analysis of a SAGES parallel found in M. Pesachim 4:8 and T. Pischa 3:19–22. I will then interact with scholars who have explored this parallel in order to compare my analysis with theirs. I am particularly interested to see whether they have noticed any variance between the ways that the Mishnah and Tosefta depict the SAGES and their authority in this SAGES parallel. In chapter 5, I will analyze the thirteen remaining SAGES parallels.

A SAGES Parallel: Mishnah Pesachim 4:8 and Tosefta Pischa 3:19–22

Embedded in the Mishnah and Tosefta tractates discussing practices related to Passover (Mishnah Pesachim and Tosefta Pischa), this parallel concerns the SAGES' response to six Sabbath practices of “the men of Jericho.”

(10.1) Mishnah Pesachim 4:8⁸⁰

ח שֶׁשָּׂה דְּבָרִים עָשׂוּ אֲנָשֵׁי יְרִיחוֹ, עַל שְׁלֵשָׁה מִחוּ בִּידָם, וְעַל שְׁלֵשָׁה לֹא מִחוּ בִּידָם. וְאֵלוּ הֵן שְׁלֹשׁ מִחוּ בִּידָם, מִרְכִּיבֵין דְּקָלִים כָּל הַיּוֹם, וְכוֹרְכִין אֶת שְׁמַע, וְקוֹצְרִין וְגוֹדְשִׁין לִפְנֵי הָעֹמֶר, וְלֹא מִחוּ בִּידָם. וְאֵלוּ שְׁמֹחוּ בִּידָם, מִתִּירִין גְּמֻזִּיּוֹת שֶׁל הַקֹּדֶשׁ, וְאוֹכְלִין מִתַּחַת הַנֶּשֶׁרִים בַּשַּׁבָּת, וְנוֹתְנִין פָּאָה לַיֵּרֶק, וּמִחוּ בִּידָם חֲכָמִים:

4:8

- A. The men of Jericho did six things:
- B. concerning three they reproved them (⁸¹מיחו בידן), and concerning three they did not reprove them.
- C. These are the three for which they did not reprove them (לא מיחו בידן):
- D. (1) they graft palms the whole day; (2) they do not make the prescribed divisions in the Shema; and (3) they reap and stack [wheat] before the [offering of] the omer—
- E. and they did not reprove them.
- F. And for these they reproved them:
- G. (4) they permit the use of branches⁸² from [trees that had been] dedicated [to the Temple, perhaps for grafting], (5) they eat fallen fruit [taken] from under [trees] on the Sabbath, and (6) they set aside the a field-corner for vegetables [which is not required]—

⁸⁰ The sections of my analysis are numbered in the canonical order in which they appear. This is the tenth of fourteen parallels.

⁸¹ The root of this verb is מחה. In the Piel stem, when followed by ביד, it signifies “forewarn, interfere, try to prevent” (Jastrow 1903, 750). Since no physical element is indicated in any of the texts under consideration, I choose the English “reprove,” which indicates the strong verbal force signified in each case.

⁸² The transmission of this word is unstable. The various manuscripts vary between גמזיות (branches), גוזיות (cuttings), and גזיות (twigs). The overall point remains the same.

H. and the SAGES reproved them.

The Mishnah presents a terse account of the SAGES' response to six Sabbath practices of the men of Jericho. The SAGES reprove them for three practices and do not reprove them for the other three. It is assumed that reproof and non-reproof are based on the SAGES' judgment of the validity of these practices. The SAGES' right to reprove is emphasized by the six occurrences of the phrases **מִחוּ בְּיָדָם** or **לֹא מִחוּ בְּיָדָם** in this brief account. These phrases tie the passage together aurally, structurally, and thematically. As observed by Walfish (2006), "in pre-modern texts, and particularly in oral compositions, the mnemotechnical value of a literary technique was intimately bound up with the conceptual associations with which it was linked. Hence it may be presumed that word repetitions, wordplays, and literary patterns found in the Mishnah, alongside whatever mnemotechnical value they may possess, were designed to create conceptual associations and patterns, in much the same way as they do in more overtly literary works."

In response to this expression of authority, the men of Jericho have no voice in the Mishnah. This lack of response gives the impression that the final and only worthwhile opinion is that of the SAGES. Thus, the Mishnah's account seems to show the SAGES in a position of unambiguous authority.

Because there is no dissent recorded after the SAGES' opinion, this is a Type 3A dispute.

(10.2) Tosefta Pischa 3:19–22

יט ששה דברים עשו אנשי יריחו, שלשה כרצון חכמים, ושלושה שלא כרצון חכמים. אילו כרצון חכמים, מרכיבין דקלים בערבי פסחים כל היום, וכורכין את שמע, וקוצרין לפני העומר. ואילו שלא כרצון חכמים, מתירין גזיות של הקדש, ואוכלין נשורין בשבת, ונותנין פאה לירק. אמ' ר' יהודה אם כרצון חכמים הן עושין יהו כל אדם עושין כן, אלא שלשה מיחו בידן, ושלושה לא מיחו בידן. אילו שלא מיחו בידן, מרכיבין דקלים בערבי פסחים, וכורכין את שמע, וגודשין וקוצרין לפני העומר, ולא מחו בידן, אילו שמיחו בידן, מתירין גזיות של הקדש, ואוכלין נשורין בשבת, ונותנין פאה לירק. כיצד כורכין את שמע, אומ' שמע ישראל וגו', ולא היו מפסיקין, ר' יהודה או' מפסיקין היו, אלא שלא היו אומ' ברוך שם כבוד מלכותו לעולם ועד.

כ כיצד נותנין פאה לירק, לא היו נותנין אלא ללפת ולקפלוט, מפני שלקיטתן כאחד, ר' יוסה אומ' אף לכרוב. אמ' ר' יוסה מעשה בבנו של נבו היין שנתן אביו פאה ללפת ובא ומצא עניים על פתח גינתו, אמ' להם, בניי, לא נחוש לדברי חכמים? השליכו מה שבידכם. והשליכו מה שבידן, ונתן להם כפלים במעשר, ולא היתה עינו צרה, אלא שחש לדברי חכמים, כא כיצד אוכלין נשורים בשבת, שהיו פותחין גנותיהן ופרדסותיהן לעניים, שהיו בשני בצרות, והיו עניי ישראל נכנסין ואוכלין נשורין מתחת תמרים בשבת.

כב כיצד מתירין גזוזיות הקדש, אמרו להם, אי אתם מודים לנו שגידולי הקדש אסורין? אמרו להם, אבותינו כשהקדישו לא הקדישו אלא קורות עצמן, מפני שבעלי אגרוף באין ונוטלין אותן בזרוע.

T. Pischa 3:19

- A. The men of Jericho did six things,
- B. three were according to the wishes (כרצון) to the SAGES and three were not according to the wishes (לא כרצון) of the SAGES.
- C. These were acceptable to the SAGES:
- D. (1) they graft palms on the eve of Passover the whole day; (2) they do not make the prescribed divisions in the Shema; and (3) they reap and stack [crops] before the [offering of] the omer—
- E. And these were not according to the wishes of the SAGES:
- F. (4) they permit the use of twigs from [trees that had been] dedicated [to the Temple], (5) they eat fallen fruit [which may have fallen on the Sabbath] on the Sabbath, and (6) they set aside a field-corner for vegetables [which is not required].
- G. Said R. Yehudah, “If they act [in a way that is] according to the wishes of the SAGES (כרצון), let everyone do likewise.
- H. But concerning three things [the SAGES] reproved them (מיחו בידן) and concerning three things they did not reprove them (לא מיחו בידן).
- I. These are the three for which they did not reprove them: (1) they graft palms [on the eve of Passover] the whole day; (2) they do not make the prescribed divisions in the Shema; and (3) they stack and reap [wheat] before the [offering of] the omer —and they did not reprove them.
- J. And for these they reproved them: (4) they permit the use of cuttings dedicated [to the Temple]; on the Sabbath, (5) they eat fallen fruit [taken] from under [trees], and (6) they set aside the field-corner for vegetables.
- K. How did they not make the prescribed divisions in the Shema?
- L. They say, “Hear, O Israel. . . ,” and they do not then pause.
- M. R. Yehudah says, “They did indeed pause, but they did not say, ‘Blessed be the name of the glory of his kingdom forever and ever’.”

3:20

- A. How did they set aside a field-corner for vegetables?
- B. They would only set aside carob and leeks, because they are gleaned at the same time.
- C. R. Yose says, “Also cabbage.”
- D. Said R. Yose, “It once happened that the son of Ben Nebo Hayin,⁸³ his father had set aside a field-corner of turnips. And [the son] came and found the poor at the gate of his garden. He said to them, ‘My children, shall we not consider the opinion of the SAGES? Throw away what is in your hands.’ And they threw away what was in their hands. And he gave them double the tithe [allocated for the poor].
- E. And it was not that he was grudging, but he considered the opinion of the SAGES.”

83 Or the grandson of Nebo Hayin.

3:21

- A. How did they eat fallen fruit [which may have fallen on the Sabbath] on the Sabbath?
- B. Because they would open their gardens and orchards to the poor,
- A. for they were years of famine.
- C. And the poor of Israel would enter and eat fallen fruit from under the date trees on Shabbat.
- B. 3:22 A. How did they permit the use of cuttings from [trees that had been] dedicated [to the Temple]?
- C. They said to [the men of Jericho], “Do you agree with us that that which grows from what is dedicated [to the Temple] is forbidden?”
- D. [The men of Jericho] said to them, “Our fathers who dedicated [these things] only dedicated the tree trunks themselves,
- E. [and that only] because high-handed men came and seized them by force.”

In the Mishnah, the SAGES “did not reprove” (לא מִחוּ בְיָדָם) the men of Jericho for three of their practices but did “reprove them” (מִחוּ בְיָדָם) for three others. In the Tosefta, the same practices are “according to the wishes” (כְּרָצוֹן)⁸⁴ or “not according to the wishes” (לא כְּרָצוֹן) of the SAGES. R. Yehuda objects to this formulation. In his view, all six practices are impermissible. The SAGES should not be represented as accepting any of these practices. He advances an alternative: the SAGES reproved (מִיחוּ בִידָן) or did not reprove (לא מִיחוּ בִידָן). The difference is important to R. Yehuda: declining to reprove does not necessarily indicate that they accept the legitimacy of these practices for all Jews. R. Yehuda also differs about the nature of the offense concerning the Shema. The entire unit of tradition is then recast by R. Yehuda (at 3:19 G.–J.). Due to his intervention, the Tosefta presents us with two versions of the SAGES’ words.

The remainder of the narrative (the second part of the first version—3:19 K. to 3:22 C.) has not been adjusted to reflect R. Yehuda’s views; it lacks his sharper formulation. This creates the impression that R. Yehuda’s version at 3:19 G.–J. has been inserted during the process of transmission or the definitive redaction of the Tosefta. As it stands, the narrative finesses the views of R. Yehuda, which have no influence on the larger Toseftan passage.

Concerning the setting aside of a field-corner for vegetables (3:20 D.–E.), the issue at hand is the relationship between setting aside a field corner for poor and tithing

⁸⁴ Because the men of Jericho did not recite the Shema properly (although R. Yehuda differs about the nature of their error), and the SAGES would not accept such anomalous practice, it is not correct to translate כְּרָצוֹן as “in accord with the wishes” of the SAGES as Neusner does. Such practices were “permitted” by the SAGES but were not according to their wishes. Clearly, this state of affairs is not acceptable to R. Yehuda.

the whole crop for them (B. Pesachim 56b). Breaking with the halakhic norm, the men of Jericho set aside some of the vegetables as un-tithed field-corner, reserved for the poor, widows, and non-Jewish sojourners. R. Yose recounts the story of one farmer who set aside a field-corner of turnips. Presumably, this took place in Jericho even though turnips have not been mentioned up to this point.

It seems that the primary intention of Ben Nebo Hayin and his son was to benefit the poor; their violation of halakhah was motivated by benevolence and may have been inadvertent. They honor the SAGES as they defer to their interpretive authority. It remains unknown how the men of Jericho as a whole responded to the SAGES' authority in this matter.

The problem with “eating fallen fruit” on the Sabbath (3:21 A.–D.) is that some fruit may have fallen *on* the Sabbath and would therefore be forbidden. Such fruit would be mixed in with the rest and all the fallen fruit is now of doubtful status; it may not be eaten.

Here the SAGES and the anonymous text—both considered authoritative in the Tannaitic period—are set in opposition to each other. The anonymous Tosefta text defends the men of Jericho, offering a compelling rationale for their behavior: they were practicing compassion for the poor. These were years of famine and the poor were in danger of starving. If their lives were truly in danger, feeding them would have been permissible, since life takes precedence over Sabbath restrictions. Moreover, the use of the term עניי ישראל (the poor of Israel) is much more powerful than two alternatives, עניים (the poor, as in 30:20 D.) or עניי יריחו (the poor of Jericho). For the Tosefta, the local poor are part of a larger, halakhically more significant body—the poor of Israel. Thus, a practice that appeared, until this point in the narrative, to be entirely local and limited has broader implications. It is noteworthy that the anonymous voice narrates this entire portion. It also has the last word. The opinion of the SAGES is dramatically undermined.

In the matter of “the use of cuttings from [trees that had been] dedicated [to the Temple]” (3:22 A.–D.), the Tosefta presents a clash between the SAGES' position and the men of Jericho. Once again, the anonymous voice narrates. It is not entirely clear who “they” are, who ask, “Do you agree with us?” In context, one would presume it is the SAGES.⁸⁵ Do not the Jerichoans know that the growth of a dedicated tree is forbidden?

⁸⁵ The First Impression, the Cairo Geniza, and the London manuscript read “the SAGES” instead of “they.”

The Jerichoans defend their actions vigorously. First, they are not ready to concede that the growth is forbidden. In their view, only the trunks of the tree have been dedicated. In addition, even the tree trunks had not been dedicated willingly but under compulsion when “high-handed men came and seized them by force.”⁸⁶ This seems to settle the matter, as the argument ends here, with the men of Jericho having the last word. It is remarkable that in the Tosefta, the argument of simple folk overcomes the disapproval and reproof of the SAGES, who offer no response to their argument.

Concerning the issue of setting aside of a field-corner for vegetables, the SAGES’ authority is supported by example, though we are left without any indication of how the men of Jericho in general responded to the SAGES’ view. Concerning the issues of eating fallen fruit on the Sabbath and using cuttings from dedicated trees, the Tosefta’s account leaves us with the clear impression that the men of Jericho were justified in their actions; the SAGES were at fault for disapproving or reproving the Jerichoans without proper evidence.

The Tosefta’s accounts of the three questionable practices of the men of Jericho do not adhere to a formula; each one has distinctive elements. In the first, the view of the SAGES is honored. Still, we do not know whether the other men of Jericho adjusted their practice afterward. In the second, the anonymous Tosefta provides a rationale for the actions of the men of Jericho. In the third, the anonymous voice quotes the men of Jericho, who justify their actions by highlighting factors of which the SAGES seem to have been unaware. Even if these accounts have their origin in actual incidents, their inclusion in the Tosefta reflects a choice, or series of choices, made in the process of transmission or in the definitive redaction. The Tosefta thus reflects the shaping of the passage to show a response to the SAGES’ authority that falls well short of full acceptance.

We have already seen that the Mishnah’s dispute supports the authority of the SAGES unambiguously. It does not even bother to mention the matter of the SAGES’ approval or disapproval, only their reproof of the men of Jericho. It is nearly identical to the version of R. Yehuda in the Tosefta.

This passage is composed of several dispute and dispute-like elements and is therefore far more complex than straightforward disputes. As a whole, it calls the SAGES exercise of their authority into question and therefore I classify it as a Type 3C dispute.

⁸⁶ The tree trunks were not cut down and taken away at this time (otherwise, they would have not remained in Jericho to produce branches): thus, ownership was seized.

(10.1b) Mishnah Menahot 10:8

M. Menahot 10:8 offers another view of a portion of the parallel material that we are considering.⁸⁷

קוצרים בית השלחים שבעמקים, אבל לא גודשין. אנשי יריחו קוצרין ברצון חכמים,
וגודשין שלא ברצון חכמים, ולא מחו [מחו: Kaufman] בידם חכמים.

M. Menahot 10:8

- A. They reap [the crop before the omer] in irrigated fields in valleys, but they do not heap it up.
- B. The men of Jericho reaped [in a way that was] acceptable to the SAGES
- C. but stacked [in a way that was] not acceptable to the SAGES,
- D. but the SAGES did not reprove them.

The underlying issue here is the reaping and stacking of crops in relation to cutting and presentation of the omer, a grain offering made on the second day of Passover. Here, the manner of reaping is acceptable to the SAGES but the stacking is not (לא כרצון = לא). This version also specifies that the SAGES took no further action; they did not reprove them for their stacking practice, even though it was not acceptable to them.

(10.3) Analysis

The use of participles to describe the actions of the men of Jericho makes it clear that these were practices, at least somewhat regular in occurrence, rather than isolated events. The men of Jericho had apparently established practices that violated the SAGES' wishes.

All three versions—M. Pesachim, T. Pisha, and M. Menahot—agree that the SAGES did not reprove the men of Jericho for reaping and stacking before the offering of the omer. In M. Pesachim, the SAGES either reprove or do not reprove practices. However, where the Tosefta states that the reaping and stacking were *both* acceptable to the SAGES, M. Menahot declares that the reaping was acceptable to the SAGES while the stacking was not. M. Menahot also tells us that the SAGES chose *not* to reprove a practice (stacking) that was unacceptable to them.

According to R. Yehuda in Tosefta Pisha 3:19 G.–I., the SAGES do not simply find some practices to be unacceptable—they reprove them. This conforms to M. Pesachim's view of matters, but not to the full parallel in T. Pisha or to M. Menahot,

⁸⁷ A number of scholars discussed the relationship of this mishnah to the parallel under discussion. See Bokser and Schiffman (1994, 183 and n. 94), citing Lieberman, Epstein, and Halivni.

where the SAGES choice to refrain from reproving a practice of which they did not approve does not conform to the views of R. Yehuda or to M. Pesachim 4:8. M. Menahot does not explain the SAGES' choice. Perhaps their negative view of the matter does not rise to a level that would demand open reproof.

While M. Menahot shows the SAGES exercising restraint, their authority is not directly challenged as it is in the Toseftan parallel. As we have seen, the Tosefta's account is more nuanced, here giving the SAGES respect and there portraying them as hasty, issuing reproofs based on ignorance of local circumstances and before being exposed to reasonable explanations for practices they reject.

The Mishnah and Tosefta passages describe the function and authority of the SAGES in differing ways. The Tosefta depicts the SAGES as an authoritative body with weaknesses; in particular, they make rulings before familiarizing themselves thoroughly with the practices they are judging. It also shows the ability of these lay people to form halakhic opinions, act on them, and defend them. The men of Jericho bring "legal principles into juxtaposition and conflict" with those of the SAGES, engaging them in dispute. Even so, the tone of the men of Jericho and of the Tosefta toward the SAGES remains respectful, indicating that they acknowledge the SAGES' status. Thus, the Tosefta maintains the status of the SAGES as an authoritative group even as it shows their fallibility.

Describing the same situation in M. Pesachim 4:8 and M. Menahot 10:8, our Mishnah depicts the SAGES as an authoritative group without fallibility. The SAGES of M. Menahot 10:8 exercise restraint; the SAGES of M. Pesachim 4:8 choose not to. In both Mishnah passages, the SAGES and the men of Jericho appear to be socially isolated from each other. The opinions of the SAGES are authoritative; the men of Jericho have no voice.

Early Scholarship

The rabbis responsible for the Yerushalmi and Bavli explored these parallels. In Y. Pesachim 4:9, M. Pesachim 4:8 is cited in full, followed by material from M. Menachot 10:8 and the Tosefta's discussion about the recitation of the Shema. The sources of the additional material are not identified. Then the Yerushalmi introduces T. Pischa 3:22.

T. Pischa 3:22

A. How did they permit the use of cuttings from [trees that had been] dedicated [to the Temple]?

- B. They [Yerushalmi: “The SAGES”] said to [the men of Jericho], “Do you agree with us that that which grows from what is dedicated [to the Temple] is forbidden?”
- C. [The men of Jericho] said to them, “Our fathers who dedicated [these things] only dedicated the tree trunks themselves,
- D. [and that only] because high-handed men came and seized them by force.”

The Yerushalmi wants to know the basis for the SAGES’ [whom it calls “rabbis”] statement about the dedication of subsequent growths in view of the fact that only the trunks were dedicated. The issue of force being exercised to obtain the commitment is not discussed. The Yerushalmi introduces a ruling taken from M. Peah 7:8: where a vineyard is dedicated after the clusters are already recognizable, the clusters are also dedicated; where a vineyard is dedicated before the clusters are recognizable, the clusters are not dedicated. The underlying reason for this is that the owner cannot dedicate “what is not his” (the clusters that do not yet exist). When the clusters appear, since they are not dedicated, they are the property of the owner.

While the Yerushalmi does not develop the analogy between a field of trees and a vineyard, the implications are clear: if the men of Jericho dedicated fields of trees before their growths were distinguishable, the growths are theirs; if they dedicated the trees after the growths became visible, the growths are dedicated. Because this analogy is not elaborated, questions remain, for example: Is there even such a thing as a tree that is developed enough to have a trunk while having no growths? If so, why do the men of Jericho specify “trunks” and not simply “trees”?

Still, the relevant issue is not the Yerushalmi’s development of the analogy but the driving force behind its discourse. For the Yerushalmi, the issue does not seem to be the SAGES’ authority but the halakhic reason underlying their opinions and those of the men of Jericho and the SAGES. The Yerushalmi’s discourse gives no indication that it predetermines the SAGES (or the Mishnah) to be correct. There is no pressure exerted in favor of one opinion or against another. It seems that the redactors of the Yerushalmi wanted only to clarify issues involved in the disagreement between the SAGES and the men of Jericho. Even after presenting the analogy of the vineyard, the Yerushalmi does not conclude that the SAGES’ opinion concerning the practices of the men of Jericho is valid. Thus, the Yerushalmi’s discussion provides a halakhic framework to understand the SAGES’ opinion (as well as the opinion of the men of Jericho), but leaves the cited Toseftan material, with its destabilization of the SAGES’ authority, untouched.

C. Pesachim 56b deals summarily with this issue. While the Bavli does not consider growths subsequent to dedication to be biblically *מְעִילָה* (dedicated), a rabbinic prohibition (presumably based on our Tosefta) forbids their use for personal purposes. Thus, the twigs were not available for use by the Jerichoans no matter when the dedication took place. The Bavli assumes that this is the SAGES' view. Unlike the Yerushalmi passage, the Bavli passage privileges the SAGES' opinion.

Modern Scholarship

A few examples will suffice to represent contemporary scholars who discuss the relationship between M. Pesachim 4:8 and T. Pisha 3:19–22.

Jacob Neusner saw the relationship between these passages in stark diachronic terms—the Mishnah came first and the Tosefta is based on it. He wrote, “T[osefta] cites and explains M[ishnah] as indicated. Here is a classic example, in connection with rather simple material, of how the Tosefta serves as a post-Mishnaic commentary to the Mishnah” (1992, 137). This depiction of the Tosefta as a commentary on the Mishnah places the two in a very clear redactional relationship. Whatever the pre-history of the Mishnah, the Tosefta depends on it and is, in fact, inscrutable without it. The Tosefta adds oral or written material only to explain the Mishnah. Neusner did not interact with scholarship that would suggest other models.

Neusner's reading of this SAGES parallel did not allow for the Tosefta to diverge significantly from the Mishnah. Yet this SAGE parallel does not fit the text-commentary relationship. Instead of elucidating the Mishnah's account, the Tosefta undermines it. The Tosefta passage contains unique material not even hinted at in the Mishnah, in particular the responses of the men of Jericho and the anonymous narrative, both of which cut against the grain of the Mishnah. This suggests that the Tosefta is not configured as a simple post-Mishnaic commentary. If it is post-Mishnaic, it is more critique than elucidation.

Other models may better describe the relationship between the Mishnah and Tosefta. The most straightforward reading of this parallel is not “Tosefta as a commentary” but “Mishnah as an abridgement” that eliminates the responses of the men of Jericho and of the anonymous narrative Tosefta, thus presenting an elevated view of the authority of the SAGES. However, they may rather embody parallel redactions of a

common tradition or definitive redactions of related Mishnaic and Toseftan traditions that diverged early in their transmission history.

Bokser and Schiffman's (1994) primary concern was how the redactor's views of the SAGES' authority are expressed by their choice of materials rather than the redactional relationship between the Mishnah and Tosefta. "[T]he Mishnah's inclusion of this list at the end of a chapter on local customs has the effect of providing the rabbis with a model of how to respond to divergent practices. In the formulation that the Mishnah's editor chose (in contrast to the alternative one in T. Pes. 3:18 [sic]), the precedent suggests that rabbis have an option to protest" (ibid, 183). The Tosefta's redactor chose a different route, not explained by the authors, but, by implication, a route that does not give the SAGES the "option to protest." Bokser and Schiffman observed that the Tosefta's version of the SAGES' responses to the practices of the men of Jericho tempers the authority of the SAGES, but they did not explain what they meant.

Bokser and Schiffman asserted that the Mishnah's account gives the rabbis "an option to protest" where the Mishnah very specifically shows the SAGES not as protesting but reproving the men of Jericho—a much tougher response indicating a stronger sense of the SAGES' authority. Meanwhile, the Tosefta's narrative, far from restricting the SAGES' options, shows them exercising a range of options—protesting, reproving and yielding. Thus, the Tosefta does not limit the SAGES' options but expands them while the Mishnah offers one option, but not the one that Bokser and Schiffman described.

Shamma Friedman (2002) argued that the Mishnah as a whole is based on material found in the Tosefta or an earlier version of the Tosefta. Building on the work of Frankel, Epstein, Albeck, and Lieberman,⁸⁸ he saw the terse Mishnaic formulations as distillations of the more elaborate Toseftan material. "[It is] the style of the Mishnah to shorten and [thus] obscure" the source material (Friedman 2002, 402). To demonstrate his thesis, he presented an in-depth examination of twenty-two parallel passages from Mishnah Pesachim and Tosefta Pisha, including the SAGE parallel M. Pesachim 4:8 and T. Pisha 3:19–22.

⁸⁸ Lieberman (1955–1967) observed many of the phenomena Friedman later gathered to demonstrate his own thesis: "The primal Mishnah is given to us in the Tosefta" (380). But Lieberman was content to note the phenomena, leaving his overall comments on the relationship of Mishnah and Tosefta to concluding material, which, unfortunately, was never written.

Friedman proposed the following scenario to explain the development of our Mishnah and Tosefta: R. Yehuda found the terms “acceptable” and “not acceptable” with reference to the SAGES to be problematic, since these terms depicted the SAGES as passive, “as if they did not have the capability to reprimand them about this or to restrain them. Hence, R. Yehuda formulated new language: ‘they reproved them’ and ‘they did not reprove them.’ In this formulation, the sages are depicted in a more active role” (ibid, 381). R. Yehuda then inserted his material in the Toseftan passage without reworking the rest of the passage. “This new wording by R. Yehuda . . . language honorific toward the sages . . . became the chosen version, and it was fixed in our Mishnah” (ibid, 381).

Friedman did not claim that the definitive redaction of the Mishnah followed that of the Tosefta, only that the Mishnah is based on Toseftan material. He failed, however, to account for important characteristics of these passages. Although he acknowledged the disruptive nature of the Tosefta’s account of the men of Jericho’s refusal to conform to the wishes of the SAGES, he does not explain why R. Yehuda, who was purportedly in position to add material to the Tosefta’s account, did not simply delete the objectionable material. Also, while Friedman’s view of the change from *לא כרצון* (“they did not approve”) to *מיחו בידן* (“they reproved them”) could account for the tone of the Mishnah, it does not account for the Tosefta’s view of the SAGES’ authority. In the Tosefta, this material is bracketed by a broader account. In the end, it is the anonymous narrative and the response of the men of Jericho— rather than the material concerning R. Yehudah—that sets the tone of the Tosefta’s view of the SAGES’ authority. In view of these weaknesses, it seems more likely that R. Yehuda’s opinion was simply part of the Toseftan tradition, and was highlighted in the Mishnah.

Whether the Mishnah and Tosefta resulted from parallel redactions of a common tradition, definitive redactions of related Mishnaic and Tosefta traditions which diverged earlier in their transmission history, or, as I suggest above, the Mishnah abridges the Toseftan material, the Mishnah presents an elevated view of the authority of the SAGES as compared with the Tosefta. In chapter 5, I will examine the remaining thirteen SAGES parallels to determine whether these divergent views of the SAGES’ authority are characteristic of the Mishnah and Tosefta Seder Moed.

CHAPTER FIVE

SAGES PARALLELS IN MISHNAH AND TOSEFTA SEDER MOED

In chapter 4, I used the SAGES parallel M. Pesachim 4:8 and T. Pisha 3:19–22 to demonstrate my synoptic approach to SAGES parallels of Mishnah/Tosefta Seder Moed. In this chapter, I discuss the remaining thirteen parallels. A thorough analysis of these SAGES parallels, representing the larger group of one hundred and forty-seven SAGES disputes, promises to yield a body of evidence that will enable me to compare how the Mishnah and Tosefta depict the SAGES and their authority.

(1) Mishnah Shabbat 6:3 and Tosefta Shabbat 4:11

These disputes relate to potential violations of the Sabbath and the consequent liability to bring a sin offering.⁸⁹ The sages carefully regulated the carrying of items from one domain to another (מְרִשּׁוֹת לְרִשּׁוֹת) on the Sabbath, considering it a violation of the biblical prohibition against work on that day. There were exceptions, however. . For example, garments and certain ornaments may be worn when passing from one's private domain (רְשׁוֹת הַיְחִיד) into the public domain (רְשׁוֹת הָרַבִּים). Others are not permitted. These disputes address articles classified as garments, ornaments, dual-purpose items (non-ornaments sometimes used as ornaments), or none of the above. Which ones may a woman wear as she crosses from one domain to another? If she wears a forbidden item, must she bring a sin offering?

(1.1) Mishnah Shabbat 6:3

ג לא תצא אשה במחט הנקובה, ולא בטבעת שיש עליה חותם, ולא בכלגאר, ולא בכובלת, ולא בצלוחית של פליטון. ואם יצתה, חיבת חטאת, דברי רבי מאיר. וחכמים פוטרין בכובלת ובצלוחית של פליטון:

6:3

- A. “[On Shabbat,] a woman may not go out with a needle which has a hole, with a ring which has a seal, with a cochlae brooch, with a spice box, or with a vial of spikenard oil.

⁸⁹ Even though the Second Temple had been destroyed in 70 C.E. and the sacrifices could no longer be offered, the sacrificial system had been so central in regulating the relationship between Israel and God that it remained embedded in the halakhic system of the sages.

- B. “And if she went out [wearing any of them], she is liable to a sin offering,” the words of R. Meir.
- C. But the SAGES declare [her] exempt [from a sin offering] in the case of a spice box and a vial of spikenard oil.

In the Mishnah, R. Meir forbids the wearing of the listed items since he does not consider them ornaments. The SAGES limit the opinion of R. Meir by exempting the spice box and vial of spikenard oil from a sin offering, presumably because they classify them as dual purpose objects, serving as both vessels and ornaments.

In this dispute, the SAGES’ function in a clearly authoritative role; their declaration resolves the dispute and concludes this Mishnah passage. Therefore, this is a Type 3A dispute.

(1.2) Tosefta Shabbat 4:11

יא לא תצא אשה במפתח שבאצבעה לרשות הרבים, ואם יצאת הרי זו חייבת. ר' אליעזר⁹⁰ פוטר בכובלת, וחכמים פוטרין בצלוחית של פלייטון, בזמן שאין בה בוסם, הא אם יש⁹¹ בה ; ; בוסם, הרי זו חייבת. כללו של דבר, כל שהוא משום תכשיט לא תצא, ואם יצאת הרי זו פטורה, כל שאינו משום תכשיט, לא תצא, ואם יצאת הרי היא חייבת.

4:11

- A. [On Shabbat,] a woman should not go out wearing a key on her finger in the public domain.
- B. And if she went out [wearing it], lo, this one is liable [for a sin offering].
- C. R. Eliezer declares [her] exempt in the case of a spice box.
- D. And SAGES declare [her] exempt in the case of a vial of spikenard oil, when there is no perfume in it.
- E. Lo, if there is perfume in it, lo, this one is liable [for a sin offering].
- F. The general principle of the matter is as follows: If [she is wearing] any [vessel] used as an ornament, she may not go out.
- G. But if she went out, she is exempt.
- H. If any item is never used as ornament, she should not go out.
- I. And if she went out, lo, this one is liable.

The Tosefta passage opens with authoritative anonymous text at A.–B. The key is simply one among many functional items not usually worn as an ornament; therefore, it may

⁹⁰ Toseftan manuscript record several variants of this sage’s name: ר. ליעזר, ר. אליעזר, ר. ר. All the references in the passages under discussion refer to the same sage, R. Eliezer, who was active in the second century CE. For the sake of simplicity and continuity, I “normalize” all references to ר. אליעזר except where it is clear that the text refers to another sage.

⁹¹ I follow Lieberman, who prefers the reading of the Vienna manuscript, which is generally considered the most reliable Tosefta manuscript. The First Impression and the Erfurt and London manuscripts reverse יש and אין here. I will discuss the alternative reading in section (1.4) and (1.5).

not be worn as an ornament on the Sabbath. After opinions attributed to R. Eliezer and the SAGES, the dispute concludes with a כלל, a general principle that applies in all cases.

For R. Eliezer and the SAGES, the issue is broader than the spice box or the vial of spikenard oil. In the discourse of the Mishnah and Tosefta, abstract principles and concerns are reflected in the discussion of concrete items and situations. The vial of spikenard oil represents the category of very small vessels that may also be used as ornaments. The issue at hand is whether this kind of item may be worn simply as ornaments on the Sabbath as a woman goes מִרְשׁוֹת לְרִשׁוֹת. Since carrying a vessel מִרְשׁוֹת לְרִשׁוֹת on the Sabbath incurs liability for a sin offering regardless of whether there are contents, the SAGES are primarily interested in whether the ornamental vessel is functioning as a vessel at the time she exits the house wearing it. If it bears contents (perfume), it is functioning as a vessel and she is liable for a sin offering. If it bears no contents, it is an ornament and she is not liable. The SAGES do not specifically declare whether the woman is permitted or forbidden to wear it in the first place. For the כלל, whether or not the ornamental vessel contains perfume is not an issue. All the objects being discussed are first considered as vessels and the operative question is whether or not they have also been used as ornaments. If it was generally (or perhaps ever) used as an ornament, she should not go out, but if she does so she is not liable for a sin offering. If it was never used as an ornament, she should not go out.

One would expect the כלל to sum up what has come before, especially the words of the SAGES. Instead, the כלל actually undermines the SAGES' ruling. The SAGES' rule on liability is based on whether or not the ornamental vessel bears contents but the כלל makes no such distinction and, in fact, subverts it.

The contradiction between the SAGES and the כלל is so clear that it is unlikely to have arisen from a careless redaction. The Tosefta's SAGES split dual-purpose items into two categories: those actually functioning as vessels when they are also worn as ornaments, and those that are not functioning as vessels while they are worn. For the כלל, she should not go out wearing an ornamental vessel (the issue of contents is not raised); however, if she does, she is not liable for a sin offering. As a result, the כלל may be more lenient than the Tosefta's SAGES, who require a sin offering from a woman who brings out an ornamental vessel bearing contents.

The SAGES' opinion is undermined by the Tosefta's redactional strategy; therefore, this is a type 3C dispute.

(1.3) Analysis

It can be argued that T. Shabbat 4:11 is simply dependent on M. Shabbat 6:3, since only the Mishnah has the antecedent mention of a spice box and a vial of spikenard oil (at M. Shabbat 6:2 A.). Another possibility is that the two traditions became independent at an early stage and took on slightly different structures. A third possibility is that both the Mishnah and Tosefta are drawn from a larger body of traditions that include (1) most or all of the items mentioned in this parallel (a needle that has a hole, a ring that has a seal, a key on the finger, a cochlae brooch, a spice box, and a vial of spikenard oil); (2) R. Meir's opinion at T. Shabbat 6:3 B. (= the Tosefta's anonymous 4:11 B.); (3) R. Eliezar's opinion at T. Shabbat 4:11 C. (attributed to the SAGES in M. Shabbat 6:3 C.); (4) the SAGES opinion; and finally (5) the כּלל, appended during transmission (or by the Tosefta's redactors).

These possibilities highlight the difficulties of a diachronic or source-tradition analysis of mixed oral and possibly written traditions that have been conveyed to us only in their definitive redactions. I do not mean to diminish the importance of diachronic analysis. My approach, however, focuses on the definitive redactions themselves in order to establish the presence or absence of differences between them. I want to determine, insofar as possible, the views expressed by the definitive redactions.

In this parallel, the position of the SAGES in the Mishnah and Tosefta do not harmonize. In the Mishnah, "the SAGES declare [her] exempt [from a sin offering] in the case of a spice box and a vial of spikenard oil." It does not seem to matter whether or not they contain spice or perfume. In the Tosefta, the "SAGES declare [her] exempt in the case of a vial of spikenard oil, when there is no perfume in it" but "if there is perfume in it, lo, this one is liable [for a sin offering]." For the Tosefta's SAGES, the ornamental vessel's actual use on the Sabbath is the definitive factor in its permissibility.

On the other hand, the final positions of the Mishnah and Tosefta passages do harmonize on the matter of liability and exemption, though they reach that alignment in different ways. The final position of the Mishnah on liability and exemption is the Mishnah SAGES' "But if she went out . . . SAGES declare [her] exempt" (M. Shabbat 6:3). The final position of the Tosefta is determined by the anonymous כּלל's "if she went out, she is exempt." The Mishnah highlights the SAGES' authoritative role, while the Tosefta privileges the anonymous כּלל, lessening the SAGES' influence within the dispute and weakening the sense of the SAGES' authority.

In the Mishnah, the SAGES bring the dispute to its conclusion with their ruling while the Tosefta shifts the focus from the SAGES' concern—the *use* of an ornament vessel—to another, the *classification* of an ornamental vessel. By privileging the anonymous כלל, the Tosefta has not allowed the SAGES to define the crucial issue in this dispute. By citing the כלל in this manner the Tosefta has undermined the SAGES' effort to conclude the dispute. The Toseftan redaction has undermined the authority of the SAGES by redefining the issue at hand in the dispute.

(1.4) Another Reading of Tosefta Shabbat 4.11

I follow Lieberman, who prefers the Vienna manuscript reading of T. Shabbat 4:11 D.–E. to that of the other witnesses.

וחכמים פוטרין בצלוחית של פלייטון, בזמן שאין בה בוסם, הא אם יש בה בוסם, הרי זו חייבת.

D. And SAGES declare [her] exempt in the case of a vial of spikenard oil, when there is no perfume in it.

E. Lo, if there is perfume in it, lo, this one is liable [for a sin offering].

Like the word “fragrance” in English, בוסם may refer to the perfume itself or to its odor. Here, I understand בוסם to mean the perfume itself. The issue at D. and E. is therefore whether or not the ornament currently contains perfume and is thus being used as a vessel. If the translation “odor” is used here, one arrives at the following: In D., where there is no odor, the object has never been used as an ornament (both visual and olfactory); therefore it is a vessel and she is exempt. In E., where there is an odor, it must have been used as a visual and olfactory ornament; thus she is liable. This reading does not seem make sense, since D. would violate established Sabbath law forbidding carrying vessels מְרֻשּׁוֹת לְרֵשִׁית and E. would make her liable for an offering for carrying an ornament, which is permitted!

However, the First Impression, Erfurt, and London reverse יש and אין. They read:

וחכמים פוטרין בצלוחית של פלייטון, בזמן שיש בה בוסם, הא אם אין בה בוסם, הרי זו חייבת.

D. And SAGES declare [her] exempt in the case of a vial of spikenard oil, when there is בוסם in it.

E. Lo, if there is no בוסם in it, lo, this one is liable [for a sin offering].

In these witnesses, בוטח is understood as the odor of perfume. This leads to another reading of the Tosefta passage.

4:11

- A. [On Shabbat,] a woman should not go out wearing a key on her finger in the public domain.
- B. And if she went out [wearing it], lo, this one is liable [for a sin offering].
- C. R. Eliezer declares [her] exempt in the case of a spice box.
- D. And SAGES declare [her] exempt in the case of a vial of spikenard oil, **when there is odor in it.**
- E. Lo, **if there is no** odor in it, lo, this one is liable [for a sin offering].
- F. The general principle of the matter is as follows: If [she is wearing] any [vessel] used as an ornament, she may not go out.
- G. But if she went out, she is exempt.
- H. If any item is never used as ornament, she should not go out.

In D., when an odor (of perfume) can be smelled, the object has been (and still is) an ornament, a visual and olfactory adornment. Therefore carrying it מְרֻשָּׁת לְרֻשָּׁת on the Sabbath does not incur liability. In E., there is no odor in it and therefore it was obviously never such an ornament, and must be treated as a simple vessel. Carrying it מְרֻשָּׁת לְרֻשָּׁת on the Sabbath therefore incurs liability. F.–H. is a gloss. For the כלל, the primary issue is not whether it currently contains perfume but whether it is generally used as a simple vessel or an ornament. If it was generally (or perhaps ever) used as an ornament, she should not go out, but if she does so she is not liable for a sin offering. If it was never used as an ornament, she should not go out. In this version, the כלל follows the SAGES' ruling and harmonizes with it.

While the Vienna reading hinges on whether or the ornamental vessel contains perfume while it is being worn מְרֻשָּׁת לְרֻשָּׁת, the alternative reading hinges on whether it has actually functioned as an ornament in the past, as evidenced by the presence of the odor of perfume in it when it is worn on the Sabbath.

Unlike the variant discussed in 1.2, the variant discussed here does not destabilize the SAGES' authority. Here, the כלל reads adds a gloss; this is a Type 3A dispute.

(1.5) Second Analysis

The alternative reading is internally consistent. Unlike the Vienna reading, the כלל does not undermine the SAGES'. In addition, the SAGES' ruling at T. Shabbat 4:1 D. and E. may harmonize with the M. Shabbat at 6.3 C. ("But SAGES declare [her] exempt [from a sin offering] in the case of a spice box and a vial of spikenard oil."), if we assume that the box and vial have been used as ornaments at some time and now the odor of spice or perfume can

be smelled. If only on the basis of this consistency, the alternative reading is preferable to the Vienna reading.

(2) Mishnah Shabbat 6:6 and Tosefta Shabbat 5:11

Like the previous parallel, these texts consider the permissibility of carrying or wearing certain items מִרְשֻׁת לְרִשְׁת (that is, when leaving one's private domain and entering public space) on the Sabbath. Here, the Mishnah and Tosefta do not discuss the same items.

However, they are conceptually parallel and share some common language, both texts concluding with the SAGES' ruling: "And any person [may do so]; but the SAGES spoke according to current [practice]."⁹² According to common practice of the time, certain items may be worn on the Sabbath for a variety of purposes (healing, modesty, hygiene, etc.). This parallel is an example of one way the SAGES relate to common practice as a legal principle.

(2.1) Mishnah Shabbat 6:6

ו יוצאין בסלע שעל הצינית. הבנות יוצאות בחיטין ואפלו בקיסמין שבאזניהן. ערביות יוצאות רעולות, ומדיות פרופות. וכל אדם, אלא שדברו חכמים בהווה.⁹³

6:6

- A. They go out with a sela [coin] on a bunion [or callus].
- B. Girls go out with threads and even chips in their ears.
- C. Arabian women go out veiled.
- D. Median women go out with cloaks looped up over their shoulders.
- E. And any person [may do so]; but the SAGES spoke on the basis of current [practice].

The Mishnah introduces several practices that relate loosely to one another. "They go out with a sela [coin] on a bunion [or callus]" describes a treatment that necessitates "carrying" an object (the sela coin). The girl's "thread and even chips" refers to adornment. The Arabian women wear veils out of modesty. The Median women, for reason that is not clear to me, wear cloaks that technically violate Sabbath ordinances. In each case, the individuals wear, and thus "carry," on the Sabbath something that is part of their daily

⁹² The only difference between the two versions of the SAGES' ruling is the introductory ו (Mishnah) and אלא (Tosefta). In these contexts both ו and אלא are simple disjunctives.

⁹³ בהווה is an uncommon construction, appearing only five times in the Mishnah and five Tosefta, and, with this meaning, not at all in the halakhic midrash collections. The usual terms for custom or common practice use some form of the root נהג.

routine. The issue is not whether the adornment is also a vessel, as in the previous parallel, but whether wearing the adornment itself is permitted when going מְרִשּׁוֹת לְרִשּׁוֹת. The SAGES rule that “any person [may do so]”—even those who previously did not customarily wear these items may now wear any of them.⁹⁴

The SAGES made the ruling בְּהוֹנָה—on the basis of common practice rather than by halakhic reasoning or an appeal to rabbinic tradition. They also chose to expand common practice beyond the specific groups mentioned in C. and D. The Mishnah emphasizes the authority of the SAGES by legitimizing their expansion of common practice without a basis in halakhah or tradition. The SAGES’ ruling is based on common practice but their ruling, not the common practice, is definitive.

The SAGES’ ruling concludes the dispute; this is a Type 3A dispute.

(2.2) Tosefta Shabbat 5:11

יֵאָדָם [רִטְנִין] יוֹצֵאִין בְּסוּדְרִין שֶׁלֹּהֶן, וְלֹא הִרְטִנִּין בִּלְבָד אָמְרוּ, אֲלֵא כָל אָדָם, אֲלֵא שְׁדַּבְּרוּ חֲכָמִים בְּהוּהָ.

5:11

- A. [Runners] go out with their scarves [on their shoulders].
- B. And they did not state this only for runners, but any person [may do so].
- C. But the SAGES spoke on the basis of current [practice].

The Tosefta introduces only one practice but its point is similar to the Mishnah’s—runners, who presumably wear scarves when they run on the ordinary days of the week may also do so on the Sabbath. The SAGES rule that any person may do the same. As in the Mishnah, they ruled בְּהוּהָ rather than as a result of halakhic reasoning or an appeal to tradition.

The placement of the SAGES’ ruling at the end of the passage indicates that it is definitive, regardless of its basis. This is a Type 3A dispute.

(2.3) Analysis

The rationale for the SAGES’ rulings is not often described explicitly in the Mishnah and Tosefta, though it is usually clear in its context. In this case, both the Mishnah and Tosefta

⁹⁴ Appropriate gender roles are assumed: anyone may go out with a sela coin on a bunion, but only women may go out with the adornments mentioned in B.–D.

explain that the SAGES spoke “בהוה.” The participles יוצאות (“they [feminine] go out”) and יוצאין (“they [masculine] go out”) represent either present, ongoing action or the language of permission (“they [may] go out”). It is unclear whether בהוה refers to what is currently practiced or what is currently permitted. If “current practice,” the SAGES base their ruling on what certain Jews are commonly doing; if “what is currently permitted,” the SAGES base their ruling on a standard of what is allowed, not necessarily what is commonly practiced. In either case, the SAGES do not arrive at their ruling by halakhic reasoning or an appeal to tradition but according to current reality.

The Mishnah and Tosefta texts show that the SAGES are familiar with common practices or standards and choose to give them a place in their halakhic framework. The SAGES are not impervious to larger communal values and practices. Although the SAGES have the last word and are clearly depicted as an authoritative group, their authority is self-consciously modulated by their relationship with the community. The SAGES may have determined that the underlying halakhah was not significant enough for them to overturn established practice. Also, the SAGES’ ruling could be, at least in part, a move by the SAGES’ to gain influence by demonstrating sensitivity to communal practices rather than an elitist insistence on their own halakhic reasoning.

In the SAGES parallel M. Pesachim 4:8 and T. Pisha 3:19–22 analyzed in chapter 4, the SAGES do not bind themselves to the practices of the men of Jericho. They are free to approve or disapprove. In the current SAGES parallel M. Shabbat 6:6 and T. Shabbat 5:11, the SAGES base their ruling on current practice. In both the Mishnah and Tosefta, the SAGES have a multidimensional relationship with common practice or standards. However, their word is depicted as authoritative regardless of its relationship to existing communal realities.

(3) Mishnah Shabbat 8:4–5 and Tosefta Shabbat 8:20

The disputes in this SAGES parallel concern the minimum amounts of various substances that incur liability when carried מְרֻשָּׁוּת לְרֻשָּׁוּת on the Sabbath.

5–8:4 Mishnah Shabbat (3.1)

ד...סיד, כְּדִי לְסוּד קִטְנָה שְׁבֻבָּנוֹת. רַבִּי יְהוּדָה אוֹמֵר, כְּדִי לַעֲשׂוֹת כָּלְכוּל. רַבִּי נְחֻמִּי אוֹמֵר, כְּדִי לַעֲשׂוֹת אֲנָדִיפִי.

ה אֲדָמָה, כְּחוֹתֶם הַמְרָצִיפִים, דְּבָרֵי רַבִּי עֲקִיבָא. וְחֻכְמִים אוֹמְרִים, כְּחוֹתֶם הָאֲגָרוֹת. זָבֵל וְחוֹל הַדֶּק, כְּדִי לְזַבֵּל קֶלַח שֶׁל כְּרוֹב, דְּבָרֵי רַבִּי עֲקִיבָא. וְחֻכְמִים אוֹמְרִים, כְּדִי לְזַבֵּל כְּרִישָׁא. חוֹל

הגס, כדי לתן על מלא כף סיד. קנה כדי לעשות קלמוס. ואם היה עבה או מרסס, כדי לבשל בו ביצה קלה שבביצים, טרופה ונתונה באלפס:

8:4

- D. [He who takes out] lime enough to make up the smallest girl [is liable].⁹⁵
- E. Rabbi Judah says, "Enough to make up the crown of [her] hair."
- F. Rabbi Nehemiah says, "Enough to make up the locks falling from [her] temples."

8.5

- A. "[He who takes out] earth [for clay], [enough to make] a seal for a large sack, [is liable];" the words of R. Aqiba.
- B. But SAGES say, "[Enough to make] a seal for a letter."
- C. "Manure and fine sand enough to manure a cabbage stalk;" the words of R. Aqiba.
- D. But SAGES say, "Enough to manure a leek."
- E. Coarse sand enough for a trowel full of plaster;
- F. Reed enough to make a pen.
- G. And if it was thick or broken, enough [to make a fire] to cook the smallest sort of egg with it, mixed [with oil] and put in a pan.

Mishnah Shabbat 8:4 concerns the minimum quantity of lime that incurs liability. The anonymous 8:4 D. states a measure that is disputed by R. Judah and R. Nehemiah, who advocate smaller measures. The SAGES appear in 8.5, where they overrule R. Aqiba twice. In the first instance, the issue is a mixture of manure (primarily rotted leaves, perhaps with dung) and fine sand (added to provide aeration). The second instance concerns the amount of coarse sand mixed with lime⁹⁶ that incurs liability. In the apparent gloss at E.–G., the SAGES establish limits on some other substances.

There is no dissent from the SAGES' opinions, which are depicted as fully authoritative.

This is a Type 3A dispute.

(3.2) Tosefta Shabbat 8:20

כ חול הגס, כדי ליתן על פי כף סיד. אמ' ר' נראין דברי ר' עקיבא בחול דק, ודברי חכמים בחול גס. סיד, כדי לסוד קטנה שבבנות. ר' יהודה או' כדי לעשות כילכול. ר' נחמיה או' כדי לעשות אנדפי. אמ' ר' נראין דברי ר' יהודה בזמן שהוא כביצה, ודברי ר' נחמיה בזמן שהוא חבוט.

8:20

- A. Coarse sand enough to [cover] the face of a [plastering] trowel.

⁹⁵ Apparently, a lime product was used as a cosmetic. Note that two Hebrew verbs (לסוד and לעשות) are translated here as "make up."

⁹⁶ This combination forms a mortar.

- B. Said Rabbi, “The opinion of R. Aqiba appears [preferable] in the case of fine sand and of SAGES in the case of coarse sand.”
- C. Lime enough to make up the smallest girl.
- D. Rabbi Judah says, “Enough to make up the crown of [her] hair.”
- E. Rabbi Nehemiah says, “Enough to make up the locks falling from [her] temples.”
- F. Said Rabbi, “The opinion of R. Judah appears [preferable] when [the lime] is [the volume of or shaped like] an egg, and the opinion of R. Nehemiah when it is mashed.”

In the Tosefta, Rabbi (Judah Hanasi), traditionally known as the Mishnah’s redactor, considers the views of Rabbi Aqiba and the SAGES on one issue, then the opinions of Rabbi Judah and Rabbi Nehemiah on another. While the opinions of Rabbi Judah and Rabbi Nehemiah are recorded in the Tosefta, the views of R. Aqiba and the SAGES are not spelled out there. The Toseftan version assumes opinions of R. Aqiba and the SAGES that can be found in our Mishnah, thus suggesting that the Toseftan version depends on some form of the Mishnah or both depend on prior tradition. The Tosefta understands the ruling on coarse sand—“enough for a trowel full of plaster” (M. Shabbat 8:5 E), which I read as a gloss—as a ruling of the SAGES. My primary concern here is not how Rabbi works through the halakhic issues but how the Tosefta passage reflects on the SAGES’ authority.

I begin with Rabbi’s handling of the views of R. Judah and R. Nehemiah:

- D. Lime enough to make up the smallest girl.
- E. Rabbi Judah says, “Enough to make up the crown of [her] hair.”
- F. Rabbi Nehemiah says, “Enough to make up the locks falling from [her] temples.”
- G. Said Rabbi, “The opinion of R. Judah appears [preferable] when [the lime] is [shaped like] an egg, and the opinion of R. Nehemiah when it is mashed.”

R. Judah and R. Nehemiah disagree about how much lime cosmetic incurs liability when brought out of one’s private dwelling into the public sphere on the Sabbath. These are the same positions they advance in the Mishnah, where their dispute is unresolved. Here Rabbi harmonizes the two opinions by explaining that the different quantities refer to lime in two different forms—compact in the shape of an egg or mashed. The two opinions, clearly at odds in the Mishnah, are re-configured so as to remove the disagreement. Rabbi approaches the opinions of R. Aqiba and the SAGES in the same way.

- A. Coarse sand enough to [cover] the face of a [plastering] trowel.
- B. Said Rabbi, “The opinion of R. Aqiba appears [preferable] in the case of fine sand and of SAGES in the case of coarse sand.”

The opinion on coarse sand may have circulated as a ruling of the SAGES, appearing as a gloss in the Mishnah and as the SAGES' opinion in the Tosefta. An opinion on fine sand is attributed in the Mishnah to R. Aqiba (M. Shabbat 8:5 C). Instead of treating the SAGES' opinion as authoritative and assessing the opinion of R. Aqiba in relation to it, Rabbi weighs the SAGES' opinion against R. Aqiba's as if these were the opinions of two individual sages, in the same way that he handles the dispute or discrepancy between R. Judah and R. Nehemiah. The syntax of the two is identical:

אמ' ר' נראין דברי ר' עקיבא ב- . . . ודברי חכמים ב- . . .
אמ' ר' נראין דברי ר' יהודה ב- . . . ודברי ר' נחמיה ב- . . .

Although such close parallelism may arise in the process of transmission and redaction, it could not have escaped the notice of the Tosefta's definitive redactors that this parallelism places the SAGES' opinion on a level playing field with the opinion of an individual sage. By handling the apparent discrepancy between R. Aqiba and the SAGES with the same methodology as he handles the apparent discrepancy between R. Judah and R. Nehemiah, Rabbi—and hence the Tosefta—undermines the notion that the SAGES' views are automatically privileged.

Obviously, none of Rabbi's predecessors can respond to him. Therefore, he has not only placed the SAGES' opinion on a level with R. Aqiba's, he has also assumed a stance of authority over all the SAGES in the dispute, including the SAGES. By subjecting the opinion of the SAGES to his assessment as an individual sage, he has compromised their authority.

In this passage, the opinion of the SAGES is equated with the opinion of an individual sage and is subject to evaluation by a later sage. Thus, this is a Type 3C dispute.

(3.3) Analysis

A comparison of the Tosefta's text with the Mishnah's produces further results. Here is the relevant text from Mishnah Shabbat 8:5:

- A. "Manure and fine sand enough to manure a cabbage stalk;" the words of R. Aqiba.
- B. But SAGES say, "Enough to manure a leek."
- C. Coarse sand enough for a trowel full of plaster

The SAGES clearly reject the quantity of manure and fine sand said by R. Aqiba to incur liability ("enough to manure a cabbage stalk") and substitute a smaller measure, "[e]nough to manure a leek." Then, according to the gloss, they set the measure for coarse

sand to be mixed with lime. Thus, the SAGES (themselves or with an anonymous glossator) have set clear standards for *both* fine and coarse sand mixtures.

Reading the Mishnah and Tosefta synoptically, and assuming that the text found in our Mishnah is the basis for the Tosefta, Rabbi decides in favor of R. Aqiba and against the SAGES in their dispute about fine sand. If the two texts are based on earlier tradition(s), the situation is less clear; the Tosefta's redactors may not have known that the SAGES had expressed an opinion on fine sand. Based on a comparative reading of the extant Mishnah and Tosefta texts, Rabbi prefers the SAGES' ruling on coarse sand (mixed with lime). In order to harmonize their views with the opinion of R. Aqiba, Rabbi elevates R. Aqiba's minority opinion on fine sand in the Mishnah to a status equal to the SAGES' opinion in the Tosefta. (We do not have R. Aqiba's opinion concerning coarse sand.) Taking the Mishnah and Tosefta texts together, the Tosefta undermines the authority of the SAGES by rejecting the authoritativeness of their ruling on (manure and) fine sand.

The construction "the opinion of x appears [preferable] to the opinion of y" appears twenty-one times the Tosefta, ten of which involve the SAGES and an individual sage.⁹⁷ There is one example, not involving the SAGES, in the Mishnah.

(4)Mishnah Shabbat 20:4 and Tosefta Shabbat 16:4

The main issue in these disputes is the permissibility of sweeping on the Sabbath.

(4.1) Mishnah Shabbat 20:4

ד גורפין מלפני הפטם, ומסלקין לצדדיו מפני הרעי, דברי רבי דוסא. וחכמים אוסרין. נוטלין מלפני בהמה זו ונותנין לפני בהמה זו בשבת

20.4

- A. "They clean out [a manger] from before a fatted ox.
- B. "And sweep to the sides because of [the possibility of being contaminated with] excrement." These are the words of R. Dosa.
- C. But SAGES prohibit [them].
- D. "They take [fodder] from before one animal and put it before another animal on the Sabbath."

The ox and grazing animal have both finished eating, leaving some uneaten fodder on the ground, mixed with straw, grass, and/or dirt. According to R. Dosa, it is permissible to

⁹⁷ An example is T. Tevul Yom 2:12, reviewed briefly on page 92 of this thesis.

sweep this mixture away for purposes of cleanliness. The SAGES prohibit it, presumably because one feeds animals on the Sabbath out of necessity but cleaning away the refuse is not required, and therefore not permitted, on the Sabbath. It is permitted, however, to take the fodder mixture from one animal to feed another.

D. is probably a gloss. Thus, the SAGES rule without dissent and this is a Type 3A dispute.

(4.2) Tosefta Shabbat 16:4

ד גורפין מלפני הפטם, ומסלקין לצדדין מפני הרעי, דברי רבי דוסא. וחכמים
אוסרין, בין כך ובין כך אין מסלקין לצדדין

20.4

- A. “They clean out [a manger] before a fatted ox and sweep to the sides because of [the possibility of being contaminated with] excrement.” These are the words of R. Dosa.
- B. But SAGES say, “One way or another, they do not sweep to the sides.”

The dispute is resolved by the SAGES’ ruling. There is no dissent; this is a Type 3A dispute.

(4.3) Analysis

The Mishnah and Tosefta passages make the same fundamental point, though the Mishnah’s gloss makes an additional point. The SAGES’ authority is unchallenged in both passages.

(5) Mishnah Eruvin 3:6 and Tosefta Eruvin 4:1, 2

The eruv (עֶרֶב from the root ערב meaning mix or mingle) is a formally bounded area that enables greater freedom for carrying or movement than would otherwise be permissible on the Sabbath. The concept of the eruv is based on Exodus 16:29: “Mark that the LORD has given you the Sabbath, therefore He gives you two days’ food on the sixth day. Let everyone remain where he is: let no one leave his place on the seventh day” (JPS). This verse associates eating with remaining in one’s place on the Sabbath. Since the people were in transit through the desert, their “place” was a tent, a temporary place of residence. The joining of the double supply of bread for Friday and Saturday with remaining in one’s place

leaves no doubt that (1) one stays home on the Sabbath, and that (2) one eats at home on the Sabbath.

Although precursors to the rabbinic eruv are found in the Dead Sea Scrolls (see Fonrobert 2004), the sages of the Mishnah and Tosefta elaborated and systematically shaped the concepts involved in the formation of eruv. They understood that a people, now settled and no longer living in tents, must observe Sabbath limits without constricting movements so severely that the Sabbath becomes onerous. In tractate Eruvin, they adapt the facts of Scripture to the realities of individual and communal Jewish life in their time, establishing mechanisms to expand the areas in which Jews may permissibly move (and carry objects) outside the strict confines of their “place” (רֶשֶׁת הַיְחִיד or “private domain”).

The sages defined several varieties of eruv as areas of expanded carrying or movement on the Sabbath and certain festival days. An eruv may be established by a community preparation of a symbolic meal by which an area of temporary common ownership is created for the Sabbath; essentially, the eruv is now their “place,” a domain in which they may freely carry. A different sort of eruv may be established by the construction of a boundary around a number of private dwellings, forming them into a single eruv.

The SAGES parallel M. Eruvin 3:6 and T. Eruvin 4:1, 2 deals with a third type of eruv. Biblical law permits a person to travel a certain distance from the edge of his town on the Sabbath. If a religious obligation requires him to travel beyond those set bounds, he may double the distance he is permitted to travel by previously depositing a symbolic meal at the usual Sabbath boundary, a set distance from the edge of his town. The location of that meal defines an eruv, a new center of his permissible movement. The permitted area of movement is effectively adjusted to include the area from the edge of town, through the location of the symbolic meal, and an equal distance past that location and away from the town. One may also travel within the edges of the town. However, one may not travel at all from the edge of town opposite the eruv. For example, if he sets up an eruv a Sabbath’s journey to the west, he may move within that eruv, but he may not travel to the east of his town.

Eruvim must be prepared on the eve of, but not on, a Sabbath or festival day. In this parallel, the Mishnah and Tosefta discuss the preparation of eruvim when a festival day and a Sabbath occur one after the other. The disputed issue is whether it is permissible to prepare

two eruvim in advance (before the first of the two days), one eruv for use on the first day and another eruv, in the opposite direction,⁹⁸ for use on the following day.

(5.1) Mishnah Eruvin 3:6

ו רבי אליעזר אומר, יום טוב הסמוך לשבת, בין מלפניה ובין מלאחריה, מערב אדם שני ערובין ואומר, ערובי הראשון למזרח, והשני למערב. הראשון למערב, והשני למזרח. ערובי הראשון, והשני כבני עירי. ערובי השני, והראשון כבני עירי. וחכמים אומרים, מערב לרוח אחת, או אינו מערב כל עקר. או מערב לשני ימים, או אינו מערב כל עקר. כיצד יעשה, מוליכו בראשון, ומחשיך עליו ונוטלו ובא לו. בשני מחשיך עליו ואוכלו. ונמצא משתכר בהליכתו ומשתכר בערובו. נאכל בראשון, ערובו לראשון ואינו ערוב לשני. אמר להם רבי אליעזר, מודים אתם לי שהן שתי קדשות :

3:6

- A. R. Eliezer says, “[Concerning] a festival day adjacent to the Sabbath, whether before it or after it, a man may prepare two eruvim and say,
- B. “ ‘My eruv for the first day is at the east, and for the second it is at the west.’
- C. “ ‘For the first it is at the west and for the second it is at the east.’
- D. “ ‘My eruv is for the first day, and the second leaves me in the status of the others who dwell in my town.’
- E. “ ‘My eruv is for the second day, and first leaves me in the status of the others who dwell in my town.’ ”
- F. But SAGES say, “He makes an eruv for a single direction
- G. “Or he does not make an eruv at all.
- H. “He either makes an eruv for both days
- I. “Or he does not make an eruv at all.
- J. “What should he do?
- K. “He sends it on the first day [to the point he wants], awaits nightfall for it, takes it, and goes along.
- L. “And on the second day he awaits nightfall for it, then he eats it.
- M. “He turns out to profit from his journeying and to profit from his eruv.
- N. “[If] it was eaten on the first day, his eruv is for the first day, and it is not an eruv for the second day.”
- O. Said to them R. Eliezer, “You concede to me then that they are two [distinct] periods of sanctification [?]”

R. Eliezer advances the notion that it is permissible to prepare two eruvim in advance if the person is going beyond the normal Sabbath limit in two different directions on the two consecutive days (the Sabbath and a contiguous festival day). In the alternative, R. Eliezer asserts, a person may make an eruv for one day and on the second day may return to his original status, “the status of the others who dwell in [his] town;” he would then be permitted to walk a Sabbath’s day journey in any direction from the town limits.

⁹⁸ The same principles apply to two eruvim prepared in different, but not necessarily opposite, directions.

The SAGES disagree: an eruv must face a single direction and serve for both days. They do not offer a rationale for their position. The SAGES are then asked, perhaps by R. Eliezer, how a single eruv may be used for two days. They respond that the eruv-maker accomplishes the goal of shifting his center of movement by placing the symbolic meal (used to create the eruv) on the eve of the first day, and eating it the eve of the second day in order to ensure the legitimacy of the eruv for the second day. (There are additional complications in K.–L. that need not detain us.) If the symbolic meal is eaten on the first day, the eruv is not valid for the second day.

Now R. Eliezer rhetorically asks whether the SAGES' last statement (that the symbolic meal may is not eaten on the eve of the first day, as this would invalidate the eruv for the second day) does not show that they agree with his claim that the two days are two periods of holiness, not one. Up to this point in the dispute, the issue of two periods of sanctification has not been raised explicitly. Apparently, R. Eliezer based his approval of two eruvim for two consecutive days on this very point: two separate periods of holiness allow for two separate eruvim. If the SAGES recognize the separate status of the two days, their assertion that one may not build two eruvim for them is called into question and R. Eliezer's position that one may build two eruvim is supported.

R. Eliezer's last statement is not a minority opinion appended to a ruling by the SAGES. It is a rhetorical question, since the formula "You concede to me that" (מוֹדִים אַתָּם לִי -) expects agreement (see below on the Tosefta version) and is used where agreement seems certain or nearly so. The SAGES have not given a rationale for their opinion, but, as R. Eliezer points out, their tacit acknowledgement of two periods of sanctity would seem to undermine their critique of his position at A.–E.

Although every tannaitic work underwent a definitive redaction, the Mishnah is arguably the most carefully redacted of them all. Therefore, we have no reason to assume that the presence of this question by R. Eliezer is a mistake. On the other hand, the absence of a response makes it difficult, if not impossible, to determine what the redactors were trying to accomplish here. Maimonides is confident that the halakhah is according to R. Eliezer.⁹⁹ However, after reviewing this passage numerous times, I am not confident that the redactors intended to undermine the SAGES' authority. In the few doubtful cases I encounter in the Mishnah and Tosefta, I place it in the more common category (Type 3A or 3B rather than 3C).

⁹⁹ Hilchot Eruvin 8:5, cited by Kehati, 1994 Eruvin, 48.

According to my reading, this is likely a Type 3B dispute.

(5.2) Tosefta Eruvin 4:1, 2

א ר' אליעזר אומ' יום טוב סמוך לשבת, בין מלפניו ובין מלאחריה, מערב אדם יום אחד לצפון ויום אחד לדרום, יום אחד לצפון ויום אחד כאנשי אותה העיר. מודה ר' אליעזר שאין מערבין חצי היום לצפון וחצי היום לדרום, שאין חולקין יום אחד. וחכמים או' כשם שאין חולקין יום אחד, כך אין חולקין שני ימים.

אמ' להם ר' אליעזר אי אתם מודים במערב ברגליו ביום הראשון שצריך לערב ברגליו ביום השני, נאכל עירובו עד שלא חשיכה אין יוצא עליו ביום השני, אמרו לו אבל. אמ' להם הא לוי שני ימים הן. אמרו לו אי אתה מודה שאין מערבין מיום טוב לחבירו. אמ' להם אבל. אמ' לו הא לוי יום אחד הוא.

ב עירב ברגליו ביום הראשון צריך לערב ברגליו ביום השני, נאכל עירובו עד שלא חשיכה אין יוצא עליו ביום השני דברי ר' מאיר, ר' יהודה אומ' הרי זה חמר גמל. רבן שמעון בן גמליאל ור' ישמעאל בי ר' יוחנן בן ברוקה או' ערב ברגליו ביום הראשון אין צריך לערב ברגליו ביום השני, נאכל עירובו עד שלא חשיכה יוצא עליו ביום השני. מודים חכמים ל ר' אליעזר בשני ימים טובים של ראש השנה שמערב אדם יום אחד לצפון ויום אחד לדרום, יום אחד לצפון ויום אחד כאנשי אותה העיר, ור' יוסה אוסר שקדושת שניהם אחת היא. אמ' להם ר' יוסה אי אתם מודים שאם באו עדים מן המנחה ולמעלה שנוהגין אותו היום קדש ולמחר קדש:

Tosefta Eruvin 4:1

- A. R. Eliezer says, "on a festival day adjacent to the Sabbath, whether before or after it, a man may prepare an eruv one day for the north and one day for the south.
- B. "One day for the north and one day he is equivalent to the other people who dwell in his town."
- C. R. Eliezer concedes that an eruv is not prepared for half a day for the north and for half a day for the south.
- D. For they do not divide up a single day.
- E. And SAGES say, "Just as they do not divide up a single day, so they do not divide up two days."
- F. Said to them R. Eliezer, "Do you not concede that one who prepares an eruv with his feet for the first day must prepare an eruv with his feet for the second day?"
- G. "If his eruv was eaten before it got dark, he may not go out depending upon it the same day?"
- H. They said to him, "True."
- I. He said to them, "Is not this [what I said]?"
- J. They said to him, "Do you not concede that they do not prepare an eruv on one [holy] day for the next [contiguous holy] day?"
- K. He said to them, "True."
- L. They said to him, "Is not this [what we said]?: They are [treated as] one day."

4:2

- A. "If one prepared an eruv with his feet on the first day, he has to prepare an eruv with his feet on the second day.
- B. "If his eruv was eaten before it got dark, he may not go out on the second day depending on it," the words of R. Meir.
- C. R. Judah says, "Lo, this is the case of an ass-driver and a camel-driver" [trying to lead an ass and a camel in the same yoke, one in front and the other behind, thus making no progress]" [See Mishnah Eruvin 3:4].
- D. Rabban Simeon b. Gamaliel and R. Ishmael b. Yohanan b. Baroqa say, "If he prepared an eruv with his feet on the first day, he does not have to prepare an eruv with his feet on the second day.
- E. "If his eruv was eaten before it got dark [on the first day], he goes out on the second day depending on it."
- F. And SAGES concede to R. Eliezer with regard to two festival days of the New Year that a man prepares an eruv on the first day for the north and on the second day for the south,
- G. on the first day for the north and on the second day he is in the status of the other people who dwell in the same town." [= Judah in Mishnah Eruvin 3:7-8]
- H. But R. Yose forbids.
- I. For the two of them form a single [period of] holiness.
- J. Said to them R. Yose, "Do you not concede that, "If witnesses came from the time of the afternoon [offering] and onward, they treat that day as holy and the next day as holy?" [Mishnah Rosh Hashanah 4:4]

The Tosefta passage begins in close parallel to the Mishnah, except the orientation is north/south instead of east/west. R. Eliezer concedes (presumably to the SAGES) that an eruv is not prepared for half a day for the north and for half a day for the south.

All parties agree that a single holy day is an indivisible period of holiness. At 4.1 E, the SAGES build on this agreement—just as they do not divide a single holy day, they do not divide two contiguous holy days. T. Eruvin 4:1 E. to 4:2 E. speaks only of (holy) days; the distinction between festival day and Sabbath is no longer in view.

There follows a lively exchange between R. Eliezer and the SAGES. An examination of the structure of the dispute at 4:1 F.–L. reveals that R. Eliezer and the SAGES use the same tactics in their argumentation. R. Eliezer does not yield to an assertion of the SAGES but engages them in rational dispute. For their part, the SAGES do not assert their authority, but also engage in rational dispute in order to establish their position.

4:1

- F. R. Eliezer: **אִי אַתָּם מוֹדִים** ("Do you not concede . . . ?")
- H. SAGES: **אֲבָל** ("True.")
- I. R. Eliezer: **הֲאֵל לִי** ("Isn't this [what I said]?")
- J. SAGES: **אִי אַתָּה מוֹדֵה** ("Do you not concede . . . ?")
- K. R. Eliezer: **אֲבָל** ("True.")
- L. SAGES: **הֲאֵל לִי** ("Isn't this [what we said]?")

After receiving R. Eliezer's concession at 4:1 J.–K., the SAGES get the last word in this exchange. However, other sages now get involved. R. Judah, in harmony with the views of the SAGES in M. Eruvin 3:6, asserts that the eruv is invalidated for the second day if the symbolic meal has been eaten on the eve of the first. Rabban Simeon b. Gamaliel and R. Ishmael b. Yohanan b. Baroqa assert that the eruv is valid for the second day even if the meal has been eaten on the eve of the first day.

At 4:2 F., the SAGES rule that one may prepare an eruv on each of the two days of Rosh Hashanah (the New Year). This is a concession to R. Eliezer (מודים חכמים לר' אליעזר), possibly because the two days of Rosh Hashanah are not equal in holiness. They are halakhically a special case, for reasons not important for our analysis.

The last sage to speak is R. Yose. He adheres to a stricter version of the SAGES' original position that the two days "form a single period of holiness" (and therefore may not be divided), since he includes even the two days of Rosh Hashanah in that dictum. He supports this view with a rhetorical question at 4:2 J., concluding the Tosefta's version of this dispute. The formula "Do you not concede that . . .?" (אי אתם מודים ש-) indicates that R. Yose expects agreement. Indeed, the SAGES can hardly disagree with R. Yose's statement about Rosh Hashanah, since it is established halakhah, a word-for-word quote of M. Rosh Hashanah 4:4. The holiness of the first day is retained, and the holiness of the second day is established, on the basis of the testimony of the late-arriving witnesses. R. Yose believes that the determination that both days are holy, which arises from one cause—the testimony of the late-arriving witnesses—unifies both days as one period of holiness, even though they are considered holy for different reasons. The SAGES' response is not recorded.

Because this dispute involves reasoned discourse by the SAGES, rather than the assertion of authority, it is a Type 3C dispute.

(5.3) Analysis

In this parallel, the Mishnah is an abridgement of the Tosefta or of earlier sources of both texts. Unlike the Mishnah, the Tosefta depicts back-and-forth argumentation, concession, and progress. Both the SAGES and R. Eliezer make concessions and refine their arguments. At 4:1 L. the SAGES seem to have won, or settled, the dispute. However, at 4:2 F. they concede to R. Eliezer in the case of the two days of Rosh Hashanah, which they agree are two distinct periods of holiness. At the end of the Toseftan passage, R. Yose has the last word, inviting the SAGES to concede his point.

The words “Do you not concede” at T. Eruvin 4:2 J. do not function in the same way in the Tosefta as at M. Eruvin 3:6 O. In the Mishnah, R. Eliezer confronts the SAGES with an apparent contradiction in their position. His wording indicates that he expects agreement. However, there is no indication in the passage that the SAGES are willing to yield or even to explain their position, though the Mishnah’s way of framing the dispute seems to indicate that they should. In the Tosefta, R. Yose’s use of the same phrase is contextualized very differently. He uses the same language of concession that R. Eliezer and SAGES use. The SAGES do not expect their opinions to be accepted on their face, but engage in rational dispute with individual sages. It would be difficult to read their silence at the end of the dispute as simply a stubborn resistance to continue in rational discourse; in fact, whether the SAGES would have conceded or disagreed with R. Yose about the implications of M. Rosh Hashanah 4:4, we would still be left with the overall impression that they are reasonable. They are willing to expose their opinion to reasoned criticism, take that criticism seriously, and if necessary adjust their views. In a sense, they engage in dispute on an equal footing with individual sages. In the Tosefta’s version, neither the SAGES nor the surrounding text of the Tosefta indicates that the SAGES have any authority or inclination to short-circuit debate.

This SAGES parallel is unique because both Mishnah and Tosefta present individual sages who do not back down before the SAGES. This is the first Mishnah passage we have encountered in which the position of the SAGES may be undermined; I simply cannot be sure that this is the case. In the Tosefta’s version, the SAGES’ clearly do not attempt to exercise a *sui generis* authority and there is no doubt that they make concessions. The Tosefta portrays the SAGES’ willingness to defend their position rationally and to concede when their line of reasoning is defective.

(6) Mishnah Eruvin 6:9 and Tosefta Eruvin 5.25

In this parallel there is a courtyard within a courtyard. The inhabitants of the inner courtyard have the right of access through the outer courtyard into the public domain beyond. How do *eruvim* apply in this situation?

(6.1) Mishnah Eruvin 6:9

ט שְׁתֵּי חֲצֵרוֹת זֶו לְפָנִים מִזֶּו, עֶרְבָה הַפְּנִימִית וְלֹא עֶרְבָה הַחִיצוֹנָה, הַפְּנִימִית מִתְּתָר וְהַחִיצוֹנָה אֲסוּרָה. הַחִיצוֹנָה וְלֹא הַפְּנִימִית, שְׁתֵּיהֶן אֲסוּרוֹת. עֶרְבָה זֶו לְעֶצְמָה וְזֶו לְעֶצְמָה, זֶו מִתְּתָר בְּפָנֵי

עצמה, וזו מתרת בפני עצמה. רבי עקיבא אוסר החיצונה, שדריסת הרגל אוסרתה, וחכמים
 :אומרים, אין דריסת הרגל אוסרתה

- A. Two courtyards, one inside another—
- B. [The people of] the inner one prepared an eruv, but [the people of] the outer one did not prepare an eruv.
- C. The people of the inner courtyard are permitted to carry, but the people of the outer courtyard are prohibited.
- D. [The people of] the outer [courtyard prepared an eruv], but [the people of] the inner one did not, then both of them are prohibited.
- E. If this one prepared an eruv for itself, and that one prepared an eruv for itself,
- F. [the area of] this one is permitted by itself, and that one is permitted by itself.
- G. R. Aqiba prohibits in the case of the outer one,
- H. For the right of access restricts it.
- I. But SAGES say, “The right of access does not restrict it.

A.–C. is straightforward. Those who prepare an eruv in their courtyard may carry there; those who do not may not carry there. D. is more difficult: inhabitants of the inner courtyard may not carry there because they did not prepare an eruv. However, while they may not carry, they may use their access rights to walk through the outer courtyard to the public domain. It is given that the combination of their right of access through the outer courtyard combined with their lack of the right to carry in their own courtyard essentially nullifies the effects of the outer eruv so that neither they nor the inhabitants of the outer courtyard may carry there.

In E.–F., the inner and outer eruvim are prepared separately; therefore, inhabitants may only carry within their own courtyard. Rabbi Aqiba objects: since the inhabitants of the inner courtyard cannot carry in the outer courtyard, their right of access through the outer courtyard nullifies the effects of the outer eruv for its own inhabitants. No one may now carry there. The SAGES disagree, affirming the principle that only the lack of an eruv in an inner courtyard, when combined with the right of access through an outer eruv, prohibits the inhabitants of the outer eruv from carrying there.

The SAGES overrule R. Aqiba. This is a Type 3A dispute.

(6.2) Tosefta Eruvin 5:25

כה שתי חצירות זו לפניו מזו, החיצונה של רבים והפנימית של יחיד, חיצונה צריכה עירוב והפנימית אין צריכה עירוב. הפנימית של רבים והחיצונה של יחיד, הפנימית צריכה עירוב והחיצונה אין צריכה עירוב. ר"ע אוסר את החיצונה, שדריסת הרגל אוסרתה, וחכ"א אין דריסת הרגל אוסרתה

- A. Two courtyards, one inside the other,
- B. If the outer one is public and the inner one private—
- C. The outer one requires an eruv, but the inner one does not require an eruv.
- D. If the inner one is public and the outer one private,
- E. The inner one requires an eruv and the outer one does not require an eruv.
- F. R. Aqiba prohibits in the case of the outer one,
- G. For the right of access restricts it.
- H. But SAGES say, “The right of access does not restrict it.

In A.–E. it is determined that in the case of one courtyard within another, the courtyard that is public requires an eruv whereas the courtyard that is private does not, regardless of which one is inside the other.

At F., Rabbi Aqiba objects: Even if the outer courtyard is private and no eruv is required for its inhabitants to be able to carry there, its status is affected by the status of the inner courtyard. If the inhabitants of the inner courtyard may not carry in the outer courtyard yet still have the right of access through it, the inhabitants of the outer courtyard are also prohibited from carrying there. The SAGES disagree, since only the lack of an eruv in an inner courtyard, when combined with the right of access through an outer eruv, prohibits the inhabitants of the outer eruv from carrying there. (See M. Eruvin 6:9 D.)

The SAGES overrule R. Aqiba. This is a Type 3A dispute.

(6.3) Analysis

M. Eruvin 6:9 G.–I. and T. Eruvin 5:25 F.–H. are identical, with the exception of the particle before הריצונה. However, the material seems to fit better in the Mishnaic context than in the Toseftan. Regardless of this issue, both passages depict the SAGES authoritatively overruling R. Aqiba, the most prominent rabbi of his generation.

(7) Mishnah Eruvin 9:1 and Tosefta Eruvin 7:14

At this point in Mishnah and Tosefta Eruvin, it has been established that vessels located in a common courtyard at the beginning of the Sabbath may be carried throughout the courtyard. The issues at hand in this parallel are whether common roofs form a single domain and how roofs, courtyards, and fenced enclosures relate to one another as domains.¹⁰⁰

¹⁰⁰ Several disputes in the sample group are difficult to read and categorize, none more than these.

(7.1) Mishnah Eruvin 9:1

א כל גגות העיר, רשות אחת, ובלבד שלא יהא גג גבוה עשרה או נמוך עשרה, דברי רבי מאיר. וחכמים אומרים, כל אחד ואחד רשות בפני עצמו. רבי שמעון אומר, אחד גגות ואחד חצרות ואחד קרפיפות, רשות אחת לכלים ששבתו לתוכן, ולא לכלים ששבתו בתוך הבית:

9:1

- A. "All roofs of a town are a single domain,
- B. "so long as one roof is not ten [hand-breadths] higher or lower [than the others]," the words of R. Meir.
- C. But SAGES say, "Each and every one is a domain of itself."
- D. R. Simeon says, "Whether roofs, or courtyards, or fenced enclosures"¹⁰¹ —
- E. "[they each constitute] one domain [in regard] to utensils that were therein on the Sabbath,
- F. but not [in regard] to utensils that were within the house on the Sabbath."

R. Meir claims that all roofs of a town form a common domain as long as they are fairly close to the same height. The SAGES disagree, ruling "Each and every [roof] is a domain unto itself." R. Simeon concludes the dispute a generation later.¹⁰² The reading "Whether roofs, or courtyards, or fenced enclosures—[they constitute] one domain," is ambiguous. Normally, the construction **אחד . . . ואחד** means that the listed items share a common characteristic.¹⁰³ In this case, the common characteristic is that they "[they each constitute] one domain." This reading has the virtue of being understandable as a support and gloss of the SAGES' opinion. I will look at the translation "[together they are] one domain" in section (7.3). Read that way, R. Simeon's opinion is a dissent.

If R. Simeon's opinion is read as a dissent, it is a Type 3B dispute. In my reading, R. Simeon glosses the SAGES' opinion and this is a Type 3A dispute. In either case, the authority of the SAGES is not compromised.

(7.2) Tosefta Eruvin 7:14

י כל גגות העיר רשות אחת. אסור לעלות ולהוריד מחצר לגגות, ומגגות לחצר. וכולן ששבתו בחצר מותרין ליטלטל בחצר, ושגגות מותרין ליטלטל בגגות דברי ר' מאיר.

וחכמים או' כל אחד ואחד רשות לעצמו. אמ' להם ר' מאיר אי אתם מודים באנשי חצר ששכחו ולא עירבו שאסור להכניס ולהוציא מחצר לבתים ומבתים לחצר, וכולן ששבתו בחצר מותרין ליטלטל בחצר, מה נשתנה גג מחצר? אמרו לו לא אם אמרת בחצר שאין

¹⁰¹ Used as small, enclosed storage areas.

¹⁰² He is identified in the Tosefta as R. Simeon ben Eliezer, a fourth generation Tanna; R. Meir was a third generation Tanna.

¹⁰³ M. Sotah 8:2 has several examples of this construction.

תחתיה דיורין, תאמר בגגות שיש תחתיהן דיורין. אמ' להם אף חצר פעמים שיש תחתיה דיורין. אמרו לו לא אם אמרת בחצר שאין כל אחת ואחת מכיר את שלו, תאמר בגגות שכל אחד ואחד מכיר את שלו? אמ' להם הרי שהיתה חלוקה, או שהיתה עשויה פסיפס, לא כל אחד ואחד מכיר את שלו?

אמ' ר' שמעון בן אליעזר עד כאן היתה תשובה. ר' שמעון או' הגג והמרפסת החצר והאכסדרה כולן רשות אחת הן.

7:14

- A. "All the roofs of the town are a single domain.
- B. "It is prohibited to go up or to descend from the courtyard to the roofs, or from the roofs to the courtyard, [while carrying something].
- C. "But all [objects] which were kept for the Sabbath in the courtyard may be carried about in the courtyard.
- D. And those kept for the Sabbath on the roofs may be carried about on the roofs," the words of R. Meir.
- E. But SAGES say, "Each one constitutes a domain unto itself."
- F. Said to them R. Meir, "Do you not concede in the case of the men of a courtyard who forgot and did not participate in an *eruv*, that it is prohibited to bring in or take out objects from the courtyard to the houses or from the houses to the courtyard? Yet all [objects] that were kept for the Sabbath in the courtyard are permitted to be carried about in the courtyard.
- G. "So what is the difference between the roof and the courtyard?"
They said to him, "No. If you have stated [the rule] in regard to the courtyard, underneath which there are no residences [and so one area of a courtyard may not be clearly distinguished from another], will you state the same rule in regard to the roofs, beneath which there are residences [and so one roof may be distinguished from another]?"
- I. He said to them, "So also in the case of the courtyard, sometimes there are residences under it."
- J. They said to him, "No. If you have already spoken concerning the courtyard, in which case not everyone will recognize what part is his, will you [then] speak concerning the roofs, in which case each person does recognize what part is his?"
- K. He said to them, "Look, if [a courtyard] were divided, or was made in mosaics, will not everyone recognize what is his?"
- L. Said R. Simeon ben Eliezer, "Up to this point was the reply [of R. Meir to the SAGES]."
- M. R. Simeon says, "The roof and the balcony, the courtyard and the portico—all together constitute a single domain."

The Toseftan passage begins with R. Meir asserting "all the roofs of the town are a single domain." Furthermore, since objects left in the courtyard below may be carried about on the Sabbath, if the roofs form one domain, objects left on the roofs may also be carried about on the roofs. But the SAGES rule that each roof and each courtyard is a domain of its own. By implication, objects may not be carried from roof to roof on the Sabbath.

The next section of dispute is not represented in the Mishnah. In F., R. Meir challenges the SAGES' ruling in order to support his opinion that one principle applies to both roofs and courtyards. The courtyard is a common area and objects left in it may be carried about in the courtyard on the Sabbath (even when an individual has neglected to participate in the *eruv* that halakhically defines the courtyard as a domain). The question he asks the SAGES ("Do you not concede?") assumes a positive response. Based on this assumption, R. Meir asks, "So what is the difference between the roof and the courtyard?"

The SAGES do not disagree with R. Meir's statement in F. but with the implied answer to his rhetorical question at G. They maintain that there is still a difference between roofs and the courtyards: roofs can be distinguished from one another because they cover distinct dwellings; courtyards are not distinguishable in the same way. By implication, individual roofs form separate domains while a communal courtyard forms one domain.

R. Meir objects that there are some courtyards, under which there are distinct dwellings, presumably basement storage areas. His argument is that the existence of some such courtyards undermines the SAGES' attempt to make a global distinction between roofs and courtyards based on what is underneath.

The SAGES bring in a new argument: Individuals do not recognize the borders of their own portion of a communal courtyard but they do recognize their own roof. By implication, individual roofs form separate domains while communal courtyards form one domain.

R. Meir objects that individuals would recognize their portion of a common courtyard if the courtyard were visibly divided or tiled with mosaics. If so, this would obviate any overall distinction between roofs and courtyards based on whether individuals could recognize the boundaries of courtyards, as they do roofs, as their own. Any further exchange there may have been between R. Meir and the SAGES has not been recorded in the Tosefta.

A generation later, R. Simeon adds his opinion. According to R. Simeon, "The roof, balcony, courtyard, and portico all together constitute a one domain (כולן רשות אחת הן)." R. Simeon views the halakhic situation very differently than his predecessors, disagreeing with R. Meir's separation of roofs from courtyards (7:14A–D) and the SAGES' assertion that each roof forms its own domain (7:14 E). The entire dispute of the earlier generation—and its participants, including the SAGES—has been subjected to R. Simeon's analysis and assessment. He (and the Tosefta) implicitly claims to possess greater clarity on halakhic issues that either R. Meir or the SAGES.

The discourse reported up to 7.14 K. depicts a lively dispute with no apparent resolution. The addition of L-M basically sets aside the entire dispute in favor of R. Simeon's

opinion. Because the SAGES have engaged in reasoned dispute with R. Meir and because their opinion is subject to R. Simeon's judgment, this is a Type 3C dispute.

(7.3) Analysis

In the Toseftan passage, the SAGES' dispute with R. Meir is characterized by give-and-take, similar to what we observed in Tosefta Eruvin 4:1, 2. The SAGES are less yielding than in that dispute. They do not, however, convince R. Meir, who continues to engage them in dispute. The definitive redaction of the Tosefta does not resolve the dispute itself but subjects it to R. Simeon's later assessment. In this context, the SAGES have been accorded no more self-evident authority than R. Meir and, in effect, less than R. Simeon. What's more, the SAGES' ability to reason and dispute is called into question by R. Simeon's subsequent determination.

The Tosefta reads, "The roof and the balcony, the courtyard and the portico—all together constitute a single domain." According to my reading, the Mishnah has, "Whether roofs, or courtyards, or fenced enclosures—[they each constitute] one domain . . ." Where the Tosefta has the inclusive כולן רשות אחת הן, the Mishnah has the simple רשות אחת. Although it is possible to translate רשות אחת as "[together they are] one domain," my understanding of the Mishnah's redaction of this dispute discourages that reading.

The Mishnah offers a briefer version of this dispute. It condenses R. Meir's initial position, omits the give-and-take between R. Eliezer and the SAGES, and eliminates the Tosefta's transition at K. (R. Simeon's "up to this point was the reply," which is absent from the Mishnah). The terse Mishnaic version is a Type 3A or 3B dispute because its version of R. Simeon's opinion can be read either as a gloss or as a rejected dissent. The Toseftan version can only be read as a Type 3C dispute in which R. Simeon resolves a previously unresolved dispute. The Mishnah condenses either the Tosefta or their common tradition. In the process, the very clear כולן רשות אחת הן has become simply רשות אחת, allowing for a reading that supports the SAGES.

(8) Mishnah Pesachim 3:6 and Tosefta Pischa 3:9–11

These texts deal with the difficulty created when the fourteenth of Nisan, the day that leaven must be removed from the house, falls on the Sabbath. Should the leaven be removed "at its

proper time”—on the fourteenth, even if that is on the Sabbath—or before the Sabbath?¹⁰⁴ In addition, how should leavened *terumah*,¹⁰⁵ a special case, be treated? In all aspects of these disputes, the primary issue is which of the competing norms takes priority.

(8.1) Mishnah Pesachim 3:6

ו ארבעה עשר שחל להיות בשבת, מבערים את הכל מלפני השבת, דברי רבי מאיר. וחכמים אומרים, בזמן. רבי אלעזר בר צדוק אומר, תרומה מלפני השבת וחלין בזמן:

3:6

- A. “[When] the fourteenth [of Nisan] falls on the Sabbath—
- B. “They remove all [leaven from the house]
- C. before the Sabbath,” the words of R. Meir
- D. But the SAGES say, “At its proper time [on the fourteenth, even if it falls on the Sabbath].”
- E. Rabbi Eleazar b. R. Sadoq says, “[Leaven which is in the status of] *terumah* [is to be removed] before the Sabbath, but that which is unconsecrated [is removed] at its proper time [on the Sabbath].

R. Meir asserts that the removal of all leaven should take place before the Sabbath in order not to conflict with Sabbath norms. The SAGES overrule him, asserting that all leaven must be removed “at its proper time”—on the fourteenth—even if it falls on the Sabbath. R. Eleazar b. R. Sadoq, draws attention to the specific issue of food in the status of *terumah*. Without giving reasons for his views, he asserts that leavened *terumah* must be removed before the Sabbath while unconsecrated, ordinary food is to be removed on the eve of Passover, even if it falls on the Sabbath. Thus, R. Eleazar agrees with the SAGES about ordinary leavened food but disagrees about leavened *terumah*.

There is nothing in the Mishnah text to indicate that R. Eleazar’s opinion is anything other than a rejected dissent. This is a classic Type 3B dispute.

(8.2) Tosefta Pischa 3:9–11

(ט) ארבעה עשר שחל להיות בשבת מבערין את הכל מלפני השבת, ואופה לו מצה מערב שבת.

104 Numerous complications arise concerning the halakhah involved here, about which talmudic and subsequent sages debated for centuries. Our purpose here is not to clarify the halakhah of the Mishnah and Tosefta but to see how these passages embody views of the SAGES’ authority.

105 תרומה refers to food that has been set aside for the priests and their families. See Num. 18:8, 12, 24, 26 and Deut. 18:4 and M. and T. Terumot.

(י) תרומה טהורה וטמאה מבערין אותן מלפני השבת דברי ר' מאיר. וחכמים אומ' בזמן, תרומה טהורה וטמאה מבערין בשבת.

(יא) ר' אלעזר בי ר' צדוק אומ' תרומה מלפני השבת, שאוכליה מועטין, וחולין בשבת, שאוכליהן מרובין. אמ' רבי אלעזר בי ר' צדוק פעם אחת היינו יושבין לפני רבן גמליאל בבית המדרש בלוד, ובא זון הממונה ואמ' הגיע עת לבער החמץ, הלכתי אני ואבא לבית רבן גמליאל וביערנו את החמץ.

3:9

- A. [When] the fourteenth [of Nisan] falls on the Sabbath,
- B. they remove all [leaven from the house] before the Sabbath.
- C. And a person may bake unleavened bread for himself on the eve of the Sabbath.

3:10

- A. “*Terumah* which is ritually clean and that which is ritually unclean they remove before the Sabbath,” the words of R. Meir.
- B. But the SAGES say, “[They remove all leaven] at its proper time [even though it falls on the Sabbath]: *terumah* that is ritually clean and that which is ritually unclean they remove on the Sabbath itself.”

3:11

- A. R. Eleazar b. R. Sadoq says, “[Leaven is the status of] *terumah* [is removed] before the Sabbath, for the people allowed to eat it are few.
- B. “But unconsecrated food [is removed] on the Sabbath, for the people who are allowed to eat it are many.”
- C. Said R. Eleazar b. R. Sadoq, “One time we were in session before Rabban Gamaliel in the study-house in Lod. And Zonen, who was in charge, came along and said, ‘The time has come to remove the leaven.’ So father and I went along to the house of Rabban Gamaliel and removed his leaven.”

The Tosefta begins with an anonymous opinion that all leaven must be removed before the Sabbath. R. Meir adds that this includes *terumah*; whether ritually clean or unclean, it must likewise be removed before the Sabbath. The SAGES disagree, asserting that all leaven must be removed “at its proper time,” that is, on the fourteenth, even if that is a Sabbath. The SAGES thus disagree with the anonymous opinion that opens the dispute. The SAGES’ assertion that both clean and unclean *terumah* are to be treated under the one status seems to be a rhetorical device to emphasize that (1) all leavened *terumah* is in one category for the purposes of removal before Passover, and that (2) it is treated the same as all other leaven. Thus, for the SAGES there are only two issues: (1) leaven, and (2) the proper time, the fourteenth. All other distinctions are rendered irrelevant by these two.

Even so, R. Eleazar b. R. Sadoq maintains that there is an important distinction between *terumah* and ordinary food that is not subsumed under the issue of leaven, that is, the relative number of Israelites affected. He responds to the SAGES that leavened *terumah* is

removed before the Sabbath, while ordinary leavened food is removed on the Sabbath, supporting his opinion with a rationale (whether the food is eaten by few or many) and apparently adds a precedent concerning the house of Rabban Gamaliel.¹⁰⁶

But there is a problem. The Rabban Gamaliel mentioned in T. Pischa 3:11 C. lived two generations before R. Meir. As it turns out, there were two rabbis named Eleazar b. R. Sadoq! The first was a contemporary of Rabban Gamaliel and the second, his grandson, was a contemporary of R. Meir. It seems that the grandson dissented from the opinion of the SAGES, who had overruled R. Meir. The testimony of the grandfather was then attached to the grandson's dissent, either during transmission or by the redactors of the Tosefta. The repetition of the name at T. Pischa 3:11 A. and C. seems to be a remnant of the dual tradition.

The incident involving Rabban Gamaliel took place at the Beit Midrash before the Sabbath (the sages would not have been "in session" on the Sabbath). The grandfather reports that "leaven" was removed before the Sabbath. He does not specify "leaven in the status of *terumah*." Therefore, it is not certain that the precedent actually supports the grandson's position that *terumah* is removed before the Sabbath. The redaction has left a "seam" between the two statements assigned to "R. Eleazar b. R. Sadoq." However, even though the statements do not match well, the addition of the supposed precedent to R. Eleazar b. R. Sadoq's opinion is meant to support him and therefore to undermine the opinion of the SAGES in the Tosefta's redaction.

Since R. Eleazar's opinion is supported by a rationale and a precedent (however uncertain its applicability) that remain unaddressed by the SAGES, the SAGES opinion is undermined. Therefore, this is a Type 3C dispute.

(8.3) Analysis

The Mishnah's account is structured as a typical Type 3B dispute. An opinion is followed by an authoritative statement by the SAGES, followed by a lone dissent without rationale. In the Tosefta, "R. Eleazar b. R. Sadoq" disagrees with the SAGES and supports his dissent with a rationale and a precedent, thus advancing an argument that remains unrefuted in the passage. However questionable the precedent, the redaction is fashioned to support R. Eleazar b. R. Sadoq and thereby gives his opinion greater weight in the Tosefta than it has in the Mishnah.

¹⁰⁶ Gamaliel (a second generation Tanna) was not a priest. In order for this precedent to support Eleazar's position on leavened *terumah*, the leavened food in his house would have been leavened *terumah*, set aside to be brought to the Temple for the priests.

(9) Mishnah Pesachim 4:1, 5–6 and Tosefta Pischa 3:18

These texts are taken from larger passages dealing with the question of work permitted on the day before Passover, called “the eve of Passover.” It is understood that work is prohibited on Passover itself, as on the Sabbath (Leviticus 23:7). In this parallel, it is acknowledged that local custom had extended that prohibition, in varying degrees, into at least part of the day before. The Mishnah and Tosefta deal with how factors of time, custom, kinds of work, and various professions play into, and are affected, by this development. It is unclear whether this retrojection of the prohibition of work on Passover represents an extension backward of the sanctity of the Passover and/or a nascent connection to the existing division of that prior day into an earlier portion during which leaven may be eaten and some work undertaken and a later portion, preparatory to Passover, when both are prohibited.

(9.1) Mishnah Pesachim 4:1, 5–6

א מקום שנהגו לעשות מלאכה בערבי פסחים עד חצות, עושין. מקום שנהגו שלא לעשות, אין עושין. ההולך ממקום שעושין למקום שאין עושין, או ממקום שאין עושין למקום שעושין, נותנין עליו חמרי מקום שיצא משם וחמרי מקום שהלך לשם. ואל ישנה אדם, מפני המחלקת:

ה... וחכמים אומרים, ביהודה היו עושין מלאכה בערבי פסחים עד חצות, ובגליל לא היו עושין כל עקר. הלילה, בית שמאי אוסרין, ובית הלל מתירין עד הנץ החמה:

ו רבי מאיר אומר, כל מלאכה שהתחיל בה קדם לארבעה עשר, גומרה בארבעה עשר. אבל לא יתחיל בה בתחלה בארבעה עשר, אף על פי שיכול לגמרה. וחכמים אומרים, שלש אמינות עושין מלאכה בערבי פסחים עד חצות, ואלו הן, החיטים והספרים והכובסין. רבי יוסי בר יהודה אומר, אף הרצענים:

4:1

- A. In a place where they are accustomed to do work on the eve of Passover up to noon, they may do so.
- B. In a place where they are accustomed not to do so, they may not do so.
- C. He who goes from a place in which they do work to a place in which they do not do work,
- D. or from a place in which they do not do work to a place in which they do work—
- E. they impose on him the strict rules followed in the place from which he has gone forth and the strict rules followed in the place to which he has gone.
- F. But a person may not vary [from the local custom] so as [to avoid] discord.

[The material in M. 4:2–4 refers to other customary practices. The SAGES do not play a part in that material. The issue of work on the eve of Passover is resumed at 4:5.]

4:5

- E. But the SAGES say, “In Judah they did work on the eve of Passover up to noon, but in Galilee they did not do so at all.”
- F. And as to the night [before the fourteen of Nisan],
- G. the house of Shammai prohibit [work]
- H. but the house of Hillel permit it
- I. up to sunrise.

4:6

- A. R. Meir says, “Any sort of work which a person began before the fourteenth, he may finish it on the fourteenth.
- B. “But a person should not initiate [a project; lit., “begin at the beginning”] on the fourteenth,
- C. “even though he can complete it [on the same day].
- D. But the SAGES say, “Three sorts of craftsmen do work on the eve of Passover up to noon, and these are they:
- E. “tailors, barbers, and laundrymen.”
- F. R. Yose b. R. Judah says, “Also: shoemakers.”

The Mishnah passage follows the discussion of the removal of leaven. It begins with an anonymous halakhah about the relationship between regional custom and work on “the eve of Passover” (meaning the day leading up to the eve). Although Scripture does not forbid work on this day, the Mishnah passage shows us that it was already common practice to cease work earlier in the day. The anonymous material at 4:1, along with the ensuing discourse, seeks to embed these practices in a halakhic framework.

M. Pesachim 4:1 gives priority to custom in the matter of work on the eve of Passover. It is followed by additional examples of the force of custom (4:2–4:5 D.). The discussion of Passover resumes at 4:5 E. with the SAGES giving an example of the anonymous ruling at 4:1. This is followed by the pre-tannaitic dispute between the Houses of Shammai and Hillel, the former typically more stringent than the latter.

R. Meir looks at the issue from a different perspective: did the work *begin* before the day of Passover eve? If so, it is presumed that a worker may finish it on the day leading into the eve of Passover. However, a person may not initiate a project on that day even if it can be completed the same day. However, the SAGES permit three kinds of craftsmen who presumably initiate their work on that day to work until noon. R. Yose b. R. Judah adds a fourth kind of craftsman.

The SAGES play a central role in this passage. First, they affirm the anonymous ruling at 4:1A.–D. by mentioning customs practiced in Judah and Galilee. Second, they limit the opinion of R. Meir at 4:6A.–C.

The opinion of R. Yose b. R. Judah can be read as an expansion of the SAGES' ruling (Type 3A) since it does not contradict their fundamental approach but merely adds a type of craftsman to their list. However, it can also be read as a dissent, as the Bavli has it (at B. Pesachim 55b) and overrules. I will cautiously label it a Type 3B dispute.

(9.2) Tosefta Pischa 3:18

יב מקום שנהגו לעשות מלאכה במחובר לקרקע עד חצות עושין, מקום שנהגו שלא לעשות אין עושין. מאימתי ארבעה עשר אסור במלאכה? ר' אליעזר בן יעקב אומ' מאור ארבעה עשר, ר' יהודה או' משתנץ החמה. אמ' ר' אליעזר בן יעקב היכן מצינו יום שמקצתו אסור בעשיית במלאכה ומקצתו מותר, אמ' לו ר' יהודה הוא יוכיח על עצמו, שמקצתו אסור בחמץ ומקצתו מותר.

וחכמים או' אף מקום שאמרו אין עושין מלאכה בערבי פסחים עד חצות, שלש אומניות עושין, החייטין, והספרין והכובסין. החייטין, שכן הדיוט תופר כדרכו במועד, הספרין, שכן נזיר, ומצורע, ומי שעלתה לו מכה בראשו, מספרין במועד, הכובסין, שכן הבאין מחוץ הים וממדינת הים מכבסין.

ר' יוסה בי ר' יהודה או' אף הרצענין, שכן עולי רגלים מתקנין מנעליהן וסנדליהן במועד.

3:18

- A. In a place where they are accustomed to do work on plants affixed to the ground up to noon, they may work.
- B. In a place where they are accustomed not to work, they may not work.
- C. From what time on the fourteenth is one prohibited from work?
- D. R. Eliezer b. Jacob says, "From nightfall [on the eve of] the fourteenth of Nisan."
- E. R. Judah says, "From sunrise."
- F. Said R. Eliezer b. Jacob, "Where do we find a precedent of a day, part of which is prohibited for the doing of labor and part of which is permitted?"
- G. Said to him R. Judah, "That day [the fourteenth of Nisan] will provide evidence for its own character, for part of it is prohibited as to the use of what is leavened, and a part of it is permitted."
- H. But the SAGES say, "Even in a place where it is said that they do not work on the eve of the Passover up to noon, three sorts of craftsmen may work: tailors, barbers, and laundrymen.
- I. "Tailors: For so too does an ordinary person [not a tailor] sew in the normal manner on a festival.
- J. "Barbers: For so too a Nazirite, a person afflicted with a skin disease, and someone on whose head a sore appears cut their hair on the festival.
- K. "Laundrymen: For those who come from the seaside or from abroad wash [their clothes]."
- L. R. Yose b. R. Judah says, "Also: Shoemakers.
- M. "For thus those who come up [to Jerusalem] as pilgrims on the festivals repair their shoes and sandals on the festival."

The Tosefta starts with the priority of regional custom in a very restricted sphere (concerning work with plants affixed to the ground) on the fourteenth of Nisan, then addresses the issue of when during that day work must cease. R. Eliezer b. Jacob challenges the notion that work may be prohibited for only part of a day. R. Judah responds that the day is already divided concerning the presence of leaven in the house. By dividing the day in this fashion, implying that work (or at least some work) is permitted while leaven may be eaten, R. Judah claims a connection between the two.

The SAGES then rule that even where regional custom forbids work on the eve of the Passover up to noon, three sorts of craftsmen may work. As in the Mishnah, R. Yose b. R. Judah adds a fourth type of craftsman to their list. He presents a rationale that is in line with those offered by the SAGES for the other three crafts.

As a sage of the next next generation, R. Yose b. R. Judah's addition of "shoemakers" to the SAGES' list can be read as a gloss or as a critique of the SAGES for not considering additional craftsman. Like its Mishnaic counterpart, I will cautiously follow the Bavli and label this as a Type 3B dispute.

(9.3) Analysis

The anonymous text of both Mishnah and Tosefta grant halakhic status to local custom. The precise limits of custom are argued by individual sages, but the principle holds. The placement of the SAGES' opinion in both texts indicates their confirmation of the principle. It is clear that, in both Mishnah and Tosefta, the SAGES do not construct a sealed halakhic system without regard for existing practice. Whatever the place and influence the SAGES held in the wider Jewish society, they did not act in isolation from that society.

Although both Mishnah and Tosefta mention R. Yose b. R. Judah's inclusion of professional shoemakers as a permissible craft to be performed on the day before the Passover until noon, they contextualize his opinion differently. In the Mishnah, these opinions are recorded as simple assertions: there R. Yose b. R. Judah's inclusion of shoemaker can be read as a simple addition or as a dissent tacked onto the opinion of the SAGES. In the Tosefta, the SAGES give a rationale for each of the three craftsmen they permit to work ("tailors, barbers, and laundrymen"). When R. Yose b. R. Judah includes "shoemakers" and offers a similar rationale, his opinion can be read either as a gloss, an extension of the coherent structure established by the SAGES, or as an implicit criticism of the SAGES for not being more inclusive. In any case, the symmetry of occupation plus rationale

makes it clear that the basis for the halakhah is rational. If R. Yose b. R. Judah is criticizing the SAGES, it is because they are not following their own rational principles fully enough. If he is “piggy-backing” on the SAGES’ methodology, his addition reinforces the rationally-based opinion of the SAGES and thus may even open up the theoretical possibility that other craftsmen could be added to the list.

In the end, I remain undecided whether R. Yose b. R. Judah’s opinion is a gloss or contains an implicit criticism. If that latter, it is unclear to me whether the Mishnah and Tosefta accept or reject it.

(10) Mishnah Pesachim 4:8 and Tosefta Pischea 3:19–22

This SAGES parallel is analyzed in chapter 4.

(11) Mishnah Betzah 3:6 and Tosefta Yom Tov 3:5

Mishnah tractate Betzah and the parallel Tosefta Yom Tov concern rules of conduct for festival days. According to these tractates, the rules fall somewhere between the halakhah for weekdays and for the Sabbath. On the one hand, festival days are distinct from ordinary days, their holiness requiring some restriction of work. However, work is not as restricted as on the Sabbath. The specific issue at hand in this parallel is how portions of meat may or may not be measured out on festival days.

(11.1) Mishnah Betzah 3:6

ו אין נמנין על הבהמה לכתחלה ביום טוב, אבל נמנין עליה מערב יום טוב ושוחטין ומחלקין ביניהן. רבי יהודה אומר, שוקל אדם בשר כנגד הכלי או כנגד הקופיץ. וחכמים אומרים, אין משגיחין בכף מאזנים כל עקר:

3:6

- A. They do not take shares in cattle from the outset [lit. “at the beginning”] on a festival day.
- B. But they take shares in it on the eve of the festival, and they may slaughter and divide it among themselves [on the festival day itself].
- C. R. Judah says, “[On the festival day,] a person may weigh meat against a vessel or against meat chopper
- D. But the SAGES say, “One may not use [any kind of] scales at all.”

According to the Mishnah's anonymous opinion, shares in cattle may not be divided up, but may be distributed, on the festival day. R. Judah tries to circumvent this norm by

asserting that on the festival day itself one may weigh meat by using an atypical process, balancing it against objects such as a utensil or a meat chopper instead of the usual weights. The SAGES rule definitively that no scales (official butcher scales or any substitute whatsoever) may be used at all, thus overruling the artifice of R. Judah.

The SAGES have the final word and thus this is a Type 3A dispute.

(11.2) Tosefta Yom Tov 3:5

(ה) אין נמנין על הבהמה בתחלה ביום טוב. לא יאמר לו הריני עמך בסלע, הריני עמך בשתיים, אלא אומ' לו הריני עמך למחצה, ולשליש, ולרביע. וחכמים או' אין משגיחין בכף מאזנים כל עיקר, אבל שוקל ומניח, ואם היה טבח אומן, אל ישקול בידו, מפני שידו כמשקל, אבל חותך בכלי ונותן לזה ולזה.

3:5

- A. They do not take shares in cattle from the outset [lit. "at the beginning"] on a festival day.
- B. One may not [on a festival day] say to [the owner of the cattle], "Lo, I am with you for a *sela*'s value [of the meat],
- C. "lo, I am with you for two."
- D. But he may say to him, "Lo, I am with you for half," or "for a third," or "for a fourth [of the animal]."
- E. But the SAGES say, "One may not use [any kind of] scales at all,
- F. "But one may weigh out [meat] by hand and put it down.
- G. "And if he was an expert butcher, he may not weight out [meat] by hand, for his hand is equivalent to scales.
- H. "But he may chop off a piece with a tool and give one to this person and another piece to that person."

The Tosefta's anonymous text forbids taking shares of a herd animal on the festival day. One may not reserve a set value of meat, but may reserve a percentage of an animal on the festival day itself. As in the Mishnah, the SAGES disallow any use of scales. It is unclear whether the SAGES' ruling and the subsequent words at 3:5F.–H. should be read together as the SAGES' words or as the SAGES' opinion with a gloss. Nevertheless, I agree with Neusner that these are probably the SAGES' words. In either case, the butcher is considered so expert that his weighing by hand is equivalent to scales and is therefore prohibited.

Whether 3:5F.–H. are all the SAGES' words or include a gloss, this is a Type 3A dispute.

(11.3) Analysis

The Mishnah and Tosefta both privilege the SAGES' ruling and their authority. Even if the Tosefta's 3:5G–H is read as a gloss to the SAGES' ruling, it confirms their ruling prohibiting the use of scales by including an equivalent action in that prohibition.

(12) Mishnah Betzah 3:8 and Tosefta Yom Tov 3:8

At issue in this parallel is the permissibility of precision measurement for transfer or sale on a festival day.

(12.1) Mishnah Betzah 3:8

ח אוֹמֵר אָדָם לְחֵבְרוֹ, מִלֵּא לִי כָּלִי זֶה, אֲבָל לֹא בַּמֶּדָּה. רַבִּי יְהוּדָה אוֹמֵר, אִם הָיָה כָּלִי שֶׁל מֶדָּה, לֹא יִמְלְאוּ. מַעֲשֵׂה בְּאַבָּא שָׂאוּל בֶּן בֶּטְנִית, שֶׁהָיָה מְמַלֵּא מִדּוֹתָיו מֵעֶרֶב יוֹם טוֹב וְנוֹתֵן לְקוֹחוֹת בַּיּוֹם טוֹב. אֲבָא שָׂאוּל אוֹמֵר, אֵף בַּמוֹעֵד עוֹשֶׂה כֵן מִפְּנֵי בְּרוּרֵי הַמִּדּוֹת. וְחֻכְמִים אוֹמְרִים, אֵף בַּחֹל עוֹשֶׂה כֵן, מִפְּנֵי מִצְוֵי הַמִּדּוֹת . . .

3:8

- A. A man may say to his fellow, “Fill this vessel for me,”
- B. but he may not [specify] a measure.
- C. Rabbi Judah says, “If it were a measuring vessel, he may not fill it.”
- D. It happened that Abba Saul b. Botnit would fill up his measuring cups on the eve of a festival day and hand them over to customers on the festival day [itself].
- E. Abba Saul says, “Even on the festival [itself] one may do so,
- F. “because of the clarity of the measures.”
- G. But the SAGES say, “Even on the ordinary [intermediate] day [of the festival] one may so, because of the exactness of the measures.”

The Mishnah begins with an anonymous ruling, followed by a dissent or attempt at clarification by R. Judah and a citation of precedent in the case of Abba Saul, who would fill his measuring cups on the eve of the festival and asserts that one may even do so on the festival itself. The SAGES correct Abba Saul. בַּחֹל (“on the ordinary day”) stands for המועד (“on the ordinary [intermediate] day of the festival). They could not be clarifying issues by saying, “Even on an ordinary day of any week,” since such activities are always permitted on ordinary days of the week. Thus, the SAGES overrule Abba Saul: one may not measure on the

festival day itself, only on the intermediate days. (It is unclear why “clarity of measures” and exactness of measures” makes measuring permissible at F. and G.¹⁰⁷

The SAGES’ ruling is not challenged or glossed; therefore, this is a Type3A dispute.

(12.2) Tosefta Yom Tov 3:8

ח ... אמרו עליו על ר' אלעזר בר' צדוק ועל אבא שאול בן בטנית שהיו חנונים בירושלים כל ימי חייהם, והיו ממלין מדותיהם מערב יום טוב ונותנין ללקוחות ביום טוב. ר' חנניא בן אנטיגנס אומ' אף בחולו של מועד עושין כן, מפני בטול בית המדרש, וחכמים אומ' אף בחול עושין כן, מפני מצוי המדות.

3:8

- E. They said concerning R. Eleazar b. R. Sadoq and Abba Saul b. Botnit, who were storekeepers in Jerusalem throughout their entire lives,
- F. that they would fill up their measuring cups on the eve of a festival day and hand them over to purchasers on the festival day [itself].
- G. R. Hanina b. Antigonus says, “Even on the ordinary day of the festival they do so,
- H. “on account of [avoiding] the wasting [of time better spent] in the house of study.”
- I. But the SAGES say, “Even on the ordinary [intermediate] day [of the festival]” they do so, because of exactness of the measure.”

The Tosefta starts its narrative with the citation of a precedent, adding a second sage as an exemplar. That sage, R. Hanina b. Antigonus, offers the opinion that measuring may be done not only on the eve of the festival but also on the ordinary (intermediate) days of the festival (בחולו של מועד).¹⁰⁸ The SAGES follow with the same words found in the Mishnah, “Even בחול one may measure out.” Again, the SAGES do not make a point that ordinary activities are permissible on ordinary days. They must mean בחול המועד = בחולו של מועד. This affirms the opinion of R. Hanina b. Antigonus. Again, I do not understand “exactness of measure” in this context.

The SAGES’ ruling here is definitive and final. This is a Type 3A dispute.

¹⁰⁷ See Kehati’s discussion (1994c, 45-46).

¹⁰⁸ Rashi’s explanation at B. Betzah 29a, that מפני בטול בית המדרש עושין כן, seems as good as any.

(12.3) Analysis

In the Mishnah, the SAGES affirm R. Judah by correcting Abba Saul, whose opinion is out of sync with the anonymous opinion. In the Tosefta, all the opinions are in harmony. The SAGES affirm the precedent established by the two sages as well as the opinion of R. Hanina b. Antigonus. For the purpose of our thesis, it is observed that in both passages the SAGES play an authoritative role, their concluding opinion overruling or affirming previous opinions and establishing the underlying principle concerning measurement.

(13) Mishnah Betzah 4:6 and Tosefta Yom Tov 3:18

The primary issue in these parallel texts is the gathering and use of small bits of wood on festival days.

(13.1) Mishnah Betzah 4:6

ו רבי אליעזר אומר, נוטל אדם קיסם [משלפניו] לִחְצוֹ בֹּשֶׁנִּי, וּמִגִּבַּב מִן הַחֹצֵר וּמִדְּלִיק, שְׂכָל מֵה שֶׁבְּחֹצֵר מוֹכֵן הוּא. וְחֻכָּמִים אומרים, מִגִּבַּב מִשְׁלִפְנֵי וּמִדְּלִיק :

4:6

- A. R. Eliezer says, “A person may take a wood splinter [Kaufman adds “from before him”] in order to pick his teeth with it.
- B. “but he may gather from [whatever is in] the courtyard and kindle it.
- C. “For whatever is located in the courtyard is available [lit.: prepared] for use.”
- D. But the SAGES say, “He may [only] gather what is [immediately] before him and kindle it.”

In the Mishnah, R. Eliezer asserts that an individual may take a splinter of wood “from before him” (according to the Kaufman reading, which is usually to be preferred) to clean his teeth but for kindling he may gather from the entire courtyard. The SAGES rule that one may gather only what is immediately before him and burn it. This excludes the remainder of the courtyard that is not before him and, since only burning is specified, may also exclude gathering splinters to pick one’s teeth from elsewhere in the courtyard. If so, the SAGES’ ruling is stringent on both counts: from where wood may be gathered and what it may be used for.

There is no dissent or gloss. This is a Type 3A dispute.

יח ר' אלעזר או' נוטל אדם קיסם לחצות בו שיניו, וחכמים או' לא יטול אלא מן האבוס שלפני בהמה. ובלבד שלא יקטמו לחצות בו שיניו. אם קיטמו בשבת, חייב חטאת, ביום טוב, לוקה ארבעים. [ר' אלעזר אומ' מגביב את החצר ומדליק, ובלבד שלא יעשה צבורין, ור' שמעון מתיר. שכל שבחצר מוכן. [3.12]

3:18

- A. R. Eleazer says, "He make take a wood splinter to pick his teeth with it."
- B. But the SAGES say, "He may take only from the straw in a crib which is before cattle."
- C. "And this on condition: that he not cut it in order to pick his teeth with it."
- D. And if he cuts in on the Sabbath, he is obligated [to bring] a sin offering; [if he cuts it] on a festival day, he is whipped with forty lashes.
- E. R. Eleazer says, "He may gather what is in the courtyard and kindle it"
- F. "on condition that he not make piles."
- G. And R. Simeon declares it permitted [to pile it up],"
- H. "for whatever is located in the courtyard is available [lit.: prepared] for use."

In the Tosefta, the SAGES rule against R. Eleazer, limiting the use of splinters gathered on a festival day to those taken from "the straw in a crib which is before cattle." They also forbid cutting the straw in order to use it to pick one's teeth. R. Eleazer and R. Simeon both disagree with the SAGES. Where the SAGES limit the taking of wood splinters to the straw taken from the cattle's crib, R. Eleazer and R. Simeon permit them to be gathered in the courtyard, though they disagree about whether they may be piled up.

Although these individual opinions may be recorded dissents, a literary reader will note that some uncertainty in the resolution of the dispute: it could just as easily be an unresolved dispute or even one in which individual sages prevail.

However, since it is difficult if not impossible to decide between these alternatives, I conservatively categorize this as a Type 3B dispute.

(13.3) Analysis

In sorting out these texts, one tries to make sense of the distinction between "what is before him" and "what is in the courtyard." At B. Betza 33a, Rashi understands מִשְׁלֶפְנֵי ["before him"] to mean בבית ("in the house"). This seems to fit the dispute. In any case, the distinction does not affect the way the authority of the SAGES is depicted.

In the Mishnah, the SAGES' ruling is uncontested. They specifically exclude gathering in the courtyard. In the Tosefta, the SAGES permit only the gathering of the straw from the cattle's crib, a restriction that R. Eleazar and R. Simeon dispute. The SAGES' silence in the

face of the dissent of these two individual sages creates some uncertainty about the intention of the redactors. Given the force of the SAGES' ruling in the Mishnah, one can only conclude either that the Toseftan redactors did not possess the SAGES' ruling that ended up in the Mishnah or that they eliminated it. The structure of the existing Tosefta does not conclusively affirm or undermine the authority of the SAGES.

(14) Mishnah Ta'anit 2:5 and Tosefta Ta'anivot 1:11–13

Tractate Ta'anit focuses on the reasons for, and practices of, fasting and related prayer. The Mishnah and Tosefta texts both follow a larger discussion of fast-day prayer to be held "in the open place of the town" (M. Ta'anit 2:1; T. Ta'anivot 1:8), the place normally used for public prayer, led by a *zaken* (as specified in the Mishnah), a mature and experienced man, a *chazan* of the congregation (as specified in the Tosefta).

(14.1) Mishnah Ta'anit 2:5

ה' מעשה בימי רבי חלפתא ורבי חנניה בן תרדיון, שעבר אחד לפני התבה וגמר את הברכה כלה, ולא ענו אחריו אמן. תקעו הכהנים תקעו. מי שענה את אברהם אבינו בחר המורה הוא יענה אתכם וישמע בקול צעקתכם היום הזה. הריעו בני אהרן הריעו. מי שענה את אבותינו על ים סוף, הוא יענה אתכם וישמע בקול צעקתכם היום הזה. וכשבא דבר אצל חכמים, אמרו, לא היינו [היו Kaufman =] נוהגין בן אלא בשער המזרח ובהר הבית:

2:5

- A. It happened in the time of R. Halafta and R. Hananiah b. Taradion that someone passed before the ark and completed the entire blessing, and they did not respond to him, "Amen."
- B. "Sound the sustained sound on the *shofar*, O priests! Sound the sustained sound on the *shofar*!"
- C. "He who answered Abraham our father at Mt. Moriah will answer you and hear the sound of your cry this day."
- D. "Sound the quavering sound on the *shofar*, sons of Aaron! Sound the quavering sound on the *shofar*."
- E. "He who answered our fathers at the Red Sea will answer you and hear the sound of your cry this day."
- F. And when the matter came before the SAGES, they said, "We [Kaufman = "they"] were not accustomed to practice thus except at the Eastern Gate and on the Temple Mount."

In the Mishnah, the larger passage takes place "in the open place of the town" until the matter comes before the SAGES, who are apparently in another place, perhaps in Jerusalem or even at the Temple. Then it becomes clear that the practice outlined in M. Ta'anit 2:5—reciting this particular liturgy in the towns—is not legitimate. According to the

SAGES, it could only be recited in association with the Eastern Gate of Jerusalem and the Temple Mount. The precedent of R. Halafta and R. Hananiah b. Taradion practicing it in the town is given no halakhic standing.

The traditional text at 2:5 has, “we were not accustomed,” which can be understood as either “we (the SAGES) were not accustomed— or possibly “we (as a people) were not accustomed.” The Kaufman reading—“they were not accustomed”—reads more smoothly. In either case, this passage removes any basis for continuing the practice in the towns.¹⁰⁹

The SAGES rule definitively and without dissent. This is a Type 3A dispute.

(14.2) Tosefta Ta'anivot 1:11–13

יא במקדש מה הן או' . . .

יב על הראשונה הוא אומ' ברוך ה' אלהי ישראל מן העולם ועד העולם ברוך גואל ישראל, והן עונין אחריו ברוך שם כבוד מלכותו וגו'.

יג וחזן הכנסת או' להם תקעו הכהנים תקעו, וחוזר ואו' להם מי שענה את אברהם בהר המוריה הוא יענה אתכם וישמע קול צעקתכם ביום הזה. תוקעין ומריעין ותוקעין. על השנייה הוא או' ברוך ה' אלהי ישראל מן העולם ועד העולם, ברוך זוכר הנשכחות, והן עונין אחריו ברוך שם כבוד מלכותו. וחזן הכנסת או' להן הריעו בני אהרן הריעו, וחוזר ואו' להן מי שענה משה ואבותינו על ים סוף הוא יענה אתכם וישמע קול צעקתכם ביום הזה. תוקעין ומריעין, אחת תקיעה ואחת תרועה, אחת תקיעה ואחת תרועה, עד שגומר את כולם, וכך הנהיג ר' חלפתא ביפורי ור' חנינא בן תרדיון בסיכני. וכשבא דבר אצל חכמים אמרו לא היו נוהגין כן אלא בשערי מזרח בלבד.

1:11

A. And in the Temple, what do they say? . . .

1:12

A. First, he says, “Blessed be the Lord, the God of Israel, from everlasting to everlasting (Ps 106:48). Blessed be the Redeemer of Israel.”

And they answer after him, “Blessed be his glorious name for ever. May his glory fill the whole earth. Amen and amen (Ps 72:19).”

1:13

A.1. And the minister of the synagogue says to them, “Sound the sustained sound on the *shofar*, O priests! Sound the sustained sound on the *shofar*!”

¹⁰⁹ The difference lies between הָיִינוּ נוֹהֲגִין (“we were not accustomed” in Albeck’s Mishnah) and הָיוּ נוֹהֲגִין and (“they were not accustomed” in the Tosefta).

- A.2. Then he returns¹¹⁰ and says to them, “He who answered Abraham our father at Mt. Moriah will answer you and hear the sound of your cry this day.”
- B. They sound a sustained, a quavering, and a sustained sound on the *shofar*.
- C. Second, he says, “Blessed be the Lord, the God of Israel from everlasting to everlasting (Ps 106:48). Blessed is he who remembers forgotten things.
- D. And they answer after him, “Blessed be his glorious name forever.”
- E.1. Then the minister of the synagogue says to them, “Sound the quavering sound on the *shofar*, sons of Aaron! Sound the quavering sound on the *shofar*.”
- E.2. Then he returns and says to them, “He who answered Moses and our fathers at the Red Sea will answer you and hear the sound of your cry this day.”
- F. They sound a sustained and a quavering note on the shofar, one sustained, one quavering, one sustained, one quavering,
- G. until one completes all of them.
- H. And so did R. Halafta customarily *practice* in Sepphoris, and R. Haniniah b. Taradion in Sikhnin.
- I. But when the matter came before the SAGES, they said, “They were not accustomed *to practice* thus except at the Eastern Gate alone.”

In the Tosefta, the scene clearly shifts from the town to the Temple at 1:11. Thus, when R. Halafta of Sepphoris, and R. Haniniah b. Taradion of Sikhnin (both in the Galilee region) are mentioned in 1:13 H., their practice is contextualized as anomalous even though the word *הנהיג* indicates customary behavior. The SAGES rule that this liturgy was only practiced customarily (*נהיגי*) at the Eastern Gate. 1:11, thus nullifying the unacceptable practice in the Galil.

Here, as in the parallel Mishnah passage, there is no dissent or gloss. This is a Type 3A dispute.

(14.3) Analysis

The statement that “the matter came before the SAGES,” indicates that the matter was brought to the SAGES for formal deliberation by supporters or opponents of the practices described or by individuals needing a definitive ruling to guide their actions. In both texts, the SAGES cite precedent that limited these practices, which were restricted to areas of greater holiness than “the open place of the town.” The ruling of the SAGES establishes these traditions and uproots the customs practiced by R. Halafta and R. Hananiah b. Taradion.

¹¹⁰ The implication of *וחזר* here is that he steps back to return to his place while the *shofar* is blown.

Since the Mishnah and Tosefta both place the SAGES' ruling at the end of the dispute, with no additional comment or dissent, it is definitive. Both works present the SAGES as an authoritative body that can nullify ongoing custom practiced by individual rabbis.

Taken together, the twenty-eight passages I have examined in chapters 4 and 5 depict the SAGES as an authoritative body functioning in the social network of sages in the Tannaitic period. I approached them synoptically as fourteen pairs in order to prepare a body of evidence for how the Mishnah and Tosefta texts depict the authority of the SAGES. In chapter 6, I will review and collate these findings.

CHAPTER SIX

VIEWS OF MISHNAH AND TOSEFTA SEDER MOED SAMPLE GROUP ON THE AUTHORITY OF THE SAGES

My thesis question is “How do the Mishnah and Tosefta depict the authority of the SAGES as a group?” In order to address the question, I selected a representative group of texts, the fourteen SAGES parallels found in Mishnah and Tosefta Seder Moed—twenty eight passages in all—among the seventy-six Mishnah disputes and seventy-one Tosefta disputes that involve the SAGES. In this chapter, I explore the analyses of chapters 4 and 5 to delineate what the Mishnaic and Toseftan depiction of the Sages and their authority have in common and where they differ.

It is important to recall that the Mishnah and Tosefta express their ideology and values in concrete terms. It would be unexpected for them to conduct extended discussions on the subject of authority in rabbinic circles. The two disputes in Mishnah/Tosefta Eduyot on the status of minority opinions are as close as they get to such a discussion. Lacking a direct treatment of the SAGES and their authority, I have read the passages of the sample group closely for indications of how the Mishnah and Tosefta view these matters. In the tables and comments below, I tabulate and explain my findings. I begin with Table 2, which summarizes the results of my analysis of the twenty eight passages discussed in in chapters 4 and 5.

Table 2 – SAGES’ Parallel Disputes

SAGES Parallel	Mishnah Type 3	Tosefta Type 3
(1) Mishnah Shabbat 6:3 and Tosefta Shabbat 4:11	A	A*
(2) Mishnah Shabbat 6:6 and Tosefta Shabbat 5:11	A	A
(3) Mishnah Shabbat 8:4–5 and Tosefta Shabbat 8:20	A	C
(4) Mishnah Shabbat 20:4 and Tosefta Shabbat 16.4	A	A
(5) Mishnah Eruvin 3:6 and Tosefta Eruvin 4:1, 2	B	C
(6) Mishnah Eruvin 6:9g-i and Tosefta Shabbat 5.25f-h	A	A
(7) Mishnah Eruvin 9:1 and Tosefta Eruvin 7:13, 14	A	C
(8) Mishnah Pesachim 3:6 and Tosefta Pisha 3:9–11	B	C

(9) Mishnah Pesachim 4:1, 5–6 and Tosefta Pischa 3:18	B	B
(10) Mishnah Pesachim 4:8 and Tosefta Pischa 3:19–22	A	C
(11) Mishnah Betzah 3:6 and Tosefta Yom Tov 3:5	A	A
(12) Mishnah Betzah 3:8 and Tosefta Yom Tov 3:8	A	A
(13) Mishnah Betzah 4:6 and Tosefta Yom Tov 3:18	A	B
(14) Mishnah Ta'anit 2:5 and Tosefta Ta'anivot 1:11–13	A	A

Key:

(3A) Disputes Resolved (and concluded) by the SAGES with or without a gloss

(3B) The SAGES' ruling is followed by an individual opinion

(3C) The SAGES' opinion is disputed (or undermined redactionally)

* Two variants result in different classifications, Type 3A and 3C. I placed this dispute in Type 3A, the most common dispute type, rather than the much less frequent Type 3C.

Overviews of the SAGES Parallels in the Mishnah and Tosefta

I will review this material in three steps: (1) describing the twenty eight disputes as a group; (2) comparing the Mishnah's group of fourteen disputes with the Tosefta's group of fourteen in order to isolate characteristic similarities and differences between the depiction of the SAGES in the Mishnah and the one in the Tosefta; (3) focusing on five Toseftan Type 3C disputes with approaches unique to the Tosefta.

Having completed this review, and before describing the Mishnaic and Toseftan literary constructs of "the SAGES," an apparent anomaly in my results prods me to revisit the entire body of SAGES disputes in Mishnah/Tosefta Seder Moed to verify the degree to which the sample group actually represents the whole. I conclude the chapter with the results of that review.

(1.) Describing the Twenty Eight Passages as a Group

Table 3 – Summary of Dispute Classifications

3A	3B	3C
18	5	5

In these twenty-eight disputes, we read accounts of the SAGES ruling on a variety of issues relating to practices that take place on the Sabbath and other special days. For example, they rule on circumstances in which wearing ornamental vessels and certain items of clothing is permitted or forbidden on the Sabbath. They rule on matters related to the preparation and use

of eruvim. The SAGES determine matters related to the Passover and the day leading up to it. They set limits on certain kinds of commerce and commercial measurement when carried out on a festival day. They determine that certain townships are in error concerning a particular fast day practice.

These disputes present the SAGES in a dominant position as they declare what is halakhically correct for their social network and, in principle, for all Jews. When the Mishnah terminates a dispute by citing the SAGES' authoritative view, there is usually no further word spoken by individual sages on the matter. I have labeled these "Type 3A" disputes. Sometimes anonymous or attributed glosses are added for the purpose of clarifying or elaborating the SAGES' views. On five occasions in the sample group, one or two dissenting opinions are attached to the dispute. However, they have no further influence on the halakhah of the Mishnah and Tosefta. I have labeled these "Type 3B" disputes. Both Type 3A and Type 3B disputes illustrate the full halakhic authority of the SAGES. The SAGES as are placed at the center of the halakhic enterprise.

There is one report of a dispute in which it is unclear whether or not the SAGES' view prevailed over the opinion of individual sages (5:1). The dissenting opinion seems to be emphasized literarily. However, I cannot say with confidence that the redactors intended to undermine or modulate the authority of the SAGES.

Finally, there are accounts of the SAGES' views being subjected to rational discourse or analysis (3:2, 5:2, 7:2, and 8:2); on one occasion, they are shown to have judged a situation without having examined it carefully (10:2). I have categorized these as Type 3C disputes wherein the sui generis authority of the SAGES is called into question. The picture of the SAGES painted in these passages differs from the one painted by the larger number of Types 3A and B passages that I have already summarized. It is notable that all five of these passages are found in the Tosefta.

Taken together, these twenty eight passages present the SAGES as an authoritative group that normally is made to prevail in disputes with individual sages (twenty three of the twenty eight passages or 82%). There are five disputes (about 18%) in which the SAGES' view, or at least the view they first express, does not prevail. Thus, in these twenty eight passages as a whole, the SAGES are depicted as a group that normally functions with a high degree of authority; the five anomalous Toseftan disputes do not seem to fit this description.

(2.) Comparing the Mishnah Group with the Tosefta Group

Table 4 – Summary of Dispute Classifications in the Sample Group

	3A	3B	3C
Mishnah	11	3	0
Tosefta	7	2	5

Among the Mishnah's fourteen passages, there are eleven in which the SAGES are shown ruling authoritatively with no following dissent. There are three passages where dissent is recorded. Among the Mishnah passages there are no texts that clearly weaken the authority of the SAGES or present them as anything less a group that collectively settles halakhic disputes in a definitive manner.

Among the Tosefta's fourteen passages, the SAGES are portrayed ruling authoritatively with no following dissent in seven Type 3A disputes. In three Type 3B texts there is recorded dissent. Finally, in five passages the original opinion of the SAGES is called into question.

Early in my research for this thesis, it seemed to me that the Tosefta's five Type 3C passages present an intentional weakening of the SAGES' authority by the Toseftan redactors. On closer examination, the authority of the SAGES is not necessarily compromised when they allow their views to be questioned or when engaging in rational argumentation with individual sages. Rather, the Tosefta's portrayal of the SAGES as a group that is willing to defend their opinions with the use of reason and even to change their views when reason dictates appears to present them as a group that exercises authority reasonably. This is not a picture of vulnerability—as if the SAGES are unable to assert their authority—but flexibility and strength. This group of five passages includes the incident in Jericho (10.2), where the SAGES seem uncertain how to express their disapproval of certain practices and the men of the town are depicted showing the Sages how they have overlooked certain facts in their opinions. Thus, they are shown to be subject to error, if only on this occasion.

Among the twenty eight passages in the sample group, the Mishnah's fourteen Type 3A and 3B disputes portray the SAGES authority as *sui generis*. The Tosefta's fourteen disputes may be divided into nine Types 3A and 3B and five Type 3C. Clearly, the Toseftan construction of the SAGES and their authority is not in full harmony with that of the Mishnah. While it can be asserted that Type 3A and Type 3B disputes, in which the SAGES rule definitively, are characteristic of both works, the Toseftan disputes include five that do not portray the authority of the SAGES as the Mishnah does.

(3) The Five Toseftan Type 3C Disputes

The five Type 3C disputes among the fourteen in the sample group distinguish the Tosefta's view of the SAGES from Mishnah's. In order to flesh out this observation, I will review the Tosefta's five Type 3C disputes, comparing each with its Mishnaic counterpart, and then summarize my findings.

Type 3C Tosefta Dispute #1—Tosefta Shabbat 8:20 (SAGES Parallel 3)

8:20

- A. Course sand enough to [cover] the face of a [plastering] trowel.
- B. Said Rabbi, "The opinion of R. Aqiba appears [preferable] in the case of fine sand and of SAGES in the case of course sand."
- C. Lime enough to make up the smallest girl.
- D. Rabbi Judah says, "Enough to make up the crown of [her] hair."
- E. Rabbi Nehemiah says, "Enough to make up the locks falling from [her] temples."
- F. Said Rabbi, "The opinion of R. Judah appears [preferable] when [the lime] is [the volume of or shaped like] an egg, and the opinion of R. Nehemiah when it is mashed."

T. Shabbat 8:20 is a record of Rabbi's rational halakhic analysis of prior disputes. He handles the dispute between R. Aqiba and the SAGES in precisely the same way as the dispute between R. Judah and R. Nehemiah. The two are parallel:

Said Rabbi, "The opinion of R. Aqiba appears [preferable] in the case of fine sand and of the SAGES in the case of course sand."

Said Rabbi, "The opinion of R. Judah appears [preferable] when [the lime] is [the volume of or shaped like] an egg, and the opinion of R. Nehemiah when it is mashed."

In this passage, the Tosefta's retrospective analysis functions as nascent gemara to the Mishnah's account. Rabbi's review undermines the SAGES' authority by subjecting their opinion to his independent judgment. He further undermines their authority by giving the SAGES' opinion no more weight than R. Aqiba's and marginalizing the Mishnaic SAGES' view on fine sand by reframing the category "rotted leaves and fine sand," found in the Mishnah, as simply "fine sand" in the Tosefta.

Meanwhile, in the parallel Mishnah passage (Shabbat 8:5), the SAGES are depicted as fully authoritative, overruling the influential R. Aqiba twice and, in an apparent gloss,

establishing limits on some other substances. There is no dissent from the SAGES' opinions. The Tosefta's version of this dispute thus stands in stark contrast to the Mishnah's.

Type 3C Tosefta Dispute #2—Tosefta Eruvin 4:1, 2 (SAGES Parallel 5)

T. Eruvin 4:1–2 consists of a series of exchanges involving the SAGES and six individual sages. The exchanges between R. Eliezer and the SAGES at 4:1 and 4:2 F.–G. are of particular interest. The halakhic principles involve the Sabbath, holy days, and the preparation of *eruvim*

- A. R. Eliezer says, “on a festival day adjacent to the Sabbath, whether before or after it, a man may prepare an *eruv* one day for the north and one day for the south.
- B. “One day for the north and one day he is equivalent to the other people who dwell in his town.”
- C. R. Eliezer concedes that “an *eruv* is not prepared for half a day for the north and for half a day for the south.
- D. For they do not divide up a single day.”
- E. And SAGES say, “Just as they do not divide up a single day, so they do not divide up two days.”
- F. Said to them R. Eliezer, “Do you not concede that one who prepares an *eruv* with his feet for the first day must prepare an *eruv* with his feet for the second day?
- G. “If his *eruv* was eaten before it got dark, he may not go out depending upon it the same day?”
- H. They said to him, “True.”
- I. He said to them, “Is not this [what I said]?”
- J. They said to him, “Do you not concede that they do not prepare an *eruv* on one [holy] day for the next [contiguous holy] day?”
- K. He said to them, “True.”
- L. They said to him, “Is not this [what we said]?: They are [treated as] one day.”

4:2

- F. And SAGES concede to R. Eliezer with regard to two festival days of the New Year that a man prepares an *eruv* on the first day for the north and on the second day for the south,
- G. on the first day for the north and on the second day he is in the status of the other people who dwell in the same town.”

R. Eliezer and the SAGES engage in rational argumentation. At F. Eliezer asks for the SAGES' concession and at H. they respond, “[It is] true.” The reverse occurs where the SAGES ask for R. Eliezer's concession at J. and he responds, “[It is] true” at K. Finally, at 4:2 F., the SAGES again concede to R. Eliezer. On both sides, concessions take place in a common halakhic framework; they logically dispute the scope and application of agreed halakhic

principles; they each concede when convinced by the other's argument. While at 4:1 L. the SAGES seem to have settled the dispute, at 4:2 F. they concede to R. Eliezer, agreeing that the two days of Rosh Hashanah are two distinct periods of holiness. Thus, the last opinion of the SAGES is a concession to R. Eliezer.

The SAGES are depicted as a reasonable and flexible group who are willing to engage in debate without the protection of positional, *sui generis* authority. They do not expect their opinions to be accepted on their face, but engage in rational dispute with individual sages, relying on their understanding of halakhic principles and displaying a willingness to yield when that understanding is shown to be defective. The SAGES do not attempt to overcome opposition on any other basis than reason.

The words מוֹדִים אַתֶּם לִי פְּ- do not produce the same results in the Mishnah as they do in the Tosefta. In the Tosefta, the SAGES yield to R. Eliezer's reasonable expectation of agreement. In M. Eruvin 3:6 O., R. Eliezer confronts the SAGES with an apparent contradiction in their position. The same words indicate that he expects agreement but the SAGES do not yield to his challenge. The parallel Mishnah passage is the only one of the fourteen Mishnah passages in which the position of the SAGES may be weakened, since R. Eliezer opposes them there as well.

Type 3C Tosefta Dispute #3—Tosefta Eruvin 7:14 (SAGES Parallel 7)

- A. "All the roofs of the town are a single domain.
- B. "It is prohibited to go up or to descend from the courtyard to the roofs, or from the roofs to the courtyard, [while carrying something].
- C. "But all [objects] which were kept for the Sabbath in the courtyard may be carried about in the courtyard.
- D. And those kept for the Sabbath on the roofs may be carried about on the roofs," the words of R. Meir.
- E. But SAGES say, "Each one constitutes a domain unto itself."
- F. Said to them R. Meir, "Do you not concede in the case of the men of a courtyard who forgot and did not participate in an *eruv*, that it is prohibited to bring in or take out objects from the courtyard to the houses or from the houses to the courtyard? Yet all [objects] that were kept for the Sabbath in the courtyard are permitted to be carried about in the courtyard.
- G. "So what is the difference between the roof and the courtyard?"
They said to him, "No. If you have stated [the rule] in regard to the courtyard, underneath which there are no residences [and so one area of a courtyard may not be clearly distinguished from another], will you state the same rule in regard to the roofs, beneath which there are residences [and so one roof may be distinguished from another]?"
- I. He said to them, "So also in the case of the courtyard, sometimes there are residences under it."

- J. They said to him, “No. If you have already spoken concerning the courtyard, in which case not everyone will recognize what part is his, will you [then] speak concerning the roofs, in which case each person does recognize what part is his?”
- K. He said to them, “Look, if [a courtyard] were divided, or was made in mosaics, will not everyone recognize what is his?”
- L. Said R. Simeon ben Eliezer, “Up to this point was the reply [of R. Meir to the SAGES].”
- M. R. Simeon says, “The roof, balcony, courtyard, and portico—all together constitute a single domain.”

Here the SAGES are depicted as engaged in rational argumentation with R. Meir. However, at the end of this dispute, they have not budged from their original positions. This is not because either party is unreasonable but because the halakhic issues, though partially clarified in the course of the original debate (ending at K.), are not brought to a clear-cut resolution. In my view, the salient feature of the SAGES’ discourse remains their willingness to debate individual sages rationally on an equal footing. The exchange at F.–G. typifies the dispute. As we have seen elsewhere, the question, “Do you (SAGES) not concede . . .?” anticipates a positive response. R. Meir expects the SAGES to agree. The SAGES do agree in part, calling R. Meir’s statement “the rule of the courtyard.” However, they disagree with his subsequent analogy between courtyards and roofs. This analogy is drawn by means of a direct statement but by R. Meir’s question at G. In fact, almost the entire dispute is conducted by means of questions and ends, at least in that generation, with another R. Meir question, which receives no response.

In the Tosefta’s redaction, the dispute is reviewed a generation later by R. Simeon ben Eliezer, who subjects the earlier dispute to rational analysis and appends his own view, which differs both with R. Meir’s separation of roofs from courtyards (7:14A.–D.) and the SAGES’ claim that each roof is a separate domain (7:14 E.). The status of the SAGES is reduced when their rational discourse is rejected by a sage of a later generation.

The Mishnah parallel is a Type 3A dispute where R. Simeon glosses the words of the SAGES. It is also possible to read it as a Type 3B dispute with R. Simeon dissenting. In either reading, the SAGES’ authority remains clear.

Type 3C Tosefta Dispute #4—Tosefta Pischa 3:9–11 (SAGES Parallel 8)

These texts deal with the difficulty created when the fourteenth of Nisan, the day when leaven is removed from the house, falls on the Sabbath. Should the leaven be removed “at its

proper time” (on the fourteenth, even if it falls on the Sabbath) or before the Sabbath? In addition, how should leavened *terumah*, a special case, be treated?

3:9

- A. [When] the fourteenth [of Nisan] falls on the Sabbath,
- B. they remove all [leaven from the house] before the Sabbath.
- C. And a person may bake unleavened bread for himself on the eve of the Sabbath.

3:10

- A. “*Terumah* which is ritually clean and that which is ritually unclean they remove before the Sabbath,” the words of R. Meir.
- B. But the SAGES say, “[They remove all leaven] at its proper time [even though it falls on the Sabbath]: *terumah* that is ritually clean and that which is ritually unclean they remove on the Sabbath itself.”

3:11

- A. R. Eleazar b. R. Sadoq says, “[Leaven is the status of] *terumah* [is removed] before the Sabbath, for the people allowed to eat it are few.
- B. “But unconsecrated food [is removed] on the Sabbath, for the people who are allowed to eat it are many.”
- C. Said R. Eleazar b. R. Sadoq, “One time we were in session before Rabban Gamaliel in the study-house in Lod. And Zonen, who was in charge, came along and said, ‘The time has come to remove the leaven.’ So father and I went along to the house of Rabban Gamaliel and removed his leaven.”

While the Mishnah simply records R. Eleazar b. R. Sadoq’s dissent, the Tosefta allows him to explain his dissent with a rationale (3:11 A.–B.) and a supporting precedent (3:11 C.). This version was possible only because there were two rabbis named Eleazar b. R. Sadoq: the first was a contemporary of Rabban Gamaliel and the second, his grandson, a contemporary of R. Meir. Someone—whether during the prior transmission of the dispute or during the Tosefta’s redaction—has fashioned this dispute to support the younger R. Eleazar b. R. Sadoq’s opinion and has thereby portrayed him as winning the dispute on a rational basis. As I mentioned in chapter 5, the precedent is unclear and the redaction has left a seam between the two statements of “R. Eleazar b. R. Sadoq.” In any case, the redactors of the Tosefta included it their anthology, somewhat awkwardly showing the SAGES’ argument defeated by rational discourse.

Type 3C Tosefta Dispute #5—Tosefta Pischa 3:19–22 (SAGES Parallel 10)

The Tosefta’s narrative begins with a general description of six practices of the men of Jericho, sorting them into two categories: three that were in accordance with the SAGES’

wishes and three that were not. The use of participles to describe the actions of the men of Jericho depict ongoing practices that violated the SAGES' wishes.

R. Yehudah is not content with the situation. According to him, the SAGES' wishes should be treated as halakhic standards: whatever applies to the men of Jericho should apply to everyone. There follows a new version of the situation in which the SAGES, apparently following R. Yehuda's wishes, are described reproving the men of Jericho for their three unacceptable practices.

After a quick review of the practices the SAGES did not reprove, the Tosefta focuses on the practices they did reprove. Ben Nebo Hayin and his son, like other men of Jericho, had generously set aside a field-corner of a vegetable for the poor, a practice that the SAGES reproved because at least some of the crops did not fall in the category of vegetables that require the setting aside of a field-corner. The son combined his father's generosity with sensitivity to the SAGES' wishes. He substituted a double tithe of vegetables for the field corner, thus honoring existing halakhah promulgated by the SAGES and also feeding the poor.

The SAGES also reproved the men of Jericho for eating fallen fruit on the Sabbath. Since it may have fallen on the Sabbath, this would violate Sabbath halakhah, a very serious offense. It turns out that the SAGES were not well-informed. In a time of famine, the men of Jericho let "the poor of Israel" into their gardens and orchards to eat fallen fruit. The anonymous narrator has the last word and the SAGES are silent, highlighting the narrator's justification of the practice of the men of Jericho. The SAGES' reproof was ill-informed and rash.

The final section of the passage refers to the SAGES reproving the men of Jericho for permitting the use of cuttings from trees dedicated to the Temple. As it turns out, the situation was not as clear as the SAGES thought. The anonymous Toseftan narrator depicts these common folk offering a reasonable halakhic defense of their practice. Once again, the anonymous narrator has the last word; the SAGES have nothing more to say.

The passage T. Pischa 3:19–22 is framed and carried along by anonymous narrative, suggesting a very conscious redaction. The SAGES are shown being prodded into premature action by R. Yehuda. Their reproof concerning fruit fallen on the Sabbath turns out to have been ill-informed; the narrator explains and justifies this practice of the men of Jericho. Finally, the men of Jericho are allowed to justify their private use of growth from trunks dedicated to the Temple. Once again, the SAGES are ill-informed.

In the parallel Mishnah passage, the SAGES reproved the men of Jericho for three Sabbath practices and did not reprove them for three others. The SAGES rule without any accompanying dissent. In this parallel, the Mishnah and Tosefta are worlds apart.

Table 5 –Comparison of Tosefta Type 3C Disputes with Mishnah Parallels

SAGES' Parallel	Mishnah Type 3	Tosefta Type 3
(3) Mishnah Shabbat 8:4–5 and Tosefta Shabbat 8:20	A	C
(5) Mishnah Eruvin 3:6 and Tosefta Eruvin 4:1, 2	B	C
(7) Mishnah Eruvin 9:1 and Tosefta Eruvin 7:13, 14	A	C
(8) Mishnah Pesachim 3:6 and Tosefta Pischa 3:9–11	B	C
(10) Mishnah Pesachim 4:8 and Tosefta Pischa 3:19–22	A	C

All the Mishnaic counterparts to the Tosefta's five Type 3C disputes portray the SAGES bearing *sui generis* authority. When the specific features of the Toseftan texts are considered, the Toseftan Type 3C disputes are of a very different character than their Mishnah parallels (and from all the Mishnah passages in the sample group). They show their SAGES making concessions, being reviewed and assessed by a later sage, and in other, less precisely schematized ways. Somehow, the SAGES disputes in Mishnah and Tosefta Seder Moed describe two significantly different series of snapshots of the same five tannaitic disputes.

Additional Research

Table 5 shows that the Tosefta's five Type 3C disputes are all found in the first three tractates of Seder Moed. Although these are the largest tractates, accounting for nearly half of the Seder, and it can be expected that they would have the largest number of such disputes, the absence in the sample group of any Type 3C in the other nine tractates raises the question of whether the view of the SAGES found in Type 3C disputes is unique to those tractates of the Tosefta. As Schaffer, Boyarin, and others have proposed, different tractates may have developed in different ways and therefore possess unique characteristics that set them apart from others. The information represented by the chart may therefore call into question my premise that the fourteen SAGES' parallels represent, with reasonable accuracy, the entire body of Mishnah/Tosefta Seder Moed's disputes involving SAGES. This observation requires me to review the entire body of

seventy-one Toseftan SAGES disputes and the Mishnah's seventy-six in order to determine whether and in which work(s) Type 3 disputes are found elsewhere in Seder Moed. I follow with an overview of this body of disputes, utilizing the same mode of analysis that I used with the sample group to determine their type.¹¹¹

Table 6 shows the distribution of Type 3C disputes that I discovered in Tosefta Seder Moed in the canonical order of the tractates (which is generally largest to smallest). I found no Type 3C disputes in Mishnah Seder Moed.

Table 6 – Distribution of Type 3C Disputes in Mishnah/Tosefta Seder Moed¹¹²

	Shabbat	Eruvin	Pesachim	Shekalim	Yoma	Succah
Tosefta	2	2	2	0	0	0

	Betza	Rosh Hashanah	Ta'anit	Megillah	Moed Katan	Hagigah	Total
Tosefta	0	1	2	0	3	0	12

This table shows that six of the fourteen tractates of Tosefta Seder Moed include Type 3C disputes. Considering the modest number of such disputes in Seder Moed, it is not unexpected that they do not appear in all the tractates. This distribution is wide enough to allay my concern that Type 3C disputes might be found exclusively in a small number of tractates and that, therefore, the Type 3C disputes in the sample group may not be representative of the whole in terms of its tractates.

During this review, I found that in the Tosefta's Type 3C SAGES disputes in the larger group fall in the same three sub-categories (concessions, reviews, and miscellaneous). Table 7 shows the distribution of the three varieties of Type 3C disputes in the sample and in full Seder.

Table 7—Varieties of Type 3C Disputes in the Sample and Full Groups

	3C(1)	3C(2)	3C(3)
Tosefta (sample group)	1	1	3

¹¹¹ The type of all these disputes is listed in Appendix 1

¹¹² The type of every SAGES dispute in Mishnah/Tosefta Seder Moed is listed in the Appendix.

Tosefta (full Seder)	4	3	5
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Taking into consideration the modest number of Type 3C disputes, their distribution in the two groups is very similar. In this regard, the sample group has adequately represented the whole.

(1) Concessions: In Tosefta Seder Moed, there are four instances of the Sages involved in rational argumentation with named sages after they have seemingly made an authoritative ruling. Concessions are made in the course of rational argumentation. This involves explicit language of concession (מודה רבי פלוני and מודים חכמים לרבי פלוני (להחכמים)). The reasons for these concessions are not normally explained, but can usually be teased out. This variety of Type 3C dispute consists of rational argumentation within a given halakhic framework; dispute is not shut down by “but the SAGES say.”

(2) Reviews: Tosefta Seder Moed includes three reviews of SAGES disputes while Mishnah Seder Moed has none. In each case, the later sage revises the earlier dispute, subjecting the SAGES’ opinion to their own rational analysis and limiting its scope. I have already analyzed one such dispute in depth, T. Shabbat 8:20 (SAGES parallel 3; Type 3C Tosefta Dispute 1).

(3) Miscellaneous: There are five miscellaneous disputes in which the SAGES authority is compromised or modified in some way.

Tables 4 and 4.1 summarize the distribution of SAGES dispute types 3A, 3B, and 3C in the sample group and in the full Seder Moed.

Table 4 – Summary of SAGES Dispute Types in the Sample Group

	3A	3B	3C
Mishnah	11	3	0
Tosefta	7	2	5

Table 4.1 – Summary of Dispute Types in Mishnah/Tosefta Seder Moed

	3A	3B	3C
Mishnah	69	7	0
Tosefta	53	6	12

Types 3A and 3B disputes characterize both works, although not to the same extent. In Seder Moed as a whole, 100% of the Mishnah’s seventy-six SAGES disputes are Type 3A or 3B. Of the Tosefta’s seventy-one SAGES disputes, fifty-nine (83%) are Types 3A or 3B.

The twelve Type 3C disputes account for a modest minority (17%) of Toseftan disputes and about 8% of the whole body of SAGES disputes.

I conclude that the only notable difference between the sample and full groups is the percentage of Type 3C disputes in each. While five of the fourteen disputes in the sample group are Type 3C (36%), only twelve of the seventy-one in the full Toseftan group are Type 3C (17%). In the full group, the commonalities in the Mishnaic and Toseftan literary constructs of “the SAGES” are greater and the differences, though still unmistakable, are less prominent than in the sample group. Obviously, any explanation of the use of the term “the SAGES” in this order must take this statistic into account.

While the sample group of fourteen pair of parallel SAGES disputes is not fully representative of the full Mishnah/Tosefta Seder Moed, the Tosefta appears to be unique in its use of Type 3C dispute. Nevertheless, just as it was prudent to determine how accurately the sample group represents the whole, it seemed necessary to determine whether Seder Moed accurately represents the whole of the Mishnah and Tosefta in the use of Type 3C disputes.

An examination of Mishnaic SAGES disputes outside Seder Moed reveals instances of miscellaneous Type 3C disputes, showing that these are not unique to the Tosefta. Three examples will suffice.

1. M. Bava Batra 8:5 Q.-T.

הכותב את נכסיו לאחרים והניח את בניו, מה שעשה עשוי, אבל אין רוח חכמים
נוחה הימנו. רבן שמעון בן גמליאל אומר, אם לא היו בניו נוהגין כשורה, זכור לטוב:

Q. He who writes over his property to others and leaves out his sons—

R. what he has done is done.

S. But SAGES are not pleased with him.

T. Rabban Simeon b. Gamaliel says, “If his sons were not behaving properly, may his memory be for good.”

Because a property owner is within his rights to write over his property to others and leave out his sons, the SAGES cannot forbid it. They can, however, make their displeasure known. Presumably this will exert moral pressure on those contemplating taking the permitted action. However, Rabban Simeon b. Gamaliel points out a circumstance in which the father’s action is praiseworthy—if the sons’ behavior was not proper. His comment points out a weakness in the SAGES’ position. This is not simply a minority opinion recorded for posterity but a challenge. The Mishnah does not describe a response from the SAGES, leaving the impression that Rabban Simeon was right: the SAGES have overlooked an important scenario in which the father’s action is not only permitted but praiseworthy.

2. M. Makkot 3:2 I.-N.

כָּמָה יֵאָכֵל מִן הַטֶּבֶל וְיֵהָא חַיֵּב, רַבִּי שְׁמַעוֹן אוֹמֵר כָּל שֶׁהוּא, וְחֻכְמִים אוֹמְרִים כְּזֵית.
אָמַר לָהֶם רַבִּי שְׁמַעוֹן, אֵין אַתֶּם מוֹדִים לִי בְּאוֹכֵל נִמְלָה (כָּל) שֶׁהוּא חַיֵּב. אָמְרוּ לוֹ,
מִפְּנֵי שֶׁהִיא כְּבִרְיָתָהּ. אָמַר לָהֶן, אִף חֲטָה אַחַת כְּבִרְיָתָהּ :

I. How much food untithed food does one eat so as to be liable?

J. R. Simeon says, "Any amount at all."

K. And SAGES say, "An olive's bulk."

L. Said to them R. Simeon, "Do you not agree with me in the case of one who eats an ant, however small, that he is liable?"

M. They said to him, "It is because that is how it has been created."

N. He said to them, "Also a single grain of wheat is in the form in which it has been created."

R. Simeon asserts that there is no minimum quantity in this case. The SAGES disagree, setting a minimum of an olive's bulk. R. Simeon raises an objection that liability is incurred even for consuming an ant. The SAGES agree that the ant is an exception to the minimum of an olive's bulk not because of its size but because it is a complete being, not a portion of something larger. R. Simeon responds that the same argument applies to a grain of wheat, apparently undermining the SAGES' minimum. Since untithed wheat would have been common, this is a real issue. The lack of any response by the SAGES leaves one with the impression that they have been bested by R. Simeon.

3. Mishnah Menahot 2:1

הַקּוֹמֵץ אֶת הַמִּנְחָה לֶאֱכֹל שְׂגִירָהּ אוֹ לְהַקְטִיר קִמְצָהּ לְמַחֵר, מוֹדָה רַבִּי יוֹסִי בָּזָה
שֶׁהוּא פְּגוּל וְחֵיבִין עָלָיו כֶּרֶת. לְהַקְטִיר לְבוֹנֵתָהּ לְמַחֵר, רַבִּי יוֹסִי אוֹמֵר, פָּסוּל וְאֵין בּוֹ
כֶּרֶת, וְחֻכְמִים אוֹמְרִים, פְּגוּל וְחֵיבִין עָלָיו כֶּרֶת. אָמְרוּ לוֹ, מֶה שָּׁנָה זֶה מִן הַזֵּבַח. אָמַר
לָהֶם, שֶׁהַזֵּבַח דָּמוֹ וּבִשְׁרוֹ וְאַמּוּרָיו אֶחָד, וּלְבוֹנָהּ אֵינָה מִן הַמִּנְחָה :

A. He who takes the handful of meal offering [with the improper intention] to eat its residue or to burn its handful on the next day —

B. R. Yose agrees in this case that it [the sacrifice] is refuse and they who eat it are liable on its account to extirpation [= M].

C. [If he does so with the improper intention] to burn its frankincense on the next day,

D. R. Yose says, "It [the sacrifice] is invalid. And extirpation does not apply to it."

E. And SAGES say, "It is refuse. And they are liable on its account to extirpation."

F. They said to him, "What is the difference between this case [of the meal offerings and frankincense] and the animal sacrifice?"

G. He said to them, "The animal sacrifice — its blood and its flesh and its sacrificial parts are [of] one [genre].

H. "But the frankincense is not from the meal offering [which is flour]."

The conclusion of this dispute draws out attention. The SAGES' give their opinion at E. and offer rational support for it at F. R. Yose concludes the dispute by offering a response to the SAGES' argument. Because the SAGES do not respond, R. Yose's argument, his opinion

does not appear as a rejected minority opinion, simply expressed and recorded, but as a successful refutation. According to this reading, the SAGES' authority has been undermined.

Although there were no examples of miscellaneous Type 3C disputes in Mishnah Seder Moed, I was able to find several examples in the Mishnah as a whole. It seems that in these disputes redactors of the Mishnah and Tosefta use literary devices rather than the language of concession to indicate the superiority of individual sages' logic. In both cases, the SAGES and individual sages are depicted as engaging in face-to-face dispute. This differs sharply from the review form that depicts a later sage subjecting the opinions of the SAGES and individual sages to retrospective analysis. In the review form, there is no possibility of the SAGES responding either with disagreement or concession.

The presence of miscellaneous Type 3C disputes in the Mishnah shows that the dynamics present in the Tosefta's miscellaneous Type 3C disputes are present in both documents and are therefore a part, albeit minor, in the literary construct of the SAGES in both. Since miscellaneous Type 3C disputes cannot be identified by the use of formulaic language, the precise numbers of such disputes in the entire Mishnah and Tosefta would require a thorough analysis of about a thousand SAGES disputes, I chose to focus instead on the first two varieties of Type 3C dispute—concessions and reviews—because they can be quickly and unambiguously identified by specific language. Results of this research are listed in Appendices 2 and 3.

In the Tosefta, the SAGES concede unilaterally to a named sage eighteen times. The Mishnah's SAGES concede to a named sage eight times. These are clearly Type 3C Mishnaic disputes, a type that did not appear in my previous research in the Mishnah because none of them are found in Seder Moed. Their presence elsewhere in the Mishnah shows that this variety of Type 3C, the use of the language of concession, is not uniquely Toseftan. Unilateral concessions by the SAGES are found in the literary construct of the SAGES in both works. They show that the SAGES can be influenced by the rational arguments of individual sages. In each case, the SAGES either modify their original opinion or have clearly changed their thinking on the halakhic issue at stake. As far as I can tell, their authority is not compromised by this flexibility.

There are also nine Toseftan disputes in which the SAGES and named sages make *mutual* concessions; there are none in the Mishnah. T. Eruvin 4:1,2 (SAGES parallel #5) is an example of Toseftan disputes in which mutual concessions are made. It is possible, though far from certain, that these disputes involving mutual concessions represent a conscious

development from the unilateral concessions that are found in both the Mishnah and Tosefta, insofar as they show a higher level of rational engagement than unilateral concessions.

In the full Tosefta, there are ten reviews of earlier SAGES disputes, three of which appear in Tosefta Seder Moed, along with eleven reviews of non-SAGES disputes. In the Mishnah, there are no reviews of SAGES disputes and one of a non-SAGES dispute. There are no such reviews in the halakhic midrash collections. Rabbi—or the Tosefta’s literary construct of Rabbi—plays a central role in these reviews, conducting the one review recorded in the Mishnah’s and sixteen of the twenty-one Toseftan reviews.

In all twenty-one Toseftan reviews, *every opinion* expressed in the earlier disputes is reshaped in some way by the application of rational analysis and the introduction of new halakhic considerations. In order to flesh out this statement, I will present examples of Toseftan reviews, beginning with a review of a non- SAGES dispute, a dispute between two named sages. At T. Arakhin 4:33, also found at M Arakhin 8:5 (the only review in the Mishnah), Rabbi reviews a dispute between R. Judah and R. Shimon.

כהנים ולוים אין מחרימין דברי ר' יהודה. ר"ש אומר כהנים אין מחרימין שחרמים שלהם.
לוים מחרימים שאין חרמים שלהן. אמר רבי נראין דברי ר' יהודה בקרקעות כי אחוזת
עולם הוא להם ודברי ר"ש במטלטלין שאין חרמים שלהן.

- A. “Priests and Levites do not declare things herem,” the words of R. Judah
- B. R. Shimon says, “Priests do not declare things herem, for things declared herem belong to them. Levites declare things herem, for things declared herem do not belong to them.
- C. Rabbi said, “The words of R. Judah appear [reasonable] with regard to real estate, for “it is their perpetual possession” (Lev. 25:4), and the words of R. Shimon in the case of movables, for things declared herem do not belong to them.”

Here, Rabbi introduces two overarching considerations: (1) permanent possession and (2) the relationship between possession and declaring herem (to be destroyed as unfit or dangerous for use). Anything that belongs permanently to a priest may not be declared herem, since it may be destroyed. Since real estate is the priests’ everlasting possession, they may not declare it herem. Movables do not belong to Levites permanently, so they may declare movables herem. Once again, Rabbi has introduced new halakhic considerations into the dispute with the result that the two opinions are altered and harmonized. (It is not clear to me why a priest, who does not possess movables permanently, may not declare them herem.)

The Tosefta’s reviews of SAGES disputes are conducted in the same way as reviews of non-SAGES disputes. This is particularly clear at T. Shabbat 8:20 (SAGES parallel 3; Type 3C

Tosefta Dispute 1),¹¹³ where Rabbi reviews one of each type, introducing the relationship between quantity and form into both disputes. Another review of a SAGES dispute is found at T. Moed Qatan 2:2.

רבי יהודה אומר הבאין מחוץ הים וממדינת הים [לכבס ולספר וחכמים . . . מתירין]. אמר רבי נראין דברי רבי יהודה בזמן שלא נטל רשות ודברי חכמים בזמן שנטל

G. . . . R. Judah said, "Those who come [back] from the seashore or from overseas [on an intermediate day of a festival] are prohibited to cut [their hair] or to wash [their clothing]."

H. But the SAGES permit [both].

I. Rabbi said, "The words of R. Judah seem [reasonable] in a time when one has not gotten permission and the words of the SAGES when he has gotten [permission]."

While it is not clear whether R. Judah or the SAGES had the issue of permission (presumably from the SAGES) in mind here, Rabbi has not pulled it from thin air. Permission to cut one's hair or wash one's clothes on an intermediate day of a festival is discussed in 2:1A and 2:2A. Although these occurrences do not refer to returning travelers, introducing the issue of permission at G.-I. is instrumental to bringing greater coherence to the entire passage (2:1-2). Rabbi has employed a halakhic distinction (permission/no permission) as the basis for a new analysis of the dispute.

One of the seven reviews of SAGES disputes outside Seder Moed is found at T. Hullin 8:6, where Rabbi introduces a different consideration into a dispute between R. Judah and the SAGES.

טיפת חלב שנפלה על החתיכה, רבי יהודה אומר, אם יש בנותן טעם באותה חתיכה, וחכמים אומרים, באותו הקדירה. אמר רבי, נראין דברי רבי יהודה בזמן שלא ניער ולא . . . כיסה ודברי חכמים בזמן שניער וכיסה

A. If a drop of milk fell on the piece of meat,

B. R. Judah says, "If there is [enough to] impart flavor to that piece of meat [it is prohibited]."

C. But the SAGES say, "[Enough to impart flavor] to that pot."

D. Rabbi said, the words of R. Judah seem [reasonable] when one has not stirred and covered [the pot] and the words of the SAGES when one has stirred and covered [the pot].

Unlike halakhah concerning ritual impurity, where a ritually impure piece of meat would immediately impart ritual uncleanness to the whole pot, here the issue is whether the actual flavor of milk has spread, however subtly, throughout the pot. The SAGES' opinion

¹¹³ See pages 126-29 and 166-67 of this thesis.

does not take this into account. Rabbi has neatly harmonized the opinions of R. Judah and the SAGES by introducing the factor of mixture into the dispute.

At T. Tevul Yom 2:12, Rabbi uses a precedent from the Mishnah to parse the opinions in this dispute.

עגול של דבילה שנפלו על מקצתו ה"ז קוצה הימנו עד שלש אצבעות על רוחב מלא . . .
הקצות דברי ר' יהודה וחכ"א אינו נוטל (הימנו) אלא מקום משקה בלבד. אמר רבי נראין
דברי ר' יהודה בדבילה שמינה שלא גרסה וחכ"א בדבילה שמינה שגרסה.

T. Tevul Yom 2:12

- A. A round cake of figs, on the edge of which liquids fell.
- B. "Lo, one removes up to three finger-breadths near the full [thickness of] the edge," the words of R. Judah.
- C. But the SAGES say, "One removes from it only the edge on which the liquids fell alone."
- D. Said Rabbi, "The opinion of R. Judah seems best in the case of a cake of figs which one did not pulverize, and the opinion of the SAGES seems best in the case of a cake of figs which one pulverized [into bits]."

The moisture at the edge of the cake of figs makes the rest of the cake susceptible to ritual impurity. In order to avoid that situation, part of the edge is removed. R. Judah and the SAGES disagree on the amount of the cake that should be removed. Presumably, R. Judah is concerned that the moisture has seeped into the cake a little. The SAGES disagree; perhaps in their view moisture does not seep into a cake of figs in that way.

There is a parallel situation at M. Tevul Yom 2:3. There, R. Judah distinguishes between a whole garlic clove, which communicates ritual uncleanness, and a pulverized clove, which does not because the bits of pulverized garlic are not ritually connected with one another and therefore do not communicate ritual uncleanness.

In the Tosefta, Rabbi introduces the garlic precedent into the dispute between R. Judah and the SAGES. From his perspective, since the SAGES decide that it is enough to remove only the edge, they must have a pulverized fig cake in mind and R. Judah, who wants far more removed, a non-pulverized cake. Rabbi's reconfiguration of the dispute is very reasonable. By assessing and reconfiguring the dispute in this manner, he establishes rational analysis, rather than authority, as the controlling factor.

I present two further examples in summary form.

T. Sheviit 8:3 is part of a lengthy discussion about financial obligations that the Sabbatical year cancels and those it leaves untouched. The dispute itself does not appear in the Toseftan text. Rabbi apparently understands the anonymous opinion at M. Sheviit 10:1 to be the opinion of the SAGES (or he had an oral tradition to that effect). The opinion is that a

debt owed to a shopkeeper is not cancelled by the Sabbatical year unless he converts it into loan. Also in the Mishnah, R. Judah disagrees, claiming that each new debt automatically converts the previous debt into a loan. It is known that loans are cancelled by the Sabbatical year; therefore the debts, automatically converted to loans, are cancelled.

According to Rabbi in the Tosefta, the conversion is not automatic, but occurs only when the shopkeeper has made a certain kind of record of the previous transactions. It is apparently not necessary for the record to have been made with the intent that it be converted to a loan. Rabbi determines that R. Judah's opinion is preferable when such a record has been made and the SAGES' is preferable when it has not. R. Judah's opinion, which appears unconditional, is made conditional. The SAGES' opinion, which appears to require an intentional conversion to a loan, is weakened by the possibility that the conversion has been unintentional.

Niddah 4:5 is embedded in a larger passage that considers when a woman becomes ritually unclean due to an abortion. The issue of whether the abortion was spontaneous or induced is not in view. Ritual uncleanness results from any childbirth, including an abortion, when the fetus looks human. The dispute between R Meir and the SAGES is reviewed by R. Hananiah ben Gamaliel, who introduces a new factor into the dispute—whether the fetus has human-looking eyes—which reconfigures both opinions.

Other Toseftan reviews of SAGES disputes are found at T. Demai 1:9, where Rabbi leverages the SAGES' opinion about certain regularly imported produce to apply the criterion of regular/irregular imports to the entire dispute; T. Moed Qatan 1:3, where Rabbi introduces the distinction between intermediate days of a festival and the Sabbath year; and T. Maaser Sheni 4:5 and 4:6, where Rabbi relates eating and not eating certain designations of produce to the Sabbath and weekdays.

The review form's innovation is two-fold. First, in the literary past, the SAGES were the subject ("the SAGES say"); in the review form they and their words are objectified with the language, "It seems [reasonable] that the words of the SAGES. . ." in the same way as the words of individual sages. The SAGES opinions are subjected to a new analysis that results in a limitation of their scope while the opinion of a named sage, previously rejected, is reinstated and given some scope. Second, in each case, the reviewer introduces one or more new halakhic considerations into a dispute that had seemingly been settled in a previous generation. On the basis of this halakhic consideration, he reshapes the dispute and its constituent opinions, a rational process that brings them into harmony and balance. The effect of these two strategies, when applied to SAGES disputes, is to undermine the SAGES' authority

in four ways: (1) subjecting the SAGES' supposedly authoritative opinion to review; (2) objectifying the SAGES' opinion; (3) according the SAGES' opinion no more weight than the opinion of an individual sage; (4) limiting the scope of the SAGES' opinion.

In this chapter, the synoptic analysis of fourteen pairs of Mishnah/Tosefta texts has been collated in order to reveal the common and distinguishing characteristics of their views of the SAGES' and their authority. The results of this work presented a challenge that spurred me to additional research that led, in turn, to the identification of a variety of Type 3C dispute that I have labeled the "review" form and the final synoptic analysis of this thesis: an analysis of review forms found in the entire Mishnah and Tosefta.

CHAPTER SEVEN

In chapter 7, I will describe the common characteristics of the Mishnaic and Toseftan literary constructs of the SAGES and how the Toseftan review form's use of retrospective analysis of SAGES disputes colors its literary construct of the SAGES. I will also offer an explanation of the development of the review form, including its lone example in the Mishnah's review of a non-SAGES dispute.

THE SAGES AS A LITERARY CONSTRUCT: AUTHORITY AND THE ROLE OF RATIONAL ANALYSIS

The widespread use of the term "the SAGES" in all literary works of the Tannaitic period points beyond the Mishnah and Tosefta to antecedent traditions with their oral repeaters, scribes, and redactors, and thus to the broader social network of sages. The redactors of the Mishnah and Tosefta inherited this term as a cultural artifact deeply embedded in traditions that had formed over at least several generations. They did not simply record these traditions about the SAGES; they sorted, compiled, selected, and supplemented what they received. Based on the research I have described in chapters 1 and 3 through 6, I will respond to the thesis question, "How do the Mishnah and Tosefta depict the authority of the SAGES as a group?"

Since I cannot determine to what extent the perspectives that are incorporated in the Mishnah and Tosefta line up with realities in the tannaitic network of sages, my response is restricted to examining the SAGES as a literary phenomenon. The presence of commonalities and

The Mishnaic and Toseftan literary construct of the SAGES have seven characteristics in common: (1) the SAGES always act as an authoritative body in halakhic disputes; (2) there are no accounts of how the SAGES as a group was formed on any occasion; (3) the SAGES are indeterminate as to composition and number; (4) the SAGES are always depicted speaking with one voice; (5) the SAGES relate flexibly to local practices and custom; (6) the SAGES sometimes make concessions to arguments by individual sages, and vice-versa; and (7) the SAGES are sometimes depicted as "losing" disputes in other ways.

The first common characteristic of the Mishnah's and Tosefta's SAGES is that they always act as an authoritative body in halakhic disputes; in fact, they are the only such

authoritative body. Another group, the priestly class, persisted into and past the Tannaitic period. Although there are priestly traditions, and the opinions of a few priests, incorporated in tannaitic texts, the priests did not participate in the halakhic process as a group. Local communities influenced halakhah, but they were not authoritative in the context of disputes (however, see comments on local practices and custom below).

The issue of the SAGES' authority is part and parcel of every dispute in which they are involved and is expressed first of all in rulings issued by the SAGES without dissent (Type 3A). This is one example:

Mishnah Shabbat 6:3

- A. "[On Shabbat,] a woman may not go out with a needle which has a hole, with a ring which has a seal, with a cochlae brooch, with a spice box, or with a vial of spikenard oil.
- B. "And if she went out [wearing any of them], she is liable to a sin offering," the words of R. Meir.
- C. But the SAGES declare [her] exempt [from a sin offering] in the case of a spice box and a vial of spikenard oil.

R. Meir's opinion is nullified, the dispute is closed, and the halakhah determined by the SAGES' ruling. This type of dispute constitutes the vast majority of SAGES' disputes (122 or 83% of the 147 disputes).

The presence of a small number of one or, rarely, two dissents from the SAGES' opinion (Type 3B) does not diminish the SAGES' air of authority. Here is an example.

Mishnah Pesachim 3:6

- A. "[When] the fourteenth [of Nisan] falls on the Sabbath—
- B. "They remove all [leaven from the house]
- C. before the Sabbath," the words of R. Meir
- D. But the SAGES say, "At its proper time [on the fourteenth, even if it falls on the Sabbath]."
- E. Rabbi Eleazar b. R. Sadoq says, "[Leaven which is in the status of] *terumah* [is to be removed] before the Sabbath, but that which is unconsecrated [is removed] at its proper time [on the Sabbath].

Taken by itself, the relative status of the SAGES' opinion and individual opinions in a single dispute may be unclear. However, in the context of the large majority of Type 3A disputes, the views of R. Meir and R. Eleazar b. R. Sadoq (which are mutually exclusive) stand out as isolated phenomena. As Hezser pointed out, the presence of a small number of dissenting opinions only seems to emphasize that the SAGES' represent the overwhelming majority of the social network of sages (Hezser 1997, 241). The recording of dissent does not diminish the authoritative status of the SAGES' ruling. Type 3B disputes account for 13 (or 9%) of the 147 disputes.

While activities of the social network of individual sages, their families, and others is also reflected in the Mishnah and Tosefta, the SAGES as a literary construct appear occasionally in non-dispute contexts and function exclusively as an authoritative body in those contexts as well.

Second, the SAGES as a group is indeterminate as to composition and number. In the one hundred and forty-seven SAGES disputes, there is no mention of the number of sages included in the group or how it was formed on any occasion; there are no accounts of their origins as a group. In the disputes of the Mishnah and Tosefta, there are no descriptions of how the SAGES formed on any occasion. When the Mishnah and Tosefta raise the curtain on SAGES disputes, the SAGES are already there, fully-formed. Thus, the pre-history of the SAGES is a total void. This absence of origins, combined with the absence of detail about their makeup, lends weight to the suggestion that the Mishnah's and Tosefta's SAGES are idealized groups. Their connection to actual groups of sages is unknown. Had they represented existing groups, one would expect some residual evidence of their makeup, origins, and other associations. As it is, there is no such evidence.

Third, the SAGES are indeterminate as to composition and number. It is difficult to avoid the impression that this lack of detail is intentional. The faceless SAGES are meant to embody a consensus of some sort and the very lack of detail about their makeup is part of the Mishnah's and Tosefta's intentional articulation of the SAGES as an authoritative body.

Fourth, the SAGES are always depicted speaking with one voice. This chorus-like univocality is a striking characteristic of the portrayal of the SAGES in the Mishnah and Tosefta. Since it is evident on its face that no group, even a small one, can think and speak with one voice in this manner, the univocality of the SAGES is arguably the strongest single indicator that the SAGES is a literary construct. This univocality is most evidently artificial where the SAGES are depicted as engaging in back-and-forth dispute with individual sages where they sometimes yield to the superior argumentation of individual sages and, in their turn, ask for similar concessions from those sages. There are no accounts of individual voices or internal discussion among the SAGES about how to proceed in a given dispute. There are also no instances of one or more included sages changing their mind and leaving the group. The SAGES' univocality limits both personality and the way the SAGES can be shown relating to others outside the context of disputes. Thus, there are few accounts of the SAGES' actions and relationships outside the setting of disputes where differing halakhic principles are brought into play.

Fifth, the SAGES are made to relate flexibly to local practices and custom. At times, reject it, but most often they accept, limit, or even expand it. Accounts of the SAGES interacting with local practices and customs show them in a somewhat different light than in the pure dispute. In these accounts, practices or customs existing in the time of the SAGES are halakhically normalized either by accepting them in some way or by nullifying them. For example, at M. Shabbat 6:6 and its parallel at T. Shabbat 5:11, the SAGES normalize the current practice of certain groups to wear veils, cloaks, or scarves on the Sabbath, declaring these practices permissible for everyone. Similar practices are normalized by the SAGES at M. Shabbat 6:9 and T. Shabbat 5:13.

In M. Pesachim 4:5, the SAGES accept the local practices of Judah and Galilee concerning whether, and up to what time, one may work on the day before Passover. However, at T. Shabbat 3:18 they make three exceptions: “Even in a place where it is said that they do not work on the eve of the Passover up to noon, three sorts of craftsmen may work: tailors, barbers, and laundrymen.” In M. Pesachim 4:8 and T. Pisha 3:19-22, three practices of the men of Jericho violate the SAGES’ norms. The Toseftan redaction seems to justify the Jerichoans practice of violating the Sabbath by feeding the poor in time of famine. Finally, at T. Ta’anit 1:13 the SAGES void a customary practice of two Galilean rabbis that clashes with a broader custom that is based on the holiness of Jerusalem and the Temple.

The SAGES relate flexibly to local custom and practice. At times, they accept or even expand it. At other times, they accept but limit it. At times, they reject it entirely. In these examples, the SAGES implicitly acknowledge the status of local custom and are not eager to overturn it. Thus, the SAGES negotiate the tensions between local customs, arising as they do for any number of reasons, and halakhic principles. Based on their rulings in the sample group, the SAGES viewed both custom and halakhah as necessarily flexible to some degree. Their relative status was determined in the context of specific situations rather than on a purely theoretical basis. For example, the wearing of scarves into the public domain on the Sabbath seems to be a halakhic violation of the prohibition against carrying, but the SAGES do not merely accept its practice by existing groups; they extend it to everyone. On the other hand, they liberalize local customs that limit work on the day before Passover; their motive is to ensure that the immediate needs of pilgrims coming to Jerusalem for the festival are met. For the SAGES, halakhah and the customs and needs of the people are not mutually exclusive.

Sixth, the SAGES sometimes make concessions to arguments by individual sages, and vice-versa. This common characteristic did not surface in the sample group; I discovered it when I did additional research in the full Mishnah and Tosefta during my work on chapter 6.

All of the Mishnaic accounts of concessions are unilateral: either the SAGES or an individual makes a concession to the other. The Tosefta also includes disputes where mutual concession takes place. While these present a deeper engagement of the parties with each other, it does not seem to impact the literary constructions of the SAGES in the two works

Seventh, the SAGES are sometimes depicted as “losing” disputes in other ways. In these disputes, the SAGES are shown conceding to the arguments of individual sages by literary devices rather than overt concession. At times, they are depicted as failing to make any response at all to a sage’s rejoinder. These are the miscellaneous Type 3C disputes found in the Mishnah and Tosefta. A Toseftan example concerns the SAGES and the men of Jericho (T. Shabbat 8:20), which I have already analyzed in detail. A Mishnaic example is found at M. Makkot 3:2 I.-N, where the SAGES do not respond to R. Simeon’s argument that even a single grain of untithed wheat makes one liable, leaving the impression that R. Simeon has won the dispute. Although I did not do a detailed analysis of all Mishnaic and Toseftan SAGES disputes to determine the precise number of this variety of dispute, a broad survey revealed that the numbers are modest.

What, then, is the difference between the way that the Mishnah and Tosefta construe the authority of the SAGES? To answer this question, I draw on three bodies of research: my analysis of the twelve SAGES parallels in Mishnah/Tosefta Seder Moed, an examination of all SAGES disputes in Mishnah/Tosefta Seder Moed, and a study of reviews in the full Mishnah and Tosefta. The primary factor that separates the Mishnaic and Toseftan literary construct of the SAGES is the Tosefta’s body of reviews of SAGES disputes. There are three such reviews in Tosefta Seder Moed and ten in the Tosefta as a whole. The Tosefta’s reviews of SAGES disputes color its literary construct of the SAGES. The broader significance of these reviews becomes apparent only as the eleven reviews of non- SAGES disputes in the Tosefta (compared with one in the entire Mishnah) are also taken into account.

The review form is made up of two parts: the original dispute and the review itself. The original dispute, a version of which is usually found in the Mishnah, may be quoted in full or in part. The ten reviews of SAGES disputes analyze an opinion of the SAGES and the opinion of one or more individual sages who are overruled in the original dispute. In each instance, the reviewer seeks to understand and ultimately to harmonize the two opinions. In order to accomplish this, he introduces one or more new halakhic considerations into the dispute as a framework within which to analyze it. As a result, the scope of both opinions is altered. The effect of this process is to limit the scope of the SAGES’ opinion, which had

previously been understood to apply to all circumstances, and to restore individual sage's opinion, which had been rejected, and give it scope within the wider framework created by the reviewer. Because reviews subject all opinions to rational analysis, they accord the SAGES' opinion no more and no less importance than that of individual sages.

By limiting the scope of the SAGES' opinion and diminishing its status vis-à-vis the opinion of individual sages, the Toseftan review undermines the *sui generis* authority of the SAGES and alters the literary construct of the SAGES. Their opinions are no longer final, as they are in the Mishnah's construct, but are vulnerable to retrospective analysis and reconfiguration at a later date. It was no longer impossible to revisit earlier, apparently closed, SAGES disputes, place them in a new framework, and alter the scope of opinions in order to increase harmony

To sum up, the Mishnah's and the Tosefta's literary construct of the SAGES is substantially the same. The difference lies not in the way they depict face-to-face disputes but in the way the Tosefta reviews earlier SAGES disputes. These reviews show, at the very least, that those who were responsible for the reviews and for their inclusion in the Tosefta no longer perceived the authority of the SAGES in the same way as their Mishnaic predecessors. I argue that this shift of perspective did not arise from a programmatic attempt to diminish the SAGES' real or imagined authority but from impetus to elevate the role of rational analysis.

The Development of the Review Form

The Mishnah's and Tosefta's literary constructs of the SAGES have much in common. This commonality may be explained by the common traditional context within which they were produced. The two constructs are made to differ most conspicuously by the Tosefta's ten reviews of SAGES disputes. In order to address this difference, I will offer an account that relates the full body of twenty-one Toseftan reviews, as well as the single Mishnaic review, to their third century milieu, focusing on the Tosefta's expanded the use of rational analysis.

The Mishnah does not offer an explicit explanation of its purpose as a work. This lack of self-reflective activity is characteristic of third century rabbinic works. The redactors of the Mishnah do not explain why they included some traditional material and chose not to include the rest. Likewise, the redactors of the halakhic midrash collections do not explicitly say how they viewed the Mishnah or their reasons for not distinguishing between Mishnaic and Toseftan material in any way. The sages and redactors of the Tosefta also did not record a

justification for their work, express their views of the Mishnah, or explain why they used the review form as they did.

This lack of self-reflective material in third century works stands in stark contrast to the traditional and academic assertions, especially concerning the Mishnah, that would be made in the centuries to follow and up to the present day. First and foremost is the common assertion that the Mishnah was consciously redacted to be an authoritative expression of the Oral Torah that had been handed down faithfully from Sinai. Along these lines, Fraade observed, “Although the designations of torah *shebikhtav* (Torah by writing) and *torah sheb'al peh* (Torah by mouth) have not yet become standard [in the Tannaitic period], other designations—especially the more performative distinction between *miqra'* (that which is read/recited) and *mishnah* (that which is taught/repeated)—denote much the same idea” (1999, 37). In other words, *mishnah* refers, in this context, to the entirety of the unwritten tradition (halakhah and aggadah); there is no claim that the work “the Mishnah” is the authoritative expression of the unwritten tradition or even of the halakhic tradition. We cannot assert that the Mishnah’s redactors intended to produce an authoritative work simply because it has characteristics that enabled it later to be considered authoritative.

I begin my account with the suggestion that the redactors of the Mishnah did not fashion it as a self-contained, self-referential, and authoritative work; it was an expression of tannaitic oral tradition that was intended to be understood by fellow sages only with reference to that tradition. This is a suggestion, a heuristic device rather than an assertion, because I cannot prove a negative. On the other hand, to assert that the Mishnah included and excluded traditions on the basis of their validity and authority (or the lack of these characteristics) requires some sort of internal or contemporaneous evidence. In my view, there is no such evidence. It is also not demanded by the Mishnah itself, which records dissenting opinions and includes large numbers of unresolved disputes that often include conflicting opinions of uncertain individual authority. It is difficult to understand these inclusions on the basis of validity or authority. While Mishnaic disputes are clearly fashioned to present halakhic discourse in distinct ways, there is no overall pattern I am aware of, no pervasive pattern of Mishnaic inclusion and exclusion on the basis of validity or authority that distinguishes it from the Tosefta (that is, apart from reviews of SAGES disputes that I have identified in the Tosefta if, indeed, they existed at the time of the Mishnah’s definitive redaction). I suggest that the Mishnaic redaction is distinct in the way it *fashions* and *expresses* the oral tradition rather than in the way it purportedly evaluates the validity or authority of individual traditions.

In chapter 1, I considered the evidence of the halakhic midrash collections for the relationship between the Mishnah and Tosefta. Although their redactors drew a significant amount of material drawn from the Mishnah and Tosefta (or proto-Tosefta), they did not indicate the sources from which they drew. They used citation formulas, such as *מכאן אמרו*, to lend authority to their midrashic interpretations without regard for the origins as Mishnaic or Toseftan material. If the Mishnah was already seen as a particularly authoritative work at the time of the redaction of the halakhic midrashim, it is puzzling, perhaps inexplicable, that their redactors did not distinguish Mishnaic material from non-Mishnaic. By citing unidentified Mishnaic and Toseftan texts to support their interpretations, the redactors seem to treat the cited texts as authoritative not because they were associated with the Mishnah or the Tosefta but because they were part of the larger body of authoritative tradition. The redactors were blind to the Mishnah as a uniquely authoritative source and to purported criteria for inclusion and exclusion that are commonly attributed to the Mishnah. Thus, assertions that the Mishnah was viewed as a uniquely authoritative work soon after it was first circulated do not account for the evidence of the halakhic midrash collections.

If the redactors of the Mishnah had arrogated to themselves the right to assess the entire tradition in order to produce a work that would not merely summarize but also largely substitute for it, why is there no record of any overt response to their actions? If claims of special authority were attached to the Mishnah, one would expect to find some evidence of third century acceptance of, or reaction against, it such as later took place upon the publication of Maimonides' *Mishneh Torah*. Instead, the halakhic midrash collections and the Tosefta stand as witnesses to the network's ongoing commitment to the authority of the full body of tradition as they continued to discuss, shape, and transmit that tradition entirely without reference to the Mishnah as a source of unique authority.

In light of these considerations, it is likely that the redactors of the Mishnah did not attribute a higher status to material they included and a lower status, much less invalidity or irrelevance, to excluded material. The Mishnah, circulated orally or in writing, was meant to function only in the context of the full body of tradition that was known to the social network of sages.

As it turned out, the Mishnah, as a cogent body of virtually fixed traditions, became a convenient reference manual. The disproportionate amount of Mishnaic material in the halakhic midrash collections can be attributed to this factor rather than to the Mishnah's supposedly higher level of authority. Nevertheless, the halakhic midrash collections and the

Tosefta did not know of the Mishnah's future elevated status at the times of their definitive redactions.

How, then, did redactors of the Mishnah view their work? I suggest that they viewed it as what may be termed a redactional performance of the tradition, akin to oral performances of individual traditions. Like oral performances, which were fluid and differed from one another in various ways, a redactional performance would have not have been intended to limit or define the tradition, but rather to express it performatively. The Mishnah is a redactional performance based on thousands of performances of individual traditions. Just as performances of individual traditions were considered part of the broader tradition, so was the Mishnah. I suggest that the redactors of the Mishnah produced such a redactional performance that expressed its broader tradition within the bounds of acceptable variation and was therefore accepted as expression of that tradition.

In its redactional performance, the Mishnah construes the SAGES, a group whose origins and composition are not described, as an authoritative body that speaks with one voice in halakhic disputes. They sometimes make concessions to arguments by individual sages, and vice-versa, and relate flexibly to local practices and custom. In the Mishnah, the opinions of the SAGES are never reviewed by later named sages. The one example of review language (נראה דברי רבי פלוני) in the Mishnah shows that the review form was in use, but addresses only the opinions of individual sages. The Mishnah's literary construct of the SAGES was accepted as part of its redactional performance. It is not important, for this account, how fully this construct already existed in the tradition. What is important is that it appeared textually for the first time in the early third century Mishnah and elicited no objection in later third century works.

If this assessment is accurate, the Mishnah's greatest initial achievement was the successful circulation of a new genre of traditional performance—one that may have been pioneered by the proto-Mishnah and proto-Tosefta—that paved the way for the halakhic midrash collections and the Tosefta, which were also redactional performances of the tradition. Taken together, third century rabbinic works can thus be viewed as a collection of two varieties of redactional performance: Mishnaic (the Mishnah and Tosefta) and midrashic (the halakhic midrash collections).

Working a few decades after the Mishnah's definitive redaction, the redactors of the Tosefta produced a much larger and more inclusive redactional performance of the tradition that had been passed down to them. Like the Mishnah, the Tosefta construes the SAGES as an authoritative body that speaks with one voice in halakhic disputes. They sometimes make

concessions to arguments by individual sages, and vice-versa, and relate flexibly to local practices and custom. The Tosefta also includes a ten of reviews of earlier SAGES disputes and eleven of non-SAGES disputes. These reviews retrospectively subject all opinions, including the SAGES', to rational analysis. The SAGES would remain an authoritative body in their Toseftan construct. Yet, for the first time in writing, the words of the SAGES were not accepted at face value but seen as being in need of clarification vis-à-vis the words of individual, named sages.

When the Tosefta's redactors expanded the use of rational analysis in this way, they incidentally changed the literary construct of the SAGES. Toseftan reviews of SAGES disputes are the first recorded examples of a process that transforms the SAGES as a literary construct from an active subject ("the SAGES say . . .") to a passive object ("the words of the SAGES seem [reasonable] here but R. Judah's there"). In these reviews, the SAGES are diminished to the status of an individual sage. The significance of this innovation becomes evident when the Toseftan reviews are read closely as a body and compared with any other body of SAGES disputes. Although the number reviews is modest for a work the size of the Tosefta, the large gap between the numbers in the Mishnah and Tosefta (and their absence in the halakhic midrash collections) indicates that we are seeing something unprecedented in the Tosefta.

Meanwhile, it is possible to make some basic observations about the review form and the Mishnah. The review form existed when the Mishnah was definitively redacted, if not a generation earlier,¹¹⁴ but its redactors made almost no use of it. Either there were very few reviews in existence then or the Mishnah's redactors chose not to include a representative portion of them. They also did not choose to author and include new reviews. As a result, the one review in the Mishnah appears to be anomalous.

Likewise, certain observations can be made about the review form in the Tosefta. The review form had existed for several decades when the Tosefta was definitively redacted in the second half of the third century. It is not possible to tell whether use of the form had increased in the interim and/or whether the Tosefta's redactors generated some of their own. In any case, the redactors employed the review form twenty-one times, ten of which involve SAGES disputes. Since the review form is applied to disputes generally—not only to SAGES disputes—it seems that the intent of the redactors was to expand, or recording an existing

¹¹⁴ The Mishnah was redacted in the fifth tannaitic generation. The Tosefta includes several reviews attributed to fourth century sages. If those attributions are correct, the review form existed in the fourth generation.

expansion of, the use of rational analysis in the halakhic process rather than to compromise the SAGES' authority.

The Tosefta's reviews represent a process that could eventually subject the entire tradition to review. Although this shift was an innovation, it was based on rational elements that were already present in the tradition, as evidenced most clearly by the rational analysis in the Mishnah's anonymous passages and disputes between individual sages, where the authority of the SAGES does not come into play. It is also evident in the variety of Type 3C disputes in which the SAGES or individual sages make concessions on the basis of rational argumentation.

The sixteen Toseftan reviews attributed to Rabbi (one of which also appears in the Mishnah) form the core of the twenty-one reviews in the Tosefta. The remainder is conducted by three fourth-generation tannaim (R. Yose, R. Shimon, and R. Hanina ben Gamaliel). If the attributions to fourth generation tannaim could be verified, we would know that the review form originated then, a generation before Rabbi. As it is, the Mishnaic review attributed to Rabbi shows that it originated no later than the fifth tannaitic generation, during which the Mishnah received its final redaction.

If the Toseftan reviews attributed to Rabbi were actually authored by him, the inclusion of only one review in the Mishnah is of great interest. Why were others not included? On the other hand, it seems unlikely that the Toseftan reviews (including those attributed to Rabbi) are pure inventions; unless invented opinions or disputes were in tune with the larger tradition, the redactors could not have expected them to be received as valid. If the reviews were not authored by the sages they are attributed to, it seems likely that they were composed over time, perhaps using Rabbi's lone Mishnaic review as a model, by sages who wished to expand the role of rational analysis. If this is so, the freshly authored reviews were accepted by the sages who transmitted the larger tradition before they appeared in the Tosefta and attributions were attached during the process of transmission.

We have no direct evidence to support any of these scenarios, but I would like to offer an explanation that fits the first—that Rabbi composed the reviews attributed to him, as did R. Yose, R. Shimon, and R. Hanina ben Gamaliel. (I do not preclude the possibility that some attributions were changed in the process of transmission). As we have seen, Rabbi's reviews in the Tosefta are sixteen of the twenty-one reviews that expand the role of rational analysis beyond what is found in the Mishnah, save Rabbi's one review there. The thought of using such reviews, including reviews of SAGES disputes, more systematically may well have arisen during Rabbi's extensive analytical work that was undertaken during the Mishnah's

redaction. However, he was not confident that the social network of sages in his day was ready to accept such an expanded role for rational analysis and the way it might reflect negatively on the authority of actual sages. He decided to include one review, not of a SAGES dispute but of a dispute between two sages, as a low-impact sample of his work. Perhaps he repeated the remainder privately in oral form and they were eventually put in general circulation.

If Rabbi's reviews were in general circulation, the Tosefta's redactors knew that, in their time, his approach was acceptable to the social network of sages. They inserted the reviews, or a selection of them, along with a few others known to them, in their redaction. Thus, the Tosefta became the first textual evidence of a broader use of rational analysis that also colored the literary construct of the SAGES.

If my explanation is correct, at least in its broad outlines, the expansion of rational analysis was Rabbi's program. If reviews were generally accepted by the time of the Tosefta's definitive redaction, their inclusion in the Tosefta can be explained as part of the Tosefta's redactional performance of the tradition as it existed in their time.

I suggest that these phenomena are best explained by an account that does not assign unique authority to the Mishnah. Most Toseftan reviews assess and reconfigure Mishnaic disputes and alter the scope of their constituent opinions. Most dramatically, ten of their reviews diminish the scope of the SAGES' opinion they review. If the Mishnah were considered uniquely authoritative at the time of the Tosefta's definitive redaction, it is unclear how to explain the publication of Toseftan reviews that undermine the Mishnaic redaction without producing a negative reaction.

When the Tosefta was redacted in the second half of the third century C.E., its redactors' familiarity with the Mishnah did not constrain the way they selected, shaped, and supplemented the traditions available to them because they had no sense that the Mishnah was, or would become, the normative expression of the tradition. The tradition had always been characterized by fluid oral performance and varying opinions and dissents, so the redactors of the Tosefta did not feel the impulse or need to make their work consistent with the Mishnah or to respond to it. This in line with Jaffee's claim that rabbinic works are "anthologies whose compilers did not hesitate to alter the form and content of the anthologized materials, for the materials being gathered were never perceived as 'works' in their own right. [These anthologies] are collections of materials . . . known widely from antecedent tradition (whether oral or written one often cannot judge)" (1999a, 22-23). As Jaffee also pointed out, "the anthological compilation points attention away from itself to a

world of speech in which there are no documents, but much discourse” (ibid, 26). The concern of the Tosefta’s redactors would have been to express or perform the tradition, pointing to the larger tradition rather than attempting to agree with or respond to the Mishnah. This resulted in a redactional performance of the tradition that differed from the Mishnah’s in a number of minor ways and, notably, in an expanded use of rational analysis with implications for the literary construct of the SAGES.

If Fisch’s characterization of the Bavli is correct¹¹⁵—that it is an anti-traditionalist project that subjected the entire tradition to the rationality of the talmudic rabbis—the reviews conducted by Rabbi and others in the Tosefta prefigured the more thorough analysis of the tradition that was later undertaken by the sages and redactors of the Bavli. In this limited sense, Jacob Neusner’s characterization of the Tosefta as “the initial Talmud” (1992, xi) is apt. The Toseftan reviews, anticipated by a lone review in the Mishnah, were beginning to assign an expanded role to rational analysis that the SAGES’ authoritative opinion could previously short-circuit. Although it is not possible to draw firm conclusions about the actual conduct of sages in the social network from the Mishnaic or Toseftan literary constructs of the SAGES, their literary conduct gives us a picture of how the sages and redactors of these works perceived or desired rabbinic authority to function. The Tosefta’s redactors perceived *and* desired an expanded role for rational analysis. Although that role was not as obvious in the Tosefta as it would later be in the Bavli, the Tosefta’s reviews of prior disputes indicate that the sages generally and/or the Tosefta’s redactors construed the halakhic process somewhat differently than those who were responsible for the Mishnah and the halakhic midrash collections. As a by-product of this innovation, the Tosefta’s reviews of SAGES disputes disregarded the previously authoritative status of SAGES’ opinions and altered the literary construct of the SAGES. When the SAGES of the Mishnah and Tosefta make concessions, they do so as active agents. They respond to the arguments of individual sages and, when convinced of their rationality, concede. In the Toseftan reviews of SAGES disputes, the SAGES have lost their voice. They have become a thing of the past, not only a literary construct but also a literary artifact, their opinions is altered without their consent.

¹¹⁵ See pages 57-58 and 94-95 of this thesis.

Suggestions for Further Research

While work on the differences between the two Talmudim is now proceeding, this thesis is the first attempt I am aware of to explore characteristic differences between the Mishnah and Tosefta in an area as central to the rabbinic enterprise as the SAGES and their authority. It is also the first to highlight the importance of Toseftan reviews in the expansion of the role of rational analysis in the third century C.E.

I suggest four avenues for further research. First, my work in Seder Moed should be extended to the entire Mishnah and Tosefta, including analysis of the full body of miscellaneous Type 3C disputes. I suggest that the presence of reviews and concessions in the Mishnah and Tosefta remained unnoticed until now because of their modest numbers. Further research may surface unique literary forms and precise language that have gone unnoticed.

Second, I suggest work in the literary constructs of individual sages and their place in the network of sages. The enterprise of rabbinic biography has been largely discredited, but the sayings of individual sages are often marked by an internal consistency that is characteristic of literary constructs. This is an area in which traditional scholarship has flourished, albeit not with literary presuppositions.

Third, I suggest that the milieu of third century C.E. rabbinic Judaism may be a fruitful field for scholars who are willing to remain agnostic about the veracity of later claims made for it. I cannot say how well my explanation of observable phenomena (and the absence of evidence for commonly held assumptions) will fare in the light of such research. However, I do feel quite strongly that my approach—refusing to assume facts not in evidence—is the only way to make progress in that research.

Finally, the role assigned to Rabbi in the Tosefta bears further investigation. In addition to the sixteen reviews attributed to him, are there other distinct modes of discourse in his name? Is there a consistent literary construct of “Rabbi” in the Tosefta and how may it differ from the “Rabbi” of the Mishnah?

APPENDIX 1

ALL SAGES DISPUTES IN MISHNAH/TOSEFTA SEDER MOED

(Key: ∞• indicates a SAGES parallel; the number of the parallel used in chapters 4 and 5, follows in parenthesis.)

Shabbat

1. Mishnah Shabbat 2:1—A
2. Mishnah Shabbat 2:2—B
3. Mishnah Shabbat 3:4—A
4. Mishnah Shabbat 4:2—A
5. Mishnah Shabbat 5:4 —A
6. Mishnah Shabbat 6:3—A ∞• Tosefta Shabbat 4:6 —A (1)
7. Mishnah Shabbat 6:4—A
8. Mishnah Shabbat 6:5—A
9. Mishnah Shabbat 6:6—A ∞• Tosefta Shabbat 5: 11 A (2)
10. Mishnah Shabbat 6:9—A
11. Mishnah Shabbat 6:10—A
12. Mishnah Shabbat 12. 8.4-5—A ∞• Tosefta Shabbat 8: 20—C (3)
13. Mishnah Shabbat 10:6—A
14. Mishnah Shabbat 11:1—A
15. Mishnah Shabbat 12:5 —A
16. Mishnah Shabbat 12:6—A
17. Mishnah Shabbat 13:1—A
18. Mishnah Shabbat 13:5 —B
19. Mishnah Shabbat 17:7—A
20. Mishnah Shabbat 20:1—A

- 21. Mishnah Shabbat 20:4—A ↔ Tosefta Shabbat 16: 4—A (4)
- 22. Mishnah Shabbat 21:3—A
- 23. Mishnah Shabbat 22:3—A
- T1. Tosefta Shabbat 4:6—A
- T2. Tosefta Shabbat 4:11—A
- T3. Tosefta Shabbat 5:11 A
- T4. Tosefta Shabbat 5:12—A
- T5. Tosefta Shabbat 5:13—A
- T6. Tosefta Shabbat 6:14—A
- T7. Tosefta Shabbat 7:14—A
- T8. Tosefta Shabbat 8:20—C
- T9. Tosefta Shabbat 9:13—A
- T10. Tosefta Shabbat 10:19—A
- T11. Tosefta Shabbat 11:15—A
- T12. Tosefta Shabbat 11:17—A
- T13. Tosefta Shabbat 12:14—C
- T14. Tosefta Shabbat 13:8—A
- T15. Tosefta Shabbat 14:11—A
- T16. Tosefta Shabbat 16:4—A
- T17. Tosefta Shabbat 16:11—A

Eruvin

- 24. Mishnah Eruvin 1:10—A
- 25. Mishnah Eruvin 1:10—A
- 26. Mishnah Eruvin 2:4—A
- 27. Mishnah Eruvin 3:6—B ↔ Tosefta Eruvin 4:1, 2—C (5)
- 28. Mishnah Eruvin 3:7—A
- 29. Mishnah Eruvin 3:8—A

- 30. Mishnah Eruvin 3:9—A
- 31. Mishnah Eruvin 4:5—A
- 32. Mishnah Eruvin 4:8—A
- 33. Mishnah Eruvin 5:2—A
- 34. Mishnah Eruvin 5:5—A
- 35. Mishnah Eruvin 6:9—A ◊• Tosefta Eruvin 5: 25—A (6)
- 36. Mishnah Eruvin 7:11—B
- 37. Mishnah Eruvin 8:10—A
- 38. Mishnah Eruvin 9:1—A ◊• Tosefta Eruvin 7:13, 14—C (7)
- 39. Mishnah Eruvin 9:2—A
- 40. Mishnah Eruvin 9:4—A
- 41. Mishnah Eruvin 10:15—A
- T18. Tosefta Eruvin 2:13—A
- T19. Tosefta Eruvin 2:15—B
- 20. Tosefta Eruvin 4:1, 2—C
- T21. Tosefta Eruvin 4:12—A
- T22. Tosefta Eruvin 4:14—A
- T23. Tosefta Eruvin 5:5—A
- T24. Tosefta Eruvin 5.25—A
- T25. Tosefta Eruvin 5:27—A
- T26. Tosefta Eruvin 6:6—A
- T27. Tosefta Eruvin 6:18—A
- T28. Tosefta Eruvin 7:1—A
- T29. Tosefta Eruvin 7:8—A
- T30. Tosefta Eruvin 7:13-14—C

Pesachim | Pisha

- 42. Mishnah Pesachim 1:3—A

- 43. Mishnah Pesachim 2:1—A
- 44. Mishnah Pesachim 3:4—B
- 45. Mishnah Pesachim 3:5—A
- 46. Mishnah Pesachim 3:6—B ↔ Tosefta Pischa 3:9-11—C (8)
- 47. Mishnah Pesachim 3:8—A
- 48. Mishnah Pesachim 4:5—A
- 49. Mishnah Pesachim 4:6—B ↔ Tosefta Pischa 3:18—B (9)
- 50. Mishnah Pesachim 4:8—A ↔ Tosefta Pischa 3:19-22—C (10)
- T31. Tosefta Pischa 1:5—B
- T32. Tosefta Pischa 3:8—A
- T33. Tosefta Pischa 3:9-11—C
- T34. Tosefta Pischa 3:18—B
- T35. Tosefta Pischa 3:19-22—C
- T36. Tosefta Pischa 4:12—A
- T37. Tosefta Pischa 9:10—A
- T38. Tosefta Pischa 9:12—A
- 51. Mishnah Pesachim 5:8—A

Shekalim

- 52. Mishnah Shekalim 1:7—A
- 53. Mishnah Shekalim 6:5—A
- T39. Tosefta Shekalim 1:8—A
- T40. Tosefta Shekalim 1:10—A
- T41. Tosefta Shekalim 2:2—A
- T42. Tosefta Shekalim 3:4—A

Yoma | Kippurim

- 53. Mishnah Yoma 1:6—A (This indicates the SAGES' or the sages' authority, but is not in a dispute or conflict situation.)

- 54. Mishnah-Yoma 3:7—A
- 55. Mishnah-Yoma 8:1—A
- T43. Tosefta Kippurim 2:1—A
- T44. Tosefta Kippurim 3:2—A
- T45. Tosefta Kippurim 3:14—A
- T46. Tosefta Kippurim -3:15—A
- T47. Tosefta Kippurim 4:14—A

Sukkah

- 56. Mishnah Sukkah 1:11—A
- 57. Mishnah Sukkah 2:6—A
- 58. Mishnah Sukkah 3:13—A
- T48. Tosefta Sukkah 1:7—A
- T49. Tosefta Sukkah 1:8 A
- T50. Tosefta Sukkah 1:13—B
- T51. Tosefta Sukkah 2:2—A
- T52. Tosefta Sukkah 3:16—A
- T53. Tosefta Sukkah 4:14—A

Betzah | Yom Tov

- 59. Mishnah Betzah 2:7—A
- 60. Mishnah Betzah 2:8—A
- 61. Mishnah Betzah 3:6—A ↔ Tosefta Yom Tov 3:5—A (11)
- 62. Mishnah Betzah 3:8—A ↔ Tosefta Yom Tov 3:8—A (12)
- 63. Mishnah Betzah 4:6—A ↔ Tosefta Yom Tov 3:18 —B (13)
- 64. Mishnah Betzah 4:7—A
- T54. Tosefta Yom Tov 2:1—A
- T55. Tosefta Yom Tov 2:9—A
- T56. Tosefta Yom Tov 3:5—A

T57. Tosefta Yom Tov 3:8—A

T58. Tosefta Yom Tov 3:12—A

T59. Tosefta Yom Tov 3:18 —B

T60. Tosefta Yom Tov 4:4—A

Rosh Hashanah

T61. Tosefta Rosh Hashanah 2:3—A

T62. Tosefta Rosh Hashanah 2:18—C

Ta'anit | Ta'aniyot

65. Mishnah Ta'anit 2:5—A ↔ Tosefta Ta'aniyot 1:11-13—A (14)

T63. Tosefta Ta'aniyot 1:1—C

T64. Tosefta Ta'aniyot 1:4 —C

T65. Tosefta Ta'aniyot 1:11-13—A

66. Mishnah Ta'anit 2:6—A

67. Mishnah Ta'anit 3:7—A

68. Mishnah Ta'anit 4:7—A

T66. Mishnah Ta'anit 3:1—A

T67. Mishnah Ta'anit 3:4—A

Megilla

69. Mishnah Megilla 3:2 —B

Moed Qatan

70. Mishnah Moed Qatan 1:2—A

71. Mishnah Moed Qatan 1:3—A

72. Mishnah Moed Qatan 1:4—A

73. Mishnah Moed Qatan 1:5—A

74. Mishnah Moed Qatan 3:6—A

T68. Tosefta Moed Qatan 1:1—C

T69. Tosefta Moed Qatan 1:3—C

T70. Tosefta Moed Qatan 2:2—C

Hagigah

75. Mishnah Hagigah 3:7—A

76. Mishnah Hagigah 3:8—A

T71. Tosefta Hagigah 1:1—A

APPENDIX 2

REVIEWS OF SAGES AND NON-SAGES DISPUTES IN THE TOSEFTA AND MISHNAH

SAGES Disputes—Tosefta

Demai 1:9

Sheviit 8:3

Maaser Sheni 4:5 and 4:6

Shabbat 8:20

Moed Qatan 1:3 and 2:2

Hullin 8:6

Niddah 4:5

Tevul Yom 2:12

Non-SAGES Disputes—Tosefta

Shabbat 8:20

Moed Qatan 1:8

Sotah 15:1

Qiddushin 4:7

Hullin 2:5

Arakhin 4:33

Temurah 1:8

Negaim 1:8

Niddah 3:4 and 9:13

Makhshirin 3:14

Non-SAGES Disputes—Mishnah

Arakhin 8:5

APPENDIX 3

THE USE OF CONCESSION LANGUAGE IN THE TOSEFTA AND MISHNAH

Both SAGES and a Sage Concede—Tosefta

Maaserot 2:2 and 2:3

Maaser Sheni 4:12

Eruvin 4:1, 2

Bava Qamma 2:4

Zevahim 8:15

Temurah 3:4

Meilah 2:1

Tohorot 7:14

A Sage Concedes—Tosefta

Shabbat 10:19 and 11:17

Yevamot 7:3

Sanhedrin 11:1

Kelim Bava Qamma 4:6

Kelim Bava Metziah 4:12

Tohorot 8:7

A Sage Concedes—Mishnah

Eruvin 4:5

Bava Batra 4:2 and 4:9

Hullin 3:5 and 9:4

Keritot 5:2 and 5:3

Ohalot 2:7 and 3:7

Negaim 4:6

Niddah 10:5

The SAGES Concede—Tosefta

Maaserot 3:14

Shabbat 12:14

Succah 1:8

Beitzah 3:12

Yevamot 11:4 and 13:5

Ketubot 7:10

Nedarim 1:2

Bava Batra 5:2

Makkot 1:7

Kelim Bava Qamma 3:2

Kelim Bava Metzia 5:11 and 10:2

Ahilot 7:10

Tohorot 6:8, 6:9, and 9:9

Makhshirin 2:3

The SAGES Concede—Mishnah

Peah 3:2

Nedarim 9:1

Bava Qamma 6:5

Bava Batra 5:9

Eduyot 3:9

Menahot 2:5

Kelim 12:6

Niddah 2:3

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