

**Law, Authority, and Interpretation in the Ancient World:
The Origin of Legal Obligation in Early Judaism**

by

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Abstract

This study draws from legal theory to help identify a development in the authority of written law that took place in early Judaism. Since the discovery of the so-called ‘Code’ of Hammurabi, Assyriologists generally agree that the ancient Near Eastern law collections did not function as binding law. The tens of thousands of legal records preserved indicate that the practice of law operated independently from the written codes. Consequently, scholars have been grappling with the question of when written law came to be treated as legally binding. Rather than starting with the question of when law became binding, however, this study begins by asking the question of what it means for law to be binding. Furthermore, drawing from legal theory, it develops a method for identifying instances in which legal texts were treated as binding by ancient interpreters.

This study claims that when a written directive is treated as law, it produces a unique normative effect within its addressees. This normative effect can be identified by the manner in which the legal text is interpreted; when a text is being treated as binding law, its interpreters will treat it in a unique and identifiable way. Drawing from Joseph Raz’s Preemption Thesis, and Lon Fuller’s inner morality of the law, this study develops seven criteria for determining when a text

is being treated as legally binding by an ancient interpreter. The bulk of this study applies these criteria to four instances of legal interpretation in early Jewish sources: 1) the Temple Scroll's interpretation of the Torah's Day of Atonement laws; 2) The Samaritan Pentateuch's interpretive rewriting of a series of laws from the Pentateuch, particularly the goring ox laws of Exodus 21:28–37; 3) the interpretive reformulations of the Qumran penal codes from the Dead Sea scrolls' rule texts; 4) the depiction of Torah-obedience in Ezra 9–10, Nehemiah 8:13–18, and Nehemiah 10.

In the end, this study concludes that the scribes responsible for the interpretations of the Torah in the Temple Scroll and the Samaritan Pentateuch viewed the Torah's laws as a source of binding obligation. By contrast, the scribes responsible for the changes to the Qumran penal codes did not view the rule texts as binding law. Finally, although the community depicted in the Ezra-Nehemiah Torah-obedience narratives viewed the Torah as legally binding, they did not interpret it as such. Rather, they relied on the expert in the law to make Torah declarations, rather than relying on text-interpretive consultation of the text. While these conclusions do not fully determine when written law came to be viewed as legally binding, they provide an important first step, and lay the methodological foundation for future study.

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INTRODUCTION

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. . . . Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term “interpretation” to the substitution of one expression of the rule for another.

Ludwig Wittgenstein, *Philosophical Investigations*, 1953, 201

Lawyers lean heavily on the connected concepts of legal right and legal obligation. We say that someone has a legal right or duty, and we take that statement as a sound basis for making claims and demands. . . . But our understanding of these concepts is remarkably fragile, and we fall into trouble when we try to say what legal rights and obligations are. We say glibly that whether someone has a legal obligation is determined by applying “the law” to the particular facts of his case, but this is not a helpful answer, because we have the same difficulties with the concept of law. . . . Why do we call what “the law” says a matter of legal “obligation”? Is “obligation” here just a term of art, meaning only “what the law says”?

Ronald Dworkin, “The Model of Rules,” 1967:14.

I. LEGAL OBLIGATION AND THE ANCIENT NEAR EASTERN LAW ‘CODES’

Within 40 years of the discovery of the great ‘Code’ of Hammurabi in 1902, Assyriologists began to notice a peculiarity when they compared it with the tens of thousands of legal records preserved from Mesopotamia: not a single recorded judicial decision cites or mentions the Laws of Hammurabi, even though it was highly venerated and well-known throughout Mesopotamia for nearly a millennium,¹ and many legal records deal with the same subject matter as its laws.² This observation has produced much scholarly inquiry

¹ Victor Avigdor Hurowitz, “Hammurabi in Mesopotamian Tradition,” in *An Experienced Scribe Who Neglects Nothing”: Ancient Near Eastern Studies in Honor of Jacob Klein* (ed. Jacob Klein and Yitzhak Sefati; Bethesda, MD: CDL Press, 2005), 497–532.

² For early observations on this, see Paul Koschaker, “Quellenkritische Untersuchungen zu den ‘altassyrischen Gesetzen,’” *Mitteilungen der Vorderasiatisch-Ägyptischen Gesellschaft* 26 (1921):16–17; B. Landsberger, “Die Babylonischen Termini für Gesetz und Recht,” in *Symbolae ad iura orientis antiqui pertinentes Paulo Koschaker dedicatae* (ed. Johannes Friedrich et al.; Studia et documenta ad iura Orientis

among Assyriologists, Bible scholars, and legal historians.³ Two questions are typically asked: 1) If the law collections from the ancient Near East were not meant to be binding upon judicial decisions, why were they written?;⁴ 2) When in the history of jurisprudence did written law come to be viewed as a source of binding obligation upon its subjects and adjudicators?

The latter of these questions will be the subject of this study. There is little doubt that the Torah was treated as binding law by the tannaitic sages,⁵ or that the Twelve Tables was considered binding by Roman jurists,⁶ or that the laws of Draco and Solon were considered binding law in 5th century Athens.⁷ There was clearly something different about the practice

antiqui pertinentia 2; Leiden: Brill, 1939), 221–22; and Godfrey Rolles Driver and John Charles Miles, *The Babylonian Laws* (Ancient Codes and Laws of the Near East.; Oxford: Clarendon, 1952), 53. They noted that “There is not a single case in the thousands of legal documents and reports which have been preserved in which reference is made to the wording of the text of the Laws [of Hammurabi]; indeed, neither judges nor private persons in their documents seem to have regarded it as verbally binding.” Similarly, Mendenhall notes: “It seems clear that the judges of ancient times had neither the custom nor the techniques for arriving at a decision by means of interpreting and applying an authoritative written lawcode.” See George E. Mendenhall, “Ancient Oriental and Biblical Law,” *BA* 17 (1954):32.

³ I will engage the Bible scholars and Assyriologists who have addressed this problem in the next chapter, mainly Raymond Westbrook and Sophie LaFont (Assyriologists), and Michael LeFebvre, and Anne Fitzpatrick-McKinley (Bible scholars). The legal historians who addressed this problem were part of a German tradition that worked in the first half of the last century. For a list, see Sophie LaFont, “Introduction,” in *Ex Oriente Lex: Near Eastern Influences on Ancient Greek and Roman Law* (ed. Kurt A. Raaflaub and Deborah Lyons; Baltimore: Johns Hopkins University Press, 2015), xv–xvi.

⁴ For an introduction to the Mesopotamian legal collections, see Martha T. Roth et al., *Law Collections from Mesopotamia and Asia Minor* (SBLWAW 6; Atlanta: Scholars, 1995). There are six main texts, two Sumerian collections (the Laws of Ur-Namma [LU] and the Laws of Lipit-Ishtar [LL]), three Babylonian collections (the Laws of Eshnunna [LE], the Laws of Hammurabi [LH], and the Neo-Babylonian Laws [LNB]), and one Assyrian Collection (The Middle Assyrian Laws [MAL]). In addition to these Mesopotamian collections, one Hittite collection has survived (HL). By far the most significant of these collections is LH. For a survey of the widespread dissemination of LH, see Bernard M. Levinson, “Is the Covenant Code an Exilic Composition? A Response to John Van Seters,” in *In Search of Pre-Exilic Israel* (ed. David Reimer; New York: T & T Clark, 2004), 292–94.

⁵ This is most obvious from the famous statement from the Mishnah: “The absolution of vows hovers in the air, for it has nothing [in the Torah] upon which to depend. The laws of the Sabbath, festal offerings, and sacrifice— lo, they are like mountains hanging by a string, for they have little Scripture for many laws” (m.*Hag* 1:8). The fact that the tannaitic sages felt uncomfortable with the lack of scriptural basis for their legal practices indicates an obligation to do only that which can be interpretively derived from the Torah. See Michal Bar-Asher Siegal, “Mountains Hanging by a Strand? Re-Reading Mishnah *Hagigah* 1:8,” *JAJ* 4 (2013):235–56.

⁶ See George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Cham: Springer, 2015), 2, 32–33.

⁷ See Edward Monroe Harris, *The Rule of Law in Action in Democratic Athens* (Oxford: Oxford University Press, 2013).

of law in Mesopotamia, when compared to these later legal systems. The question of when and how this new and (to the modern interpreter) familiar stance toward law—treating it as a source of binding obligation—developed in the ancient world has become an important issue for a number of disciplines. This is the question that I seek to address in this study.

Rather than beginning with the question of *when* written law came to be treated as binding, however, I draw from contemporary legal theory to identify more precisely the nature of this shift in legal thinking that took place. In other words, I begin by asking what it means for law to be law in the first place. Furthermore, I develop a method for identifying this new attitude toward law within our available sources. As the above Dworkin quote indicates, to call the law a source of binding obligation is no straight-forward matter. It is not enough to assume that, when the law is considered authoritative its subjects are obligated to live according to what it requires, and adjudicators are bound to apply the law in courts. What it means for the law to ‘obligate’ its subjects to live ‘according to what the law requires,’ and what it means for the law to ‘bind’ its adjudicators are both complex phenomenon; as Dworkin noted: “Our understanding of these concepts is remarkably fragile.”⁸ Without a precise means of identifying the nature of such phenomena, and, more importantly, what such phenomena might have looked like in the ancient world, we will be unable to recognize what it is that we are looking for when attempting to identify this new type of legal thinking.

Furthermore, if, as Wittgenstein poignantly observed, “no course of action could be determined by a rule, because every course of action can be made out to accord with the rule,” then how can we know when communities in the ancient world actually considered

⁸ Ronald Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35 (1967):14.

their actions to be in accord with the rule or not in accord with the rule?⁹ Or, even more to the point, how can we know whether or not a community felt compelled or obligated to live according to a set of written rules, if it can be said that any course of action that a given person or community took was determined by a rule, or, by contrast, if it can be said that no course of action they took was determined by a rule? What type of evidence are we looking for when trying to answer this question of when a community considered a set of written rules to be a source of binding obligation?

While it may seem intuitive that we would need access to a community's legal records to answer this question,¹⁰ as is the happy case for Mesopotamia and for the community at Elephantine,¹¹ I would argue that that is not enough. In order to determine whether or not a community considered itself obligated to live according to a set of written rules, we must somehow uncover an attitude or disposition that was held toward that set of laws. In fact, Bruce Wells has demonstrated several instances in which Mesopotamian legal practice corresponds to the legal collections. In other words, particularly in the Neo-Babylonian period, there are numerous cases in which the community did precisely what the law prescribes.¹² What is missing from the evidence is any citation of the law. Among the

⁹ Ludwig Wittgenstein, *Philosophical Investigations* (trans. G. E. M. Anscombe; Oxford: Blackwell, 1981), 201.

¹⁰ This is the clear assumption behind the monograph of Michael LeFebvre, in which he attempts to argue that written law in Judea did not become binding until the Ptolemaic influence of the 2nd century B.C.E. He writes: "It is, once again, the paucity of materials from Ptolemaic Judea that makes the demonstration of legal institutions in that society practically impossible. It is also this "black hole" which has left vital questions unanswered in present scholarship, thus necessitating creative efforts to get at answers." See Michael LeFebvre, *Collections, Codes, and Torah: The Re-Characterization of Israel's Written Law* (LHB/OTS 451; New York: T & T Clark, 2006), 173. This same sentiment is also expressed by Anne Fitzpatrick-McKinley, *The Transformation of Torah from Scribal Advice to Law* (JSOTSUP 47; Sheffield: Sheffield Academic Press, 1999), 99–100.

¹¹ See Reuven Yaron, *Introduction to the Law of the Aramaic Papyri* (Oxford: Clarendon, 1961).

¹² Wells demonstrates that although the Mesopotamian law codes were not a source for judicial decision making, the reverse is true, that judicial decision making—the actual practice of law—provided a source for the writing of the codes. In other words, although the law codes did not determine legal practice, they did reflect it. Proving this is a major impetus for his book, where he shows significant correspondence between

multitude of available records, no legal decision seems to have been rendered ‘according to the law.’¹³ Therefore, the records of legal practice actually say nothing about whether or not a community felt obligated to live according to the requirements of the law; in many cases, they actually did what the law requires. Rather, what is missing from our evidence is any indication that they did what the law requires, *because the law requires it of them*. In other words, it is the presence or absence of an ‘according to the law’ type citation that is missing, because we are attempting to identify an attitude or disposition toward the law, and not the actual practice of law.

This point becomes clearer with an example from the Mishnah, such as the prohibition against mixing meat and dairy: “Every [kind of] flesh [of cattle, wild beast, and fowl] is it prohibited to cook in milk” (m. *Hul* 8).¹⁴ This law reflects a tannaitic interpretation of Exod 23:19, 34:26, and Deut 14:21: “You shall not boil a young goat in its mother’s milk” (לא תבשל גדי בחלב אמו). It seems obvious that anyone who abstains from mixing meat and dairy on account of this prohibition would have been considered to be complying with the rule, which reflects an attitude of binding obligation toward the Torah. In this example, however, if we had evidence for the community’s actual legal practice (refraining from mixing meat and dairy) it would actually say nothing about whether or not they lived

Neo-Babylonian trial records and the Pentateuchal laws of testimony. See Bruce Wells, *The Law of Testimony in the Pentateuchal Codes* (BZAR 4; Wiesbaden: Harrassowitz, 2004). For other correspondence between the law collections and records of law practice see also Tikva Frymer-Kensky, “Tit for Tat: The Principle of Equal Retribution in Near Eastern and Biblical Law,” *BA* 43 (1980): 230–34. It must be noted, however, that Wells does acknowledge that the laws do not *always* correspond to the legal records: “Indeed, there are some contradictions, for instance, between provisions in the Laws of Hammurabi and legal practices reflected in Old Babylonian documents of practice. There are not many, however. . . . The codes are, in part, accurate reflections and, in part, inaccurate reflections of the law” (pp 14–15). Similarly, Roth states: “little correspondence has been found between the provisions in the law collections and contemporary practice.” See Roth et al., *Law Collections*, 5.

¹³ For an anomalous exception see Roth et al., *Law Collections*, 5–7.

¹⁴ All citations are from J. Neusner, *The Mishnah: A New Translation*. New Haven: Yale University Press.

‘according to the rule.’ This illustrates Wittgenstein’s point, that “no course of action could be determined by a rule, because every course of action can be made out to accord with the rule.” The actual law as it stands—you shall not boil a young goat in its mother’s milk—says nothing about what to eat, what not to eat, or how one should or should not prepare or consume food. The fact that such a course of action—abstaining from mixing meat and dairy—can be said to be ‘determined’ by the law is on account of the *interpretation of the rule* provided by the sages. If our only evidence for determining whether or not the Torah was considered binding at that time was a copy of the Torah along with a record of the fact that a community refrained from mixing meat and dairy, we could make no conclusions about the community’s attitude toward the Torah, since what the Torah says and what the community did are very different.

Therefore, just as with the Mesopotamian evidence, when it comes to identifying when written law came to be treated as legally binding, we are not looking for evidence of what the community did or did not do. *Rather, we are looking for evidence that reveals a certain type of attitude toward the law, one in which a community sees the law as a source of binding obligation.* This is because legal obligation has more to do with one’s disposition than with one’s actions. In the case of the Mesopotamian sources, it is the lack of something in the evidence—the citation of the law codes in the legal records—that reveals the absence of an attitude toward law that, to modern interpreters, is intuitively expected: an obligation to act in accordance with the law—doing what the law requires simply because the law requires it. The Mesopotamian legal practice records often correspond well to that which the codes require; there is just no evidence that they did what the law required *because* the law required it. In the case of the Mishnah, it is the interpretation of the Torah that reveals that the

tannaitic sages felt obligated to do what the Torah requires. If there were any legal-type records demonstrating that the community avoided mixing meat and dairy, they would say nothing about the community's attitude toward the Torah.

II. INTERPRETATION AS THE KEY TO IDENTIFYING LEGAL OBLIGATION

In the end, I would submit that the best place to look for this new attitude toward written law—one which treats it as a source of binding obligation—is within sources that interpret earlier legal traditions, what I call *interpretive sources*. I argue that, when a directive—such as law, commands, rules, advice, admonitions and so forth—is treated as a binding obligation, then it produces a normative effect upon its addressee that is of a different kind than the normative effect that non-binding directives produce. Furthermore, this unique normative effect that a binding directive produces in its addressees is recognizable by the manner in which such a directive is interpreted. This distinction between types of interpretation forms the essence of my methodology for identifying when written law came to be treated as a source of binding obligation; interpretation is the key.

The fact that the interpretation of binding norms looks different from the interpretation of other kinds of normative statements is intuitive. For example, we treat a doctor's recommendation for a flu shot differently than we would treat a legally mandated flu shot, even though both directives come from an authoritative source. While the doctor's recommendation acts as an important consideration in our reasoning process, the law actually preempts such reasoning; we do it (or at least feel obligated to do it) based on its 'say-so,' regardless of whether or not we think it is a good idea. Once a directive is understood as a binding obligation (such as a flu shot law versus a recommendation), then it completely changes how that directive is read and interpreted.

In the ancient world, there are multitudinous examples of the interpretation of earlier legal texts by later scribes, such as Deuteronomy and the Holiness Code's interpretation of the Covenant Code; Ezra's interpretation of the Torah; or the interpretation of Pentateuchal law in Jubilees, the Temple Scroll and the Halakhic Letter (4QMMT). This plethora of interpretive sources provides ample material for analysis. The main objective of this study is to develop a method for identifying when an interpretive source treats a legal text as a binding obligation, and to apply this method to a selection of interpretive sources.

III. LEGAL THEORY AND THE PROBLEM OF CONCEPTUAL ANACHRONISM

Before moving on to a chapter overview, it will be helpful at this point to provide a brief justification for my use of legal theory to address this problem of identifying the emergence of a binding attitude toward law. While a few other scholars have drawn from legal theory to examine ancient law,¹⁵ such an approach may seem intuitively anachronistic;

¹⁵ David Daube was an important figure in early studies. He influenced several important scholars including Raymond Westbrook, Calum Carmichael, and Bernard Jackson. See Calum M. Carmichael, *Ideas and the Man: Remembering David Daube* (Studien zur europäischen Rechtsgeschichte 177; Frankfurt: Vittorio Klostermann, 2004), 93–141. It should be noted that Daube was more interested in practical matters, rather than legal theory (see Carmichael's comments on pp. 133–34). More recently, Aryeh Amihay draws from legal theory to reassess Daniel R. Schwartz's distinction in legal ideologies between Saducean/Qumran "realism" and Pharisaic/Rabbinic "nominalism." Amihay correctly notes the problems with these terms and reframes the distinction as the Essene's "legal essentialism" and suggests that "legal formalism" better describes the Rabbinic/Pharisaic attitude toward law. See Aryeh Amihay, *Theory and Practice in Essene Law* (New York: Oxford University Press, 2016), 19–30. Similarly, David C. Flatto's dissertation traces the development of the legal ideal known as the separation of powers from Deuteronomy to tannaitic and Amoraic literature. See David C. Flatto, "Between Royal Absolutism and an Independent Judiciary: The Evolution of Separation of Powers in Biblical, Second Temple and Rabbinic Texts" (Ph.D. diss., Harvard University, 2010); and David C. Flatto, "The King and I: The Separation of Powers in Early Hebraic Political Theory," *Yale Journal of Law and the Humanities* 20 (2008):61–110.

A series of articles by Bernard M. Levinson seems to have a similar approach to that of Flatto, identifying the origins of the rule of law and separation of powers in Deuteronomy. Levinson, however, does not provide a critical legal-theoretical discussion on the nature of these ideals. See Bernard M. Levinson, "The Reconceptualization of Kingship in Deuteronomy and the Deuteronomistic History's Transformation of Torah," *VT* 51 (2001):518–23; Bernard M. Levinson "Deuteronomy's Conception of Law as an "Ideal Type": A Missing Chapter in the History of Constitutional Law," *Maarav* 12.1–2 (2005):83–119; and, most significantly, Bernard M. Levinson, "The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy," *Cardozo Law Review* 27 (2006):1853–88. In this article he argues that the Deuteronomic author casts a social vision in which all levels of government (local judges, the king, and the priestly high court judges) are subservient to the written Torah. The Deuteronomic authors thus "put into place two cornerstones of Western legal tradition: the separation of powers and the rule of law" (1887). While this is

how can highly abstract and philosophical discussions on modern law apply to our ancient evidence? As I argue further in Chapter Two, not only is modern theory useful, an approach to ancient law that is informed by concepts from jurisprudence actually helps to guard against conceptual anachronism.

The fact is, imposing a theory of law upon our ancient evidence is simply inescapable. The moment we use the term ‘law’ and ‘legal’ to describe Hammurabi, Deuteronomy, or any similar ancient text, we naturally import our assumptions about what law is upon these texts. These assumptions, however, are inevitably informed by our modern perceptions of law.¹⁶ This is easily illustrated by the first studies on Hammurabi. The very fact that Assyriologists saw the lack of citation of Hammurabi in the legal records as a problem reveals their modern assumptions.¹⁷ Why would they even ask that question unless they had some sort of expectation as to how law operates—unless they expected that Hammurabi’s laws were legally binding upon their subjects and applied in courts. This very notion—the idea that a written code is the sole source of law and legal decision-making—is

an appealing thesis, the article overlooks the complex nature of the rule of law (see below Chapter One sec. II.A–B). Notably, the rule of law is necessarily threatened by the act of judicial interpretation, especially creative interpretations that stray far from the text of law, such that the line between the rule of law and the rule of the judge is blurred (see further in Chapter Three sec. II–III; and Chapter Seven sec. III). I would suggest that if the Deuteronomic authors had promoted a concept of the rule of law, they would have somehow recognized this fundamental problem (like Ezra and his community and judges in Athens in 5th century B.C.E.). For helpful studies that take into account the complex nature of these legal ideals in biblical and classical studies, see Monroe, *Rule of Law in Action*; and Flatto, “Separation of Powers,” 24–30. See also my critique of Levinson’s reading of Deut 17:8–13 below (Chapter Two sec. I).

¹⁶ For a recent article that demonstrates this phenomenon, see Joshua Berman, “The History of Legal Theory and the Study of Biblical Law,” *CBQ* 76 (2014): 19–39. He notes that many scholars have engaged in Pentateuchal criticism with post-19th century conceptions of law, which was not operative prior to then. While Berman is correct that scholars’ notions of law are often anachronistic, I disagree with his claim that a “statutory” approach to law did not exist prior to the mid-19th century. He argues that earlier legal systems were governed by a “common-law” approach, in which the source of authoritative law comes from judges, and judgements do not stand as binding final statements of law, but as influential (non-binding) pieces of a growing tradition (20–26). While Berman’s argument is well-grounded in 19th century legal thought, he seems to overlook the fact that the rule of law legal ideal—which is essentially identical with his definition of “statutory law”—was present long before the Enlightenment. See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 7–31.

¹⁷ See note 2 above.

informed by a conception of law that developed over centuries (the rule of law). I would suggest that the imposition of these modern conceptions of law upon the ancient evidence is the real conceptual anachronism.

What is more, the above quotes by Wittgenstein and Dworkin show us that the modern conceptions of law, which we import to the ancient evidence, are quite fragile—even modern lawyers' conceptions of law are fragile. What is law? What does it mean for law to be binding, or to compel some sort of obligation within its subjects? What does it mean to comply with law? How can we tell what qualifies as compliance or non-compliance? What does it mean to interpret and apply law? What is the nature of the law's authority? What does it mean for law to possess authority? What is the nature of normativity? What is the difference between law and wisdom? What is the difference between unwritten social traditions and binding commands? It is inescapable that we as modern interpreters approach ancient legal texts with our own—often conflicting—ideas of how these questions should be answered. Yet the answers to these questions are far from simple; they occupy the complex realm of legal theory.

While a great many issues in the study of ancient law would benefit from a more theoretically grounded concept of law, the need for legal theory is most pressing for the question of when written law came to be seen as a source of binding obligation. As I demonstrate in Chapter Two, numerous scholars arrive at opposite conclusion on this issue based on virtually identical interpretations of the evidence. For example, some scholars argue that the Torah-obedience narratives in Ezra-Nehemiah depict a legally binding treatment of the law.¹⁸ Other scholars, however, make the opposite conclusion, while giving

¹⁸ See Chapter Seven for an extensive discussion on the Torah-obedience narratives of Ezra-Nehemiah.

a virtually identical assessment of the evidence.¹⁹ The only difference between their positions is the assumption about the nature of law that each scholar brings to the evidence. Thus, the only means of pushing the debate forward is to critically assess our assumptions about what it means for law to be law. How can we determine when law was treated as legally binding until we have a clear understanding of what it means for a text to be legally binding in the first place? Rather than being the cause of conceptual anachronism, legal theory can actually help to prevent it.

IV. OVERVIEW OF CHAPTERS

This dissertation is divided into two main parts: I) Theory and Method; II) Textual Analysis. PART I is comprised of three chapters. In Chapter One, I develop my methodology. This involves addressing two main issues. First, I establish what it is that we are looking for in interpretive sources when attempting to identify a binding attitude toward law. Second, I develop a method for identifying this in interpretive sources. This method is comprised of a set of criteria for identifying a binding attitude toward law in a scribe's interpretive engagement with a legal source. To aid this discussion, I provide a summary of these criteria (Chapter One sec. III), and apply them to one clear instance of interpretation in the Damascus Document (CD).

Chapter Two assesses previous attempts to address the question of when written law came to be treated as legally binding. I argue that what is needed to push this debate forward is an approach that draws from legal theory. The chapter is divided into two main sections. First, I provide an overview of the evidence that has been used to establish the non-binding character of law in Mesopotamia and ancient Israel. Second, I demonstrate that scholars have

¹⁹ See Chapter Two sec. II.A.ii.

been unable to achieve consensus because they have relied on conflicting assumptions on the nature of law. We need a firm grasp on what it means for law to be law, before we can identify instances in which a law is being treated as law. My critique of past scholarship comes in Chapter Two, rather than Chapter One, because it relies on my theoretical discussion of the nature of legal authority from Chapter One.

In Chapter Three I provide a theoretical framework for understanding the nature of interpreting authoritative texts. This is necessary for two reasons. First, since interpretation of authoritative texts in Second Temple Judaism is a complex phenomenon (as is evident from Dead Sea Scrolls' scholarship), I define what it is that qualifies as an interpretation of a legal text. Secondly, I argue that authority brings an added burden to the task of interpretation, which makes the limits of interpretation a critical problem. This is necessary since my method for identifying a binding attitude toward law relies on an analysis of interpretive sources.

Chapters 4–7 comprise PART II of this dissertation, which is my textual analysis of four sources that interpret earlier law. It must be emphasized at the outset that the selection of legal-interpretive sources in PART II is only a limited sample of all the texts that could be examined. There are many interpretive sources in early Judaism, diaspora communities, ancient Israel, and in Mesopotamia. The main contribution of this study is to provide a *means* of identifying a legally binding attitude toward law, and to apply that method to a few cases. This is only a first, though important, step toward identifying the emergence of this type of legal thinking in the ancient world.

My textual analyses proceed in reverse chronological order, since I work from the clearest cases in which a scribe treats (or does not treat) a text as a source of binding

obligation, to less clear cases. In Chapter Four I examine the Temple Scroll's interpretation of the Torah's Day of Atonement laws. The Temple Scroll is important for this study because it appears to do something new with the laws of the Torah that no contemporary text of its kind does:²⁰ it brings coherence to its disparate and conflicting legal corpora. While many scholars have noted this in the past, I argue that the Temple Scroll's unique approach to legal innovation is the result of the author's new legally binding attitude toward the Torah.

In Chapter Five, I examine a seemingly minor set of changes that the Samaritan scribes made to their Torah, the Samaritan Pentateuch. These changes reflect a tendency to broaden the scope of overly precise laws. This, I argue, demonstrates that the scribes viewed the Torah's laws as binding. They occur in the Covenant Code's laws on injury (Exod 21:18–21), the goring ox (vv. 28–36), animal theft (22:3 [v. 4 HB]), lost animals (23:4), and Sabbath (23:12). There is one further occurrence of this type of change in Deuteronomy's version of the lost animal laws (Deut 22:1–4). An examination of these laws is important because it reflects a rare occurrence of changes to the Torah's laws in the process of transmission that was motivated by their new attitude of binding obligation toward them.

In Chapter Six, I examine the various versions of the penal codes that circulated among the communities responsible for the Community Rule (*Serekh* texts) and the Damascus Document (the Damascus traditions). The sectarian penal codes are important for this study because they provide the best example of the interpretation of Second Temple legal texts that are not of the Torah. When these versions are compared, it is evident that the changes made to the penal codes do *not* reflect an attitude of binding obligation. That is, I

²⁰ The Temple Scroll is an example of what is known as 'rewritten Bible,' or 'rewritten scripture.' This is text that creatively rewrites earlier traditions, particularly the Torah. See my discussion in Chapter Three sec. IV.A.i.

argue that the reasoning that underlies the legal changes made to the penal codes do not reflect the type of interpretive reasoning that is applied to binding norms.

In Chapter Seven, I examine the use of the Torah in the Torah-obedience narratives of Ezra-Nehemiah, particularly the institution of *Sukkot* in Neh 8:13–18, the mixed marriage crisis of Ezra 9–10, and the wood offering of Neh 10:35. This chapter is different from chapters 4–6, however. On the one hand, it is clear that the *Yehud* community viewed the Torah as a source of binding obligation. On the other hand, the manner in which Ezra and his colleagues treat the Torah does not look anything like the type of interpretive reasoning that is applied to binding norms—the type of reasoning I seek to identify in chapters 4–6. In the end, I argue that such interpretive reasoning is absent in the EN Torah narratives because there was no distinction between the specific words of the Torah and Ezra’s declaration of what the Torah says. Whatever the Torah expert declared as a Torah-demand was treated as the Torah itself—as a binding obligation—even when such declarations differ from what the Torah actually says—or, as Wittgenstein states, when they substitute “one expression of the rule for another.”²¹

Finally, in Chapter Eight, after summarizing my theoretical approach and sketching a picture of the emergence of a binding attitude toward law that emerges from my textual analysis, I suggest that law’s authority developed according to three broad stages, which culminates in the type of legal reasoning found in tannaitic sources.

²¹ Wittgenstein, *Philosophical Investigations*, 201.

PART I: THEORY AND METHOD

CHAPTER ONE: IDENTIFYING A BINDING ATTITUDE TOWARD LAW IN INTERPRETIVE SOURCES

The goal of this dissertation is to establish a method for identifying the emergence of an attitude of binding obligation toward written law in early Judaism, and to apply that method to a selection of sources that interpret earlier law, what I call *interpretive sources*. The purpose of this chapter is to address two questions that are essential for developing such a method: 1) What are we looking for?; 2) How do we find it?

This chapter is divided into four main sections. First, I identify what it is that we are looking for in interpretive sources when we try to identify this new attitude toward law. Here I address the question: What does it mean for something to be treated as a source of binding obligation? Second, having established what it is that we are looking for, I propose a method for identifying this attitude of binding obligation toward law in our available sources. Here I address the question: How can we tell whether or not a scribe is treating a text as a binding obligation? I draw from the legal ideal known as *the rule of law* to develop a set of criteria for identifying occasions in which a law is being treated as a binding directive by an ancient interpreter.¹ In the third section I provide a summary of these criteria, which form the basis of my methodology. Finally, once I have outlined a method for identifying a binding attitude toward law, I provide one clear example of how this methodology works, focusing on the Damascus Document's (CD) Sabbath law passage (CD 10:14–11:18). Furthermore, I contrast

¹ I will define the rule of law below in sec. II.A.

CD's Sabbath interpretation with earlier inner-scriptural interpretations. This clear example will show that while CD treated the Torah as a binding obligation, earlier scribes did not.

I. BINDING OBLIGATION AND THE NATURE OF LAW'S AUTHORITY

The key to answering the question of what it means for a text to be treated as a source of binding obligation is to establish a theoretical basis for distinguishing between binding directives and non-binding directives. The normative universe contains a host of different types of 'oughts,' which is to say, different types of directives: parental advice, work responsibilities, rules for organized sports, traffic laws, company policies, a general's orders to his troops, and so forth. All these directives occupy the realm of normativity; they all impose some sort of 'ought' upon their addressees. The key to determining what it means for an 'ought' to be binding, is to be able to distinguish what sets it apart from other non-binding 'oughts.' Why does one directive bind its addressees while others do not? For example, why is a doctor's recommendation to get a flu shot not binding, while a legally mandated flu shot is binding? What is it about the law that makes it binding upon its subjects, while other normative statements are not?

In order to answer this question, it is necessary to introduce four issues from the realm of legal theory: A) H. L. A. Hart's rule of recognition; B) Joseph Raz's preemption thesis; C) the distinction between practical authority and epistemic authority; and D) the nature of reasoning with practical authorities' binding directives. This discussion will lay the foundation for section II of this chapter.

A. Law's Authority and H. L. A. Hart's Rule of Recognition

H. L. A. Hart's account of legal positivism provides a helpful starting point for answering this question of what differentiates law from other normative statements. Hart

dispelled the once common assumption that law's directives are binding because of coercion; this is the notion that people do what the law says solely to avoid sanctions. This assumption is known as the command theory of law, which is attributed to Jean Austin.² Intuitively, it is tempting to think that sanctions are what make the law binding; we feel obligated to obey the law because the law is backed by sanctions, while a recommendation is not. Thanks largely to Hart, this view of law has been almost universally rejected (although it may prevail in popular understandings of law).³ As Hart argued, if the law's power to impose obligations lies entirely in the lawgiver's ability to impose punishment, then the law is no different than a gun-wielding mugger, since both make demands that are backed by threats for non-compliance. The authority of law, as is generally understood since Hart, lies in something other than the lawgiver's coercive powers; there is a difference between the gunman's power and the law's authority.

The basis of Hart's account of the law's authority lies in his distinction between primary and secondary rules. While the primary rules are the actual rules of a legal system, secondary rules are rules about the primary rules. Secondary rules give primary rules their power. Primary rules are introduced, changed, or modified according to secondary rules: "Rules of the first type impose duties; rules of the second type confer powers."⁴ Hart writes,

[W]hile primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.⁵

² For a recent accessible explanation of Austin's theory and its history, see Gerald J. Postema, "Legal Positivism: Early Foundations," in *The Routledge Companion to Philosophy of Law* (ed. Andrei Marmor; New York: Routledge, 2012), 31–47.

³ This is also noted by Amihay, *Essene Law*, 75.

⁴ H. L. A. Hart, *The Concept of Law* (Clarendon Law Series; Oxford: Oxford University Press, 1961), 81.

⁵ Hart, *Concept of Law*, 94.

This distinction, according to Hart, is the basis of any legal system, because primary rules alone cannot be law without secondary rules. It is the difference between the demands of a gunman and the demands of the law. The most important secondary rule is the *rule of recognition*. This is the means by which a community recognizes the authority of the primary rules; in other words, primary rules can only be recognized as law because of the secondary rule that Hart calls the rule of recognition. This view of law is contrasted with the (then) popular understanding that a legal system consists of “a situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons.”⁶ Such a view is not sufficient to account for the nature of law because the authority of law goes beyond the mere threat of punishment; it is more than the coercive will of those with power. Rather, law is law to those who recognize it as law.

Hart’s rule of recognition provides a good starting point for explaining why the law is treated as binding, while other normative statements are not. However, the question of how binding directives obligate their subjects must be pushed further. The rule of recognition only tells us that law’s authority emanates from its subjects’ internal disposition toward the law, not from its capacity for external coercion. In order to understand how this internal disposition works, we must turn to Joseph Raz’s preemption thesis.

B. Joseph Raz’s Preemption Thesis

According to Joseph Raz, what differentiates a legal directive from other types of directives is that legal directives provide reasons for action that usurp, or *preempt*, other reasons for action. In other words, a legal directive tells its subjects what to do and expects that a subject will comply simply *because* it says so, and not because that subject has decided

⁶ Hart, *Concept of Law*, 100.

that it is best;⁷ the law does not persuade, it commands. This account of how law's authority operates was actually introduced by Hart (Raz's teacher), who credited it to Thomas Hobbes. Hart argued that a command (as opposed to advice) provides an "authoritative reason for action." He writes:

[T]he expression of a commander's will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act. The commander's expression of will therefore is not intended to function within the hearer's deliberations as a reason for doing the act, not even as the strongest or dominant reason, for that would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it. This I think is precisely what is meant by speaking of a command as 'requiring' action and calling a command a 'peremptory' form of address.⁸

Thus, according to Hart, the normative effect that a command has on its subjects is that commands provide a reason for action that preempts other reasons for action; other normative statements do not provide such exclusionary reasons.

Raz has further developed Hart's brief comments on law's reason-giving power to develop a highly influential theory on the legitimacy of law's authority.⁹ His entire theory goes well beyond the scope of the present study, however; I am only interested in identifying whether or not interpreters considered a text to be binding, not in addressing the issue of whether or not that text held legitimate authority.¹⁰ Only Raz's preemption thesis is

⁷ For an explanation of the 'because clause' for law's authority, see Andrei Marmor, "The Nature of Law: An Introduction," in *The Routledge Companion to Philosophy of Law* (ed. Andrei Marmor; New York: Routledge, 2012), 6.

⁸ H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (ed. H. L. A. Hart; Oxford: Clarendon, 1982), 253.

⁹ This is known as Raz's service conception of law's authority. It is comprised of three theses: 1) the content-independent thesis; 2) the normal justification thesis; and 3) the preemption thesis. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 38–69; and Joseph Raz, "The Problem of Authority: Revisiting the Service Conception 1," in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 134–43.

¹⁰ I say this because Raz's service conception has been the subject of much critique (most notably, see Stephen L. Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics* [Oxford: Oxford University Press, 2013], 135–78). Nevertheless, Raz's (and Hart's) account of how binding directives operate (according to the preemption thesis) is well accepted. See note 11 below: Herskovitz's article is a critique of

necessary for this purpose, since it provides the best means of explaining how law's authority works.¹¹

Raz explains this preemptive feature of law as follows:

A simplified picture captures the gist of the matter: laws are normally made to settle actual or possible disagreements about which standards those subject to them should follow. . . . So the law sets things straight: telling people 'this is what you should do and whether you agree that this is so or not, now that it is the law that you should, you have the law as a new, special kind of reason to do so.' The law is a special kind of reason for it displaces the reasons which it is meant to reflect. It functions as court decisions do: the litigants disagree about what they have reason to do. The court determines matters. Of course they may still disagree . . . [but]. . . [i]t does not matter. The court's decision settles matters. It displaces the original reasons (the cause of action) and now the parties are bound by the decision instead. Similarly, a law, when it is binding, preempts the reasons which it should have reflected, and whether it successfully reflects them or not it displaces them, and is now a new source of duties.¹²

Thus, according to Raz, when a standard gets passed as law, it changes the reasoning process within its subjects, because the law provides a reason for action that preempts other background reasons.¹³

An example can help illustrate this preemption thesis. In Canada, most motorists decide whether or not to put winter tires on their vehicles based on a host of reasons: cost, hassle of changing the tires, statistics on safety benefits, driving skill, driving frequency,

Raz's account of authority, particularly the normal justification thesis. Nevertheless, he accepts that the preemption thesis "tells us what an authoritative order does." This is precisely what I am concerned with in identifying a binding attitude toward law in ancient sources: I am identifying instances in which an authoritative order does its act of reason-preempting within ancient interpretive sources.

¹¹ As noted by Scott Hershovitz, while the preemption thesis (on its own) does not explain what makes an authority legitimate (which is what typically interests legal philosophers), "[t]he preemption thesis, tells us what an authoritative order does." Scott Hershovitz, "The Role of Authority," *Philosophers' Imprint* 11 (2011):2.

¹² Raz, "Introduction," 7. Similarly, Frederick Schauer writes: "When a court follows a rule, it does not decide for itself whether the rule is a good or a bad one. Nor does the court decide whether in this case to obey the rule. Instead, rules function as rules by excluding or preempting what would otherwise be good reasons for doing one thing or another." Frederick F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, (Cambridge: Harvard University Press, 2009), 61.

¹³ Raz refers to the moment when a standard gets passed as law as "the decisive moment," which is the point at which the standard preempts one's background reasoning, rather than simply adds to it. See Raz, "The Nature of Law," 107–10.

annual snowfall for a given region, and so forth. There are a host of factors to consider when one reasons whether or not to put winter tires on a vehicle; Raz refers to this type of deliberation as one's *balance of reason*.¹⁴ If a legislative body, however, were to pass a law that makes the use of snow tires mandatory, then once that directive becomes law, those reasons suddenly become moot. This is because the law provides a reason for action that preempts all those other reasons. While those background reasons do not disappear, they become irrelevant to the decision. Someone may complain to a police officer about being fined for failing to comply: "But why should I have to pay for winter tires if I hardly drive in the winter?" A police officer, however, could simply respond: "It does not matter; it is the law."¹⁵ This is because the law's authority operates by providing a reason for action that preempts other background reasons. The law's subjects must comply based on its mere say-so.

Raz's preemption thesis is the best means of explaining what it is about the law's directives that make them binding, while other types of normative statements (like a doctor's medical advice) apply a sort of non-binding pressure upon their addressees. Thus Raz's thesis provides the best means of answering the question of what it is that we are looking for when we try to identify the new binding attitude toward law in a selection of interpretive sources: *we are looking for interpretive sources that treat a text as a preemptive reason for action*. For example, as I argue in section IV below, CD's interpretation of the Decalogue's Sabbath prohibition reflects an attitude of binding obligation toward the Torah because it treats that law as a preemptive reason for action. This stands in contrast to inner-scriptural

¹⁴ See, for example, Raz, *Morality of Freedom*, 28–31.

¹⁵ For a similar example discussed by a legal theorist, see Schauer, *Legal Reasoning* (Cambridge: Harvard University Press, 2009), 14–15.

interpretations of the Sabbath found in Deuteronomy 5, which do not treat it as a preemptive reason for action. This is what we are looking for in the interpretive sources that I examine in PART II of this dissertation.

C. Practical Authority and Epistemic Authority

Before moving on to the question of how to find this legally binding attitude toward law—one that treats it as a preemptive reason for action—in our sources, one further issue must be discussed: the nature of authority. This is necessary because we need a means of accounting for the authority of non-binding directives. If it is true, as I argue below, that Deuteronomy's interpretive rewriting of the Sabbath prohibition of Exod 20:8–11 does not reflect an attitude of binding obligation toward the law (as a preemptive reason for action), this does not mean that that law did not possess authority for the Deuteronomic author. We therefore need to be able to account for the type of authority that non-binding directives possess, and distinguish it from the type of authority that binding directives possess. This discussion is based on a difference between two types of authority.

This is the distinction that legal scholars make between what is called *practical authority* and *epistemic authority*. The main difference between these two types of authority is that practical authorities possess preemptive force, while epistemic authorities do not.

Dudley Knowles explains it as follows:

[T]here are two radically distinct varieties of authority. . . . The first kind of authority is best thought of as practical authority. It is the authority of one who commands or gives orders or instructions. Examples abound: the authority of the teacher over the pupil, the parent over the child, the officer over the common soldier, as well as . . . the authority of the state and its officials over the citizens. It is dubbed practical authority because the directives generally order subjects to do or omit something, to act or forebear acting in some way or other. . . .

The second kind of authority we should think of as epistemic authority or the authority of the expert. An authority of this kind is in command of a field of knowledge or a range of skills. We seek out such authorities for help and

advice. If we wish to know what we should believe on a topic of which we are ignorant, or how we should perform a task we are finding difficult, it's good policy to find someone whose response we can take as authoritative. . . . The nub of this distinction is the difference between commands or orders on the one hand and the giving of information or advice on the other.¹⁶

Therefore, although epistemic authorities possess authority, it is of a different kind than the preemptive force that practical authorities possess; epistemic authorities can only provide good and special reasons for action that are incorporated into one's balance of reason.

This distinction can be illustrated with two hypothetical directives issued by the federal government of Canada concerning the use of winter tires. In the first directive, a government agency, based upon research on winter driving safety, issues a report on the benefits of using winter tires in Canada's snowy season. Based on this report, it issues a recommendation (a type of directive) that all vehicle owners should switch to winter tires during the snowy season. This is an example of an epistemic authority. Although such a directive is not law, it still provides very strong reason to use winter tires, to the point where, in most cases, it is simply foolish not to do what the government agency says. In other words, the directive provides a compelling, special, and authoritative kind of reason to comply with the directive. It does not, however, provide a reason that preempts all other reasons.

In the second hypothetical directive, a legislative body passes a law that requires all vehicles in Canada to use winter tires for the winter months. This is an example of a practical authority. While this second directive also provides a very compelling reason for compliance, this reason is fundamentally different from the reason for compliance in the case of the recommendation, because the law is binding while the recommendation is not. Although both directives come from authoritative sources—the first from a definitive, official study on

¹⁶ Dudley Knowles, *Political Obligation: A Critical Introduction* (Routledge Contemporary Political Philosophy London: Routledge, 2010), 34–35.

winter driving safety and the second from the legislative body that passed the law—only the second directive produces a reason for action that preempts all other reasons. When it comes to the directives of epistemic authorities, *we do not do what they say simply because they say so, but rather because we believe something to be true about what they are saying*. As Arie Rosen states:

Although both types of authority [practical and epistemic] are practical, in the sense that they ultimately guide our actions and behaviour, they have a different impact on what we believe to be the right course of action. In order to affect our practical reasoning, epistemic authority has to influence our personal beliefs regarding what is right and wrong, proper and improper. . . . [I]t tells us not only what to do but what to believe.¹⁷

The chief difference between epistemic authorities and practical authorities lies in the manner in which they affect our reasoning.

D. Reasoning with Practical Authorities

The distinction between reasoning that is applied to practical authorities versus epistemic authorities is of utmost importance for my goal of identifying a binding attitude toward law. This is because my method depends on identifying the unique character of the reasoning that is applied to the directives of practical authorities. The fact that practical authorities preempt one's balance of reason brings about a mode of reasoning that is entirely different from reasoning with epistemic authorities. Preemption does not eliminate one's reasoning; it just changes the type of questions that are applied to a directive. It changes one's mode of reasoning from asking the question of "what is best?" to the question "what does the law require?"

¹⁷ Arie Rosen, "Two Logics of Authority in Modern Law," *University of Toronto Law Journal* 64 (2014):675–76. It must be noted that Rosen prefers the term 'decisionist authority' to practical authority.

With epistemic directives, such as the official snow tire recommendation, a subject still must answer the question: “what is the best course of action?” If the addressee is persuaded by the snow tire recommendation, then they will follow the directive. However, they are still free to not comply with the directive for the reason, for example, that they do not drive often in the winter, or because the annual snow-fall for their location is low. The directive and the subject’s background reasons are all factored together to answer the question: “what is the best course of action?”

With the practical authority’s directives, however, everything changes. Once there is a law in place that requires snow tires, then the only question that occupies its subjects’ reasoning is ‘what does it mean to follow this law?’; ‘what, precisely, qualifies as compliance, and what qualifies as non-compliance?’ For example, if there is a law that states ‘vehicles must use winter tires during winter months’ then its subjects will ask questions like: “What counts as a vehicle?”; “Does the law require winter tires on scooters, ATVs, or motorcycles?”; “What counts as winter months?”; “Is the whole month in which winter begins and ends covered by the law, such as December and March, or does the law only apply from December 21st to March 21st?”; “What qualifies as a winter tire?”; “Is there an official agency that determines what is and what is not a winter tire?”; “Can all-season tires be considered winter tires, since winter is a season?” All these questions are concerned with the specific wording of the law and the question of what does and does not qualify as compliance.

In a recent article, Arie Rosen has distinguished between the different types of reasoning that is applied to the directives of practical authorities versus epistemic

authorities.¹⁸ He argues that when an epistemic directive is interpreted, its addressee is bound to what he calls the *epistemic significance* of the directive, which is determined by its underlying rationale.¹⁹ In the case of a winter tire recommendation, the addressee's interpretation will be governed by her understanding of its underlying rationale, which is road safety. She would then make a decision based on her assessment of whether or not that reason applies to her situation—i.e., based on her assessment of whether or not the benefits of road safety outweigh reasons not to use winter tires. What is important to note is that the addressees of an epistemic authority are not bound to the specific wording of its directives, but rather to its underlying rationale.

By contrast, when it comes to the directives of practical authorities (what Rosen terms decisionist authorities), its subjects are bound to its specific wording. Rosen writes:

My claim . . . is that it is this difference in the type of authority that is exercised . . . which leads us to understand, interpret, and apply authoritative directives in different ways. While the exercise of one type of authority [epistemic authority] invites us to focus on the directive's epistemic significance, which transcends the particularity of the instructor's intentions or specific way of saying things, the exercise of the other type [decisionist authority] invites us to focus on the particular content of a directive.²⁰

¹⁸ Rosen, "Two Logics of Authority in Modern Law," 669–702.

¹⁹ Rosen applies terminology from Raz's service conception of authority, particularly the concept of content-independence (see note 7 above and Chapter Seven note 17). In addition to his preemption thesis, Raz argues that law provides content-independent reasons for action. This refers to the fact that the law tells its subjects what to do, regardless of what they think is the proper course of action. Thus, a winter tire law provides a content-independent reason for action; it demands compliance independent of any reasoning that may apply to that decision. When it comes to the epistemic significance of an epistemic authority's directive, Rosen argues that such directives provide content-dependent reasons for action. I prefer to say that epistemic significance is characterized by its directive's underlying rationale, to avoid the use of too many technical terms from legal theory. See Rosen, "Two Logics of Authority in Modern Law," 674.

²⁰ Rosen, "Two Logics of Authority in Modern Law," 685. He goes on to write: "Epistemic authority urges us to treat its directives as inherently aspiring to correctness and guides our behavior as such. This gives us license to differentiate the binding epistemic significance of a directive from its plain meaning and the arbitrary intentions of the person in authority. It urges us to strike a balance between our own understanding of what is right and proper and the contribution the authoritative directive is supposed to make to our system of beliefs on the matter. Decisionist authority, on the other hand, warns us against weighing considerations of correctness and propriety in interpreting and following its directives, as doing so might undermine the value and rationale behind the exercise of authority. It calls upon us to treat directives as if they were mere fiat, and insists that the proper object of our respect is the particular content of the decision – encapsulated either in the actual intentions of the person in authority or in the conventional meaning of the directive."

Similarly, Frederick Schauer writes:

[O]ne of the principal features of rules—and the feature that makes them rules—is that what the rule says really matters . . . [A] big part of a rule’s “ruleness” is tied up with the language in which a rule is written. Central to what rules are and how they function is that what the rule says is the crucial factor, even if what the rule says seems wrong or inconsistent with the background justifications lying behind the rule, and even if following what the rule says produces a bad result on some particular occasion.²¹

Thus, according to Rosen and Schauer, the reasoning that is applied to practical authorities is characterized by a focus on a directive’s particular verbal formulation. This is not the case with epistemic authorities.

While Rosen provides a helpful conceptual framework for distinguishing between the reasoning that is applied to practical versus epistemic authorities, his main goal was to demonstrate that, in practice, judges often apply epistemic reasoning to legal directives; both modes of reasoning can be found in modern legal systems.²² He, therefore, never attempted to provide a complete description of what it looks like when one is bound by the specific formulation of a directive—that is, when one treats a directive as a practical authority. Such a description is necessary, however, in order to identify a binding attitude toward law in ancient interpretive sources. For this, I turn to another concept from legal theory: the rule of law (section II below).

²¹ See Schauer, *Legal Reasoning*, 17–18.

²² A similar argument can be found in Harm Kloosterhuis, “The Strategic Use of Formal Argumentation in Legal Decisions,” *Ratio Juris* 21 (2008):496–506.

E. Reasoning with Epistemic Authorities and Bernard Jackson's Narrative Account of Ancient Law

Before moving on to my criteria for determining whether or not an interpretive source treats the law as a practical authority, it is worth mentioning one caveat concerning reasoning with epistemic authorities. My methodology is primarily focused on identifying when a law is treated as a practical authority, and not identifying when it is being treated as an epistemic authority. This is because, as Rosen argues, reasoning with the directives of epistemic authorities is based on identifying their epistemic significance (rather than their particular verbal formulation), which does not seem immediately relevant to the ancient context. In the case of the winter tire recommendation, the epistemic significance concerns the underlying reason for the directive (road safety); this, according to, Rosen, is the “binding content” of epistemic directives. When it comes to the manner in which ancient scribes treated their revered literary traditions, it is not immediately clear that they were very concerned with their epistemic significance. Thus, I am most concerned with identifying instances when a law is treated as a practical authority, and whenever it is not treated that way, then I will conclude it was an epistemic authority.

It is worth mentioning, however, Bernard Jackson's narrative approach to biblical and Mesopotamian law. While Jackson (who is both a legal theorist and a scholar of ancient law) does not extensively deal with the issue of when law came to be seen as binding, his theory on the function of ancient law is instructive. He distinguishes between a semantic approach to law—which is equivalent to practical authority, where the only thing that matters is the meaning of the words of the law—and a narrative approach to the law—which is concerned

with the images the words of the law evoke.²³ According to Jackson, the provisions of biblical and Mesopotamian law were meant to evoke images, which would be retained in the minds of citizens, and would help them avoid third party dispute resolution. As such, they were not obligated to adhere to the literal meaning of the law, but they were meant to be informed by the law through the images of dispute resolution that the law conjures in their minds.

While I do not agree with all of Jackson's theory—I do not think that the primary purpose of biblical and Mesopotamian law was to help their addressees avoid third party dispute resolution—his narrative account of the law's function provides a helpful analog to Rosen's concept of epistemic significance. Jackson's narrative versus literal distinction in the function of law is fundamentally the same as the distinction between practical and epistemic authority. The subjects of a practical authority's directive (which provides a preemptive reason for action) are bound by the directive's particular formulation and literal meaning; the directive of an epistemic authority is meant to inform and guide its addressee's decision-making (add to their balance of reason). This fits well with Jackson's approach, where the images that the laws evoke inform its addressees' decision-making (add to their balance of reason), but do not determine it (preempt their balance of reason).

Jackson provides a helpful picture of how law in the ancient world may have been treated as an epistemic authority; the legal corpora added to citizens' balance of reason according to the narrative images they evoke.²⁴ Perhaps Rosen's concept of epistemic

²³ For a short account see Bernard S. Jackson, "Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence," *International Journal for the Semiotics of Law* 13 (2000):433–57.

²⁴ I would suggest that this is a better approach to biblical law than that of Moshe Greenberg. In a popular 1960 essay, Greenberg argued against the standard historical-critical approach to ancient law, in favour of a "commentator's" approach. This approach searches for the law's underlying postulates. For example, comparison of biblical law with Mesopotamian law can suggest that the biblical collections are built on the principle of individual responsibility (or they reject the principle of vicarious punishment), or they are built

significance should be understood in the ancient world according to Jackson's narrative theory of law. Either way, the goal of this dissertation is not to identify instances in which a law was treated as an epistemic authority, since it is difficult to establish criteria for making such a determination. Rather, the goal is to identify instances in which the law is treated as a practical authority; here we are on firmer ground, since the concept of the rule of law can provide a clear and productive methodology.

II. THE RULE OF LAW AND LEGAL INTERPRETATION

In this section I develop a set of criteria for determining whether or not an interpretive source treats a law as a practical authority (that is, as a preemptive reason for action). These criteria will be based on the legal ideal known as the *rule of law*. This ideal is complementary to the concept of practical authority. While practical authority can refer to statutes, constitutions, precedents, and so forth, it also can refer to verbal commands, such as a king's orders, or a parent's demands (do your homework!). The rule of law describes a particular class of practical authorities: those that are enshrined in long-duration texts, such as constitutions and statutes in modern legal systems, and the Torah for the tannaitic sages or the *lex aquilia* for Roman jurists in ancient systems. The rule of law is helpful for identifying a binding attitude toward law because the rule of law places a number of requirements upon a legal text that can serve as criteria for identifying when a directive is being treated as a practical authority. In other words, when a long-duration text is treated as a practical (as

upon the principle of the incommensurability of human life and property. See Moshe Greenberg, "Some Postulates of Biblical Criminal Law," in *Yehezkel Kaufmann Jubilee Volume* (ed. Menahem Haran; Jerusalem: The Hebrew University, 1960), 5–28; and Moshe Greenberg, "More Reflections of Biblical Criminal Law," in *Studies in Bible* (ed. S. Japhet; Scripta Hierosolymitana; Jerusalem: Magnes, 1986), 1–17. While Greenberg's thesis is appealing, and his critique of past historical-critical approaches to biblical law is apt, he seems to argue that the biblical laws were written *in order to* communicate these underlying principles. I prefer Bernard Jackson's narrative approach to law, which avoids the pitfalls of overly legal and historical-critical methods, and does not impute anachronistic abstract principles to the ancient legists. For Jackson's critique of Greenberg, and a history of their debate, see Jackson, *Semiotics*, 171–207.

opposed to an epistemic) authority, then it must meet these criteria. Wherever the law fails to meet these requirements, then it is insufficient to rule; it is insufficient to provide a preemptive reason for action.

The basic premise of my method for identifying a binding attitude toward law is that whenever a source's interpretive engagement with a legal text shows a concern for the requirements of the rule of law, then it reflects an attitude of binding obligation toward that text. In other words, when a text is viewed as a binding obligation, then any interpretive engagement with that text will seek to make it meet the requirements of the rule of law; it will see any threats to the rule of law as problematic.

My argument unfolds in three parts. First (A), I define the rule of law. Second (B), I identify the requirements of the rule of law. Third (C), I explain how four of the elements of the rule of law underlie the interpretation of binding directives.

A. Defining the Rule of Law

The rule of law is the legal ideology that underlies virtually all the world's legal systems.²⁵ In brief, it refers to the notion that *legal decisions must be determined by pre-established law, rather than by arbitrary discretion*. This is another way of saying that a legal decision's reasoning—whether adjudication or rule-following—must be preempted by pre-established norms.

²⁵ For example, Brian Tamanaha notes that despite occasional skepticism “[t]he fact remains that government officials worldwide advocate the rule of law and, equally significant, that none make a point of defiantly rejecting the rule of law.” See Tamanaha, *Rule of Law*, 1–3. Mortimer Sellers writes, “Developing societies seek to establish the rule of law, well-regulated societies seek to preserve it, and most governments claim to maintain it, whatever the nature of their actual practices. This makes the rule of law a nearly universal value.” See Mortimer Sellers, “An Introduction to the Rule of Law in Comparative Perspective,” in *The Rule of Law in Comparative Perspective* (ed. M. N. S. Sellers and Tadeusz Tomaszewski; Comparative Perspective on Law and Justice 3; New York: Springer, 2010), 1.

This concept is popularly recognizable from a number of common statements. For example, the rule of law is often explained in the light of its opposite, of the rule of persons.

Ralf Poscher, for example, writes:

The rule of law is famously contrasted with the rule of men. The contrast presupposes that under the rule of law conflicts are decided according to legal standards that are only applied, but not made, by the men who are entitled to adjudicate.²⁶

This same sentiment can be found in the familiar statement: ‘no one is above the law.’ This means of articulating the rule of law focuses on limiting the arbitrary power of those who hold political authority.

A second popular means of articulating the rule of law is to identify it with what is known as *the principle of legality*, which dictates that *anything is permissible except for that which is prohibited in the law*; put differently: there is no crime without a law, there is no punishment without a law (*nullum crimen sine lege, nulla poena sine lege*).²⁷ Only that which is written can be enforced as law. This means of articulating the rule of law focuses on rule-following from the perspective of the law’s subjects; what she can or cannot do according to the law. This aspect of the rule of law underlies statements like “there is no law that says I can’t wear white after Labour Day,” or “there is no rule against a girl trying out for the football team.” According to the principle of legality, rules and laws can only apply to that which they explicitly demand or prohibit, no more, no less.

²⁶ See Ralf Poscher, “Ambiguity and Vagueness in Legal Interpretation,” in *Oxford Handbook on Law and Language* (ed. Lawrence M. Solan and Peter M. Tiersma; Oxford: Oxford University Press, 2012), 141. Similarly, Miranda McGowan writes: “It is a truth universally acknowledged that a judge should interpret statutes, not rewrite or impose her own preferred meaning upon them . . . for the rule of law requires that laws, not persons, decide cases.” See Miranda Oshige McGowan, “Against Interpretation,” *San Diego Law Review* 42 (2005): 711

²⁷ Raz writes: “From a narrow legal point of view the rule of law consists of a number of principles such as *nulla poena sine lege*.” See Joseph Raz, “The Politics of the Rule of Law,” *Ratio Juris* 3 (1990):331. For a full explanation of the Latin principle see Aly Mokhtar, “*Nullum Crimen, Nulla Poena Sine Lege*: Aspects and Prospects,” *Statute Law Review* 26 (2005):41–55.

While there is debate over whether the rule of law also entails a number of moral and/or political ideals (such as equality, freedom, democracy, or judicial review),²⁸ I am only concerned with the formal articulation of the rule of law; that is, I make no distinction between the rule of good law and the rule of bad law.²⁹ As Raz has famously stated, “The rule of law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.”³⁰ There is general agreement on the formal elements of the rule of law.³¹ It applies to any long-duration text that is treated as a practical authority.

B. The Requirements of the Rule of Law

In 1964 Lon Fuller wrote an important monograph in response to H. L. A. Hart’s influential account of legal positivism.³² One famous chapter of this book depicts a fictitious king named Rex, who, upon taking the throne, sought to enact a comprehensive legal reform in his kingdom. The genius of this allegorical story is that Fuller was able to identify

²⁸ For a recent example of an argument that the rule of law necessarily entails a number of moral ideals, see Mortimer Sellers, “What is the Rule of Law and Why is it so Important?,” in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (ed. James R. Silkenat et al.; Ius Gentium: Comparative Perspectives on Law and Justice; New York: Springer, 2014), 3–14. For a list of the various ideals that have been connected with the rule of law, see Daniel B. Rodriguez et al., “The Rule of Law Unplugged,” *Emory Law Journal* 59 (2010):1457.

²⁹ The formal, or ‘thin,’ definition of the rule of law is typically contrasted with substantive, or ‘thick’ definitions, which involve moral content. For an examination of the difference between formal and substantive approaches, see Tamanaha, *On the Rule of Law*, 91–113. Dworkin has made a similar distinction, although he used the categories: 1) the rule-book approach to the rule of law; and 2) the rights approach to the rule of law. See Ronald Dworkin, “Political Judges and the Rule of Law,” in *A Matter of Principle* (ed.; Cambridge: Harvard University Press, 1985), 11–12. The one moral element of the rule of law that applies to the formal approach is predictability. Regardless of whether one is ruled by good law, or ruled by bad law, the rule of law ideal allows subjects to plan their lives so as to avoid consequences. Such predictability is a moral good. See Andrei Marmor, “The Ideal of the Rule of Law,” in *A Companion to Philosophy of Law and Legal Theory* (ed. Dennis M. Patterson; Blackwell Companions to Philosophy; Malden: Wiley-Blackwell, 2010), 666–74.

³⁰ Joseph Raz, “The Rule of Law and its Virtue,” in *The Authority of Law: Essays on Law and Morality* (ed.; Oxford: Clarendon Press, 1979), 212.

³¹ Tamanaha writes: “Adherents of this [formal] version of the rule of law are in substantial agreement about its requirements and its implications.” See Tamanaha, *On the Rule of Law*, 94.

³² Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964). This book arose in response to Hart, *Concept of Law*, and H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958):593–629.

essential features of law (what he called the inner morality of law) through King Rex's various failures at legal reform, what Fuller called "eight routes to failure in the enterprise of creating law."³³ Corresponding to these eight failures are eight essential requirements of the rule of law. For example, at one point, King Rex created a code of law that would govern the people, but kept that code secret. This plan failed because his subjects declared "it was very unpleasant to have one's cases decided by rules when there was no way of knowing what those rules were."³⁴ This failure led Fuller to identify *promulgation* as an essential requirement of the law: the law cannot rule unless it has been published and is accessible to its subjects.³⁵

Fuller's eight requirements for the rule of law ideal have received much attention and have been construed in different ways,³⁶ though everyone generally agrees with Fuller's original list.³⁷ Below is a construal of these elements recently given by Rodriguez et al.:³⁸

- 1) **Generality**, so that expectations of conduct are stated in rules widely applicable and impartially applied;
- 2) **Accessibility**, so that legal decision makers make available to the public the rules to be observed;
- 3) **Prospectivity**, so that no one will be subject to the "threat of retrospective change";
- 4) **Understandability**, or what has also been called clarity;
- 5) **Consistency**, so that no one is subject to contradictory rules;
- 6) **Possibility**, that is, the prohibition of "rules that require conduct beyond the powers of the affected party";
- 7) **Stability**, so that rules do not change so frequently that parties cannot adequately gauge their actions and inactions; and

³³ Fuller, *Morality of Law*, 41.

³⁴ Fuller, *Morality of Law*, 35.

³⁵ Fuller, *Morality of Law*, 49–51.

³⁶ Most notably see Raz, "Rule of Law," 214–18; and John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series; Oxford: Clarendon, 1980), 79.

³⁷ Jeremy Waldron notes that most conceptions of the elements of the rule of law "do not present themselves as advocating *rival* conceptions. Their approaches seem quite congenial to each other; they are filling in the details of what is more or less the same conception in slightly different ways." See Jeremy Waldron, "Is the Rule of Law and Essentially Contested Concept (in Florida)?," *Law and Philosophy* 21 (2002):155. For a helpful chart that compares these elements see Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Basingstoke: Palgrave Macmillan, 2014), 15.

³⁸ See Rodriguez et al., "The Rule of Law Unplugged," 1466–67.

8) **Congruence** between the stated rules and their actual administration.

In order for the law to rule, each of these requirements must be met. Whenever the directives of practical authority fail to meet these requirements, then it poses a problem for its subjects, because the law cannot provide a preemptive reason for action.

While all eight of the requirements of the rule of law are important for any discussion of the nature of law, only four are necessary for my purposes: generality, clarity, consistency, and possibility. These are important because they address the requirements of the *content* of the law (substantive law). The requirement of accessibility, prospectivity, stability, and congruence all address issues of procedure: how a legal system operates. My focus in this study is on how interpretive sources treated the *substance* of the law; we do not have access to the actual practice of law in ancient Israel and early Judaism. Thus these procedural elements are not relevant (though I will return to the accessibility element of the rule of law in Chapter Seven sec. III.B). In the next section I further explain the substantive elements of the rule of law, and how they affect legal interpretation.

C. Requirements of the Rule of Law and Criteria for Identifying a Binding Attitude toward Law

My basic claim in this dissertation is that whenever an interpretive source viewed a text as a source of binding obligation, then its engagement with that text will be primarily preoccupied with any deficiencies that relate to the rule of law's requirements of generality, clarity, consistency, and possibility. Whenever the interpretation does *not* show any concern with these, then that interpreter did *not* view the text as a practical authority. As I argue above, once a text is viewed as providing preemptive reasons for action, then it completely changes how that text is read and interpreted (just as a winter tire law is approached entirely

different from a winter tire recommendation). In this section I argue that the unique character of this approach to law (in contrast to non-binding normative statements) is its preoccupation with these four elements of the rule of law, particularly with any deficiencies that threaten these elements. I explain each below.

i. GENERALITY

One of the essential features of the law is that it must be stated in general, widely applicable language. King Rex's first law-making failure was to eliminate law codes altogether, and adjudicate on an *ad hoc*, case-by-case basis. He quickly realized that it was impossible to achieve consistency in law without general rules.³⁹ This is the main difference between oral commands and fixed rules. While commands are dependent on their immediate context (clean your room now!), fixed rules are meant to govern a broad scope of activity, regardless of context (children must clean their room every Saturday).⁴⁰ In order for law to be law, its requirements must reach beyond the particulars of an individual context, and apply to a range of activities.

The main challenge with the generality requirement of the rule of law is over-precision, or, what legal theorists refer to as *under-inclusiveness*.⁴¹ While context-specific oral commands are necessarily specific, since they address one particular situation, rules need to be broad. When they are too precise (under-inclusive), they fail to achieve the law's need

³⁹ Fuller, *Morality of Law*, 34, 46–49.

⁴⁰ For example, Schauer states: “In contrast to specific commands—you take out this bag of trash now—rules do not speak merely to one individual engaging in one act at one time. Instead, rules typically address many people performing multiple acts over an extended period of time.” Schauer, *Legal Reasoning*, 24–29 (quote from p. 26). Similarly, Hart wrote: “[T]he law must . . . refer to classes of persons, and to classes of acts, things, and circumstances; and its successful operation over vast areas of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classifications which the law makes.” See Hart, *Concept of Law*, 123.

⁴¹ See, for example, Andrei Marmor, “The Rule of Law and Its Limits,” *Law and Philosophy* 23 (2004): 10–15.

for generality. In modern law, this phenomenon is typically found when a lawmaker opts to create a list of specific items, rather than employ a general term for which those items can be categorized. Peter Tiersma, for example, writes:

Frequently, legal drafters must choose between using a single flexible and rather general term that encompasses a large number of things or actions, or a more precise word list that attempts to enumerate all the specific things or actions that the writer intends to include.⁴²

The risk with a specific list is that it threatens that law's need for generality; it may miss items not listed.

This can be illustrated with Hart's famous hypothetical 'no vehicles in the park' rule.⁴³ Such a law provides a good example of law's generality. Rather than list the various items that are prohibited from entering the park (cars, trucks, motorcycles, etc.), the law employs the general term 'vehicles.' However, as Hart and others have pointed out, that term can be over-inclusive, prohibiting vehicles that should not be excluded by the law, such as an ambulance attending an incident in the park, or the trucks necessary to maintain the park grounds.⁴⁴ In response to this problem of over-inclusiveness that generality can create, some law-makers will opt to create a list. However, the precision of a list can be under-inclusive. For example, a lawmaker may not include an ATV or hovercraft in her list of prohibited items. Furthermore, lists are unable to accommodate changing technologies. For example, a

⁴² See Peter M. Tiersma, *Legal Language* (Chicago: University of Chicago Press, 1999), 81.

⁴³ H. L. A. Hart introduced this hypothetical law in 1958 to illustrate the problem of what he termed "open texture" in the law. This refers to the fact that the law will always have gaps and indeterminacies such that no law can provide one answer to every legal case that comes its way. See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958), 607ff. Frederick Schauer states that the vehicles in the park prohibition "is the most famous hypothetical in the common law world." Frederick F. Schauer, "A Critical Guide to Vehicles in the Park," *New York University Law Review* 83 (2008): 1109.

⁴⁴ A creative example of such over-inclusiveness was given by Fuller: "[I]f some local patriots wanted to mount on a pedestal in the park a truck used in World War II." Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 663. See also Schauer, *Legal Reasoning*, 27–29.

list of prohibited vehicles that was made 20 years ago would not be able to address the question of whether or not a Segway or hoverboard could enter the park. Thus over-precision challenges the law's requirement of generality.

The reason that such under-inclusiveness threatens the rule of law is because it forces the law's subjects as well as adjudicators to decide for themselves whether or not an ATV or a Segway can enter the park. While some may argue that an ATV should be allowed to enter, even though it clearly violates the law's underlying rationale, others may argue otherwise. Either way, judges and citizens must rely on their own balance of reason to arrive at a decision because the law is unable to provide a preemptive reason for action. Such under-inclusiveness, therefore, threatens the rule of law.

The point of this discussion is to demonstrate that, since this law is treated as a preemptive reason for action, then such over-precision poses a problem for any interpreter of the law. If we apply this same logic to interpretive sources in ancient Judaism, then whenever an interpretive source appears to be bothered by such over-precision, we can conclude that that scribe considered his interpreted text to be legally binding. As I argue in Chapter Five, this is what we find in the Samaritan Pentateuch's interpretive rendition of the goring ox laws.⁴⁵ By contrast, if the interpretive source shows no concern for such under-inclusiveness, then that scribe did *not* consider his text to be the source of a binding obligation.

A clear example of an interpretation that addresses this problem of under-inclusiveness can be found in a passage of CD that interprets the laws on unlawful sexual relations from Leviticus 18:6–20. In the Torah passage, there is a list of forbidden unions: father-son, mother-son, uncle-nephew, uncle-aunt etc. What is obviously missing from that

⁴⁵ See Chapter Five sec. II.A.

precise list is a prohibition against uncle-niece relations. CD 5:7–11 addresses this case of over-precision:

היא אמך שאר תקרב לא אמך אחות אל אמר ומשה אחותו בת ואת אחיהו בת את איש ולוקחים
והיא אביה אחי ערות את האח בת תגלה ואם הנשים וכהם כתוב הוא לזכרים העריות ומשפט
שאר

And they marry, each man the daughter of his brother and the daughter of his sister. But Moses said “you shall not draw near to your mother’s sister, she is the kin of your mother.” The rule of incest was written for males but [they apply] likewise [for] women. Therefore, if the daughter of a brother uncovers the nakedness of the brother of her father, she is [also] kin.

The fact that the CD scribe sought to fill this gap in the list indicates that he was bothered by the over-precision of the Torah; without this interpretation, one would have to rely on their balance of reason to decide whether or not it is permissible for an uncle to have relations with his niece.⁴⁶ Since CD’s interpretation sought to eliminate such reasoning, it can be concluded that the author treated the Torah as a source of binding obligation. Therefore, *any interpretation that attempts to correct the problem of under-inclusiveness reflects an attitude of binding obligation toward the law.*

ii. *CLARITY*

The second requirement of the rule of law is clarity. It is intuitively obvious that the law cannot rule unless its requirements are clear and understandable; preemption requires that the law be clear and precise. Although the clarity requirement of the rule is obvious, it can be challenged from four different angles.

First, the clarity of the law can be challenged by the *opposite* phenomenon of under-inclusiveness; that is, it can be threatened by *over-inclusiveness*, which is caused by the use

⁴⁶ For further comment on the legal interpretation of this passage see below Chapter Three sec. II.A. and Bernard M. Levinson, “Textual Criticism, Assyriology, and the History of Interpretation: Deuteronomy 13:7a as a Test Case in Method,” *JBL* 120 (2001):231–32; and Corrado Martone, “Authority and Text in the Temple Scroll,” *Henoah* 36 (2014):27–28.

of general terms. I have already noted the fact that the general term ‘vehicle’ in Hart’s fictitious prohibition would exclude ambulances and maintenance vehicles from entering the park. In such cases, the law would lack the precision necessary to distinguish between acceptable vehicles and unacceptable vehicles; it is not clear. In my textual analyses in PART II of this study, however, I have not come across any instances of interpreters who are concerned with over-inclusiveness, so we need not dwell on this phenomenon here.

A second, much more common, threat to the law’s clarity is the problem of *vagueness*. While vagueness has received much attention from linguists and philosophers of language (in addition to legal theorists),⁴⁷ I borrow Lawrence Solum’s simple and accessible explanation. Solum claims that “vagueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply.”⁴⁸ He uses the word ‘tall’ as an example. While a person who is 6’4” is considered tall and a man who is 5’6” is considered not tall, the term may or may not apply to a person who is 5’11””; thus the term “tall” has borderline cases; it is vague.

The word ‘vehicle’ in Hart’s prohibition can serve as an example of a vague term. It is vague because it is unclear whether or not the word ‘vehicle’ applies to bicycles, electric scooters, or motorized mobility aids. These are borderline cases that force a judge or a citizen to rely on their balance of reason to decide what is acceptable; it threatens the clarity requirement of the rule of law.⁴⁹ Vagueness must be distinguished from the broader phenomenon of generality, however. As noted above, the word vehicle is a general term,

⁴⁷ For a dialogue between legal theorists and philosophers of language see Kent Greenawalt, “Vagueness and Judicial Responses to Legal Indeterminacy,” *Legal Theory* 7 (2001): 433–45.

⁴⁸ See Lawrence B. Solum, “The Interpretation-Construction Distinction,” *Constitutional Commentary* 27 (2010):98. See also Lawrence M. Solan, “Vagueness and Ambiguity in Legal Interpretation,” in *Vagueness in Normative Texts* (ed. Vijay K. Bhatia et al.; Linguistic Insights 23; Berlin: Peter Lang, 2005), 73–75.

⁴⁹ For a fuller explanation of how vagueness threatens the rule of law (and necessarily so), see Timothy Endicott, “The Impossibility of the Rule of Law,” *Oxford Journal of Legal Studies* 19 (1999):1–18.

since it refers to a class of things, such as sedans, minivans, trucks, motorcycles, as well as ambulances and park maintenance trucks. These items are all clearly included in the general category of vehicles. Vagueness is a problem that arises from the attempt to generalize, because vagueness refers to the borderline cases that are not easily categorized.⁵⁰ The generality of the term ‘vehicle’ can threaten the clarity of the law because it cannot distinguish between ambulances (which should be allowed in the park) and minivans (which should not); it prohibits them all because they are clearly vehicles, even though the former should not be prohibited. Vagueness, by contrast, refers to those instances where it is not clear whether or not an item is covered by the general term; electric bicycles are a borderline phenomenon: is it a vehicle or is it not a vehicle? This is a different threat to the law’s clarity than the case of the ambulance. Vagueness is a ubiquitous problem in both modern and ancient law, because it cannot preempt one’s balance of reason in borderline cases.⁵¹

As I argue in section IV below, an excellent example of the problem of vagueness in the Torah is the prohibition against work on the Sabbath. The word ‘work’ is notoriously vague with limitless examples of borderline cases. The author of CD spent more than a full column (cols. 10–11) attempting to address this problem, delineating a list of activities that were and were not considered a violation of the law. This interpretation of the Torah’s Sabbath law, therefore, reflects an attitude of binding obligation toward the Torah. Just as with the problem of under-inclusiveness, *whenever there is a significant attempt to add precision to vague terms in the law, it reflects an attitude of binding obligation toward that text.*

⁵⁰ Olafur Pall Jonsson, “Vagueness, Interpretation, and the Law,” *Legal Theory* 15 (2009):193–214; and Timothy Endicott, “Vagueness and Law,” in *Vagueness: A Guide* (ed. Giuseppina Ronzitti; Logic, Epistemology, and the Unity of Science 19; Dordrecht: Springer Netherlands, 2011), 171–91.

⁵¹ See Timothy Endicott, “Law is Necessarily Vague,” *Legal Theory* 7 (2001):379–85.

A third threat to the clarity of the law comes from *gaps* in the law. While the problem of vagueness, over-inclusiveness, and under-inclusiveness can all be considered examples of gaps in the law, I am here referring to occasions when the law fails to include practical considerations that are necessary to fulfill the law's requirements.⁵² This can be illustrated with a set of Ikea instructions. If the assembly instructions for a piece of furniture say "fasten brace to legs" but do not specify which size screw to use among the many options, that is a gap in the instructions. It is necessary to use a screw to fasten the brace to the legs, but the interpreter must rely on her own judgement to decide which screws to use. This is the type of gap that I am referring to. In Chapter Four I provide four such examples in the Temple Scroll's rewriting of the Torah's *Yom kippur* laws, where the author adds details that are necessary to follow the law, which are not included in the Torah's instructions.⁵³ Wherever such practical details are necessary, it forces the rule-follower to rely on their balance of reason to fully comply with the law, which poses a threat to the law's requirement of clarity. *Any interpretation that seeks to fill these practical gaps reflects an attitude of binding obligation toward the law.*

Finally, a fourth challenge to the rule of law's requirement for clarity arises when the law is not presented in a *coherent and sequential manner*. In modern legal systems the clarity of the law is threatened by complex rules that are written in verbose technical language that is only understandable to lawyers and judges.⁵⁴ In ancient legal collections, however, the clarity of the law is challenged when it is difficult to follow the order of scattered legal

⁵² I have not come across any legal-theoretical discussion on this phenomenon; law-makers typically take great care to include instructions for all practical considerations that are necessary to comply with the law. In ancient Mesopotamian and Pentateuchal law, however, which were not meant to preempt practical reasoning, written law was not held to such a standard of clarity.

⁵³ Chapter Four sec. III.E–H.

⁵⁴ See Marmor, "The Rule of Law and Its Limits," 26–27.

directives. This is because the logic behind the order of the legal collections is not always clear.⁵⁵ Furthermore, when various Pentateuchal legal corpora were combined into the Torah, it created a significant problem for the law's clarity because it set diverse legal collections alongside one another in a single document. When this happens, it is difficult to meet the law's requirements, which threatens the law's ability to provide a preemptive reason for action.

A well-known example of an ancient interpreter that explicitly sought to correct this problem of incoherence in the Torah's diverse legal corpora is Josephus. He prefaced his account of the laws of the Torah with the following:

Now those settlements [the Torah's laws] are all still in writing, as he [Moses] left them; and we shall add nothing by way of ornament, nor anything besides what Moses left us; only we shall so far innovate, as to digest the several kinds of laws into a regular system; for they were by him left in writing as they were accidentally scattered in their delivery, and as he upon inquiry had learned them of God.⁵⁶

Thus Josephus saw the haphazard organization of the Torah's law as a problem, which indicates that he viewed the Torah as a source of binding obligation. In the same way, the Mishnah was organized into tractates that logically organize the laws, so they are much easier to follow. These attempts to reorganize the scattered laws throughout the Torah show an attempt to provide an interpretive rewriting of the Torah with clearer requirements. Any interpretive attempt to correct a disorganized presentation of law reflects an attitude of binding obligation toward that text. As I argue in Chapter Four, this was one of the chief aims of the Temple Scroll's interpretive rewriting of the Torah.

⁵⁵ For Mesopotamian law, see Herbert Petschow, "Zur Systematik und Gestezestechnik im Codex Hammurabi," *ZA* 57 (1965):158–63. For the Covenant Code see Bernard S. Jackson, *Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1-22:16* (Oxford: Oxford University Press, 2006), 445–53. For Deuteronomy, see Stephen A. Kaufman, "The Structure of the Deuteronomic Law," *Maarav* 1/2 (1978–79):105–58.

⁵⁶ *Ant.* 4:197.

iii. *CONSISTENCY*

The consistency requirement of the rule of law refers to the fact that a legal text cannot contain conflicting rules. If the law's authority operates by providing preemptive reasons for action, it cannot provide two conflicting reasons for actions; such reasons cannot conflict. It forces the rule-follower to rely on her balance of reason to decide which rule to follow. Aharon Barak, for example, writes:

Conflicting norms offend and contradict the principle of rule of law. They are inconsistent with a legal system's methodical structure. A legal system saying that X is both permitted and forbidden undermines its own stability.⁵⁷

Similarly, Carlos González writes:

How does the legal system mediate conflicts between legal norms demanding mutually exclusive outcomes? In other words, how do courts adjudicate cases where one legal norm requires or allows X, while another legal norm prohibits X? A rule-based legal system must incorporate a mechanism for answering this question, for without such a mechanism a legal system cannot rationally determine what the law demands.⁵⁸

Simply put, when norms conflict, the law's ability to rule is threatened.

There are numerous examples of conflicting laws in the Torah. One famous example is found in the manumission laws. According to Exod 21:2 and Deut 15:12, a Hebrew indentured servant shall be released after six years. Lev 25:40, however, requires that he be released in the year of Jubilee, which is clearly in conflict with the previous law. Such cases of legal conflict threaten the rule of law because they provide multiple answers to a legal issue that demands one answer. In fact, such conflict indicates that the compilers of the Pentateuch did not view the law as a binding obligation; conflicting norms are only a problem when the law is treated as a preemptive reason for action. Gershon Hepner also

⁵⁷ Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), 74.

⁵⁸ Carlos E. González, "The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms," *Oregon Law Review* (2001):447–48.

notes this: “[T]he fact that the redactors of the Pentateuch codified contradictory laws strongly suggests that they did not regard them all as imperatives that should be literally obeyed.”⁵⁹

By contrast, whenever an interpretive source seems bothered by legal conflict, it indicates that he viewed that text as a source of binding obligation. As I demonstrate in Chapter Four, this was the case for the Temple Scroll’s treatment of the Torah’s *Yom kippur* law.

iv. POSSIBILITY

The possibility requirement of the rule of law refers to occasions where the wording of the law leads to impossible, overly difficult, or absurd results. In such cases, one’s balance of reason actually usurps the law as a reason for action.⁶⁰ This can be demonstrated with Hart’s ‘no vehicles in the park’ rule, particularly the case of the paramedic who wants to enter the park to attend to an emergency.⁶¹ As noted above, this is an example of an over-inclusive law, since an ambulance should be noted as an exception to the rule. However, this scenario can also be understood as a challenge to the possibility requirement of the rule of law. It would be morally absurd for a paramedic to refrain from driving her vehicle in the park on account of that rule. In such a case, the paramedic’s balance of reason would be so compelling—life-saving reasons—that the law’s preemptive power would yield to her much stronger reasons. When the law requires the absurd, then its preemptive power gives way to practical reason. Of course, the paramedic can enter the park, no matter what the law says! As I demonstrate in a test case in section IV below, a number of sectarian scrolls were well

⁵⁹ Gershon Hepner, *Legal Friction: Law, Narrative, and Identity Politics in Biblical Israel* (Studies in Biblical Literature 78; New York: Peter Lang, 2010), 26.

⁶⁰ Marmor, “The Rule of Law and Its Limits,” 32–33.

⁶¹ Poscher, “Ambiguity and Vagueness in Legal Interpretation,” 133.

aware of the possibility requirement of the Sabbath prohibition, and sought to find exceptions to the law when it led to an absurd result.⁶²

III. SUMMARY OF METHODOLOGY

The heart of my method for identifying instances when an interpretive source treats a legal text as a source of binding obligation is outlined in the chart below:

Requirement of the rule of law	Corresponding threats to the rule of law	Interpretive agenda that reflects an attitude of binding obligation toward the law
Generality	<ul style="list-style-type: none"> • Under-inclusiveness 	<ul style="list-style-type: none"> • Generalizing under-inclusive laws
Clarity	<ul style="list-style-type: none"> • Over-inclusiveness • Vagueness • Practical gaps • Incoherence 	<ul style="list-style-type: none"> • Adding precision to over-inclusive laws • Adding precision to vague laws • Gap-filling practical elements that are entailed by the law • Systematizing scattered laws on the same topic
Consistency	<ul style="list-style-type: none"> • Conflicting norms 	<ul style="list-style-type: none"> • Eliminating contradictions in the law
Possibility	<ul style="list-style-type: none"> • Absurd or immoral results 	<ul style="list-style-type: none"> • Providing exceptions to the law when it leads to an absurd or immoral result

For each of the requirements of the rule of law, there are corresponding threats. I submit that these threats are problematic to an interpreter *if and only if* the law is viewed as a source of binding obligation. In other words, if an ancient interpreter of a legal text shows a significant preoccupation with these threats, then it can be concluded that that interpreter viewed that legal text as a source of binding obligation. Each of these threats undermines the law's ability to fully preempt one's balance of reason for a given decision; wherever these threats are present, then one must resort to one's own discretion and personal judgment to take a course of an action. If an interpreter pays no attention to these threats, it is a strong indication that he did not view the law as a practical authority. By contrast, an interpretation's significant

⁶² For an alternative construal of this tension between legal obligation and moral reason from a scholar of early Judaism, see Amihay, *Essene Law*, 71–75.

preoccupation with these threats is a strong indication that that interpreter viewed the law as law in the modern sense: a source of binding obligation.

IV. SABBATH INTERPRETATION AS A TEST CASE

In this section I provide an example of how this methodology can be applied to one interpretive source whose interpretation of the Torah is clearly preoccupied with the requirements of the rule of law, which indicates that its scribe viewed the Torah as a binding obligation—imposing preemptive reasons for action. This is the interpretation of the Torah’s Sabbath law that is found in CD 10:14–11:18.⁶³ CD’s interpretive engagement with the Sabbath prohibition clearly reveals an attitude of binding obligation toward the Torah. This claim is reinforced when CD’s interpretation of the Sabbath prohibition is compared with earlier inner-scriptural interpretations of this law, which pay no attention to the threats to the rule of law.

I will examine two excerpts from CD’s extended Sabbath interpretation pericope.

First, CD 10:14–21 reads:

על הש[ב]ת לשמרה כמשפטה אל יעש איש ביום השישי מלאכה מן העת אשר יהיה גלגל השמש רחוק מן השער מלואו כי הוא אשר אמר שמור את יום השבת לקדשו וביום השבת אל ידבר איש דבר נבל ורק אל ישה ברעהו כל אל ישפוט על הון ובצע אל ידבר בדברי המלאכה והעבודה לעשות למשכים אל יתהלך איש בשדה לעשות את עבודת חפצו השבת אל יתהלך חוץ לעירו על אלף באמה . . .

Concerning the Sabbath, to keep it according to its rule: A man shall not do work on the sixth day from the time when the orb of the sun is distant from the gate with its fullness. For that is what he said: “Keep the day of the Sabbath to make it holy.” And on the day of the Sabbath a man shall not speak a foolish or empty word. And he shall not lend his peer anything. He shall not deliberate on property or profit. And he shall not speak words of work or service to do at

⁶³ The specific texts that the CD scribe engages is a complex issue. I will discuss this issue further below. For now, it will suffice to note that the CD scribe likely had the Sabbath prohibition from Deuteronomy’s Decalogue in mind. See Joseph L. Angel, “Damascus Document,” in *Outside the Bible: Ancient Jewish Writings Related to Scripture. Vol. 1* (ed. Louis H. Feldman, et al.; Philadelphia: JPS, 2013), 3018.

sunrise. A man shall not walk about in a field to do his workday business on the Sabbath.⁶⁴ He shall not walk outside his town beyond 1000 cubits. . .

When this interpretation is viewed in the light of my criteria for identifying a binding attitude toward law, it is immediately noticeable that this interpreter is immensely bothered by the vagueness of the word ‘work.’ He spends a great deal of energy listing borderline cases, in which it is not clear whether or not they are prohibited by the law, to add precision to the word ‘work.’ Does making a loan qualify as work? What about discussing property and profit, or talking about the next day’s duties? How far can one walk before it is considered work? Where can one walk? If the Torah’s Sabbath prohibition is to provide a preemptive reason for action, imposing an obligation to obey based on its mere say-so, then these are the types of questions that an interpreter will ask. They are all rooted in the question of what does and does not qualify as compliance. The author here is clearly uncomfortable with the idea that rule-followers will have to rely on their discretion to decide which activities are acceptable, so he gives a precise list of activities that the law prohibits.

Furthermore, not only does the author attempt to delineate which activities do or do not qualify as work, but also the precise temporal boundaries of the Sabbath (from the time the full sun sets past the gate).⁶⁵ Here again, because the Sabbath law is a binding obligation for the CD scribe, he does not want his subjects to decide for themselves (based on their balance of reason) when, exactly, the Sabbath begins and ends. The fact that his interpretation is significantly preoccupied with the problem of vagueness indicates that he viewed the Torah as a source of binding obligation.

⁶⁴ For the “workday business” phrase, see Angel, “Damascus Document,” 3018.

⁶⁵ For this interpretation of the phrase “מן העת אשר יהיה גלגל השמש רחוק מן השער מלואר” see Angel, “Damascus Document,” 3018.

His preoccupation with the requirements of the rule of law does not stop with the problem of the law's vagueness, however; he is also concerned with the *possibility* requirement of the rule of law. A few lines later, CD 11:16–17 reads:

אל יעלה איש בסולם וחבל וכלי. . . מקום מים ואל מקום⁶⁶ וכל נפש אדם אשר תפול אל

And any human who falls in a place of water or a place of . . . , no man shall lift him with a ladder, rope, or tool.

Here the CD scribe is concerned with two of the requirements of the rule of law: clarity and possibility. On the one hand, interpreters must rely on their balance of reason to decide whether or not lifting someone out of a pit is work. The vagueness of the Sabbath prohibition cannot on its own answer that question—it cannot preempt reason. To deal with this problem, the CD scribe specified that lifting is only a violation of the Sabbath if one uses a tool.

On the other hand, what is of primary concern in this passage is the possibility requirement of the rule of law. There must have been some question as to whether or not it was permissible to save a life on the Sabbath. The issue that underlies that question is whether or not morality and practical reason can usurp the law as a reason for action.⁶⁸ If the law leads to an absurd or immoral result, must it still be followed? Does law always preempt all reason, even if it leads to one's death? Indeed, there is evidence that at least one community may not have defended itself from attack to uphold the Sabbath.⁶⁹ If law is truly

⁶⁶ The word מים is erased here in CD A. See Joseph M. Baumgarten and Daniel R. Schwartz, "Damascus Document (CD)," in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 2: Damascus Document, War Scroll, and Related Texts* (ed. James H. Charlesworth; Louisville: Westminster John Knox, 1995), 49.

⁶⁷ There is a blank space here in CD ms A. See Baumgarten and Schwartz, *Damascus Document*, 49. For an alternative reading from 4Q271 (likely בור instead of מקום), see the composite text in Elisha Qimron, *The Dead Sea Scrolls: The Hebrew Writings. Vol. 1* (Jerusalem: Yad Ben-Zvi, 2010), 46.

⁶⁸ See the discussion in Tzvi Novick, "Overt Acknowledgement of Practical Considerations in Legal Texts from Qumran," *DSD* 21 (2014):68–69; and Amihay, *Essene Law*, 71–79.

⁶⁹ See 1 Macc 2:32–38; and Josephus, *Ant.* 12.273–77. These sources also indicate that the communities subsequently decided that it is permissible to defend oneself on the Sabbath. See Lutz Doering, *Sabbat: Sabbathalacha und -praxis im antiken Judentum und Urchristentum* (TSAJ 78; Tübingen: Mohr Siebeck, 1999), 543–45; and Doering, "Jewish Law in the Dead Sea Scrolls: Some Issues for Consideration," in

to be followed as a preemptive reason for action, then it demands compliance, regardless of whether or not one agrees with it. If following the law leads to an absurd result—i.e. one's death—then it is clearly a problem. Therefore, the fact that the CD scribe sought to address this problem—that fact that he saw it as a problem that had to be addressed in his interpretation—indicates that he viewed the Torah's Sabbath prohibition as a binding obligation.

It should be noted that the CD scribe does not invent these Sabbath prohibitions *ex nihilo*. For example, the question of whether or not it is lawful to save a life on the Sabbath is discussed in contemporary sources.⁷⁰ In all likelihood, the CD scribe was simply engaging with an existing discourse, perhaps even borrowing from contemporary sources such as 4Q265.⁷¹ While this may indicate that such Sabbath discussion was purely intellectual (rather than legal), the very fact that such debates existed demonstrates the new legally binding attitude toward law. Even if CD's Sabbath discussion was purely theoretical, the fact that the scribe was still so preoccupied with these threats to the rule of law reveals his expectation of what law should look like and the types of practical questions the law must address.

Similarly, in a recent monograph, Alex Jassen traces the influence of Isa 58:13 on three of the above prohibitions in CD: making a loan, discussing property, and discussing the next day's work. These three speech-based offenses are, according to Jassen, interpretive expansions of the enigmatic indictment against “speaking a word” on the Sabbath (וְדַבֵּר דָּבָר)

The Hebrew Bible in Light of the Dead Sea Scrolls (ed. Nora David; FRLANT 239; Göttingen: Vandenhoeck & Ruprecht, 2012), 461.

⁷⁰ See the previous note and 4Q265 6 5–8 (which is very close to CD) and Matt 12:9–11.

⁷¹ While there are similarities and differences between the Sabbath laws of CD and 4Q265, the possibility that one was borrowing from the other must not be ruled out. See Charlotte Hempel, *The Damascus Texts* (Sheffield: Sheffield Academic Press, 2000), 97–98; and Lutz Doering, “New Aspects of Qumran Sabbath Law from Cave 4 Fragments,” in *Legal Texts and Legal Issues. Proceedings of the Second Meeting of the International Organization for Qumran Studies, Cambridge 1995* (ed. Moshe J. Bernstein, et al.; Leiden: Brill, 1997), 264–73.

from Isa 58:13. These expansions are furthermore based on lexemes from nearby verses.⁷² Even though these Sabbath laws were derived through interpretive engagement with earlier scriptural texts, however, this does not negate the development in legal thinking reflected in CD. As I discuss further in Chapter Three, all interpretation involves an element of creativity and innovation. Therefore, any text can be interpreted in any number of ways, for any number of purposes. The fact that the CD scribe chose to focus his interpretive efforts (of both the Torah's Sabbath prohibition as well as Isa 58:13) on addressing the threats to the rule of law, suggests that he saw the law's lack of clarity and possibility as problems that had to be addressed. In other words, the fact that the CD scribe chose to expend his interpretive efforts addressing practical rule-of-law issues, rather than theological or ideological concerns—the primary preoccupation of earlier scribes dealing with the Sabbath—indicates that he viewed the Sabbath prohibition as a binding obligation.⁷³

What makes the Sabbath interpretation of CD (and similar contemporary texts) stand out as such a clear example of a preoccupation with the requirements of the rule of law is the fact that earlier interpretations and interpretive reworkings of the Sabbath law pay virtually no attention to the law's vagueness. Earlier “inner-biblical” interpreters were simply not asking the question of what does and does not count as compliance with this law. Such a lack of attention to the threats to the rule of law indicates that earlier interpreters did not view the Sabbath law as a binding norm, though it must be emphasized that this does not negate the

⁷² See Alex P. Jassen, *Scripture and Law in the Dead Sea Scrolls* (New York: Cambridge University Press, 2014), 73–84, esp. 80–84. Others similarly note that the three speech-based offenses here are an expansion of the initial prohibition against “speaking a foolish or empty word” (ידבר איש דבר נבל ורק) (Isa 58:13), which is undoubtedly taken from Isa 58:13. See, for example, Lawrence H. Schiffman, *The Halakhah at Qumran* (Leiden: Brill, 1975), 88.

⁷³ It should be noted that at least one Sabbath expansion in CD may be concerned with a theological issue, rather than a practical one: fraternizing with gentiles on the Sabbath (CD 11:14–15). This law may reflect a concern to be ritually pure on the Sabbath. See Schiffman, *Halakhah*, 123–24.

possibility that the Sabbath prohibition held normative value and influenced its addressees' actions as an epistemic authority.

Obviously it is not possible here to prove that all inner-scriptural interpretations of the Sabbath were not concerned with the threats to the rule of law, though this lack of attention to practical matters in the Hebrew Bible is generally understood.⁷⁴ Some brief examples and observations will help to illustrate this point. First, Moshe Weinfeld noted decades ago that Deuteronomy's interpretive reformulation of the Decalogue's Sabbath law (Deut 5:12–15) reflects the Deuteronomist's historical reorientation of the earlier Priestly-mythical Sabbath reflected in Exod 20:8–11:⁷⁵

Exod 20:9, 11 ששת ימים תעבד ועשית כל מלאכתך . . . כי ששת ימים עשה יהוה את השמים
ואת הארץ את הים ואת כל אשר במ וינח ביום השביעי על כן ברך יהוה את יום
השבת ויקדשהו

Six days you shall labor and do all your work . . . for six days
Yhwh made heaven and earth, the sea and all that is in them and
he rested on the seventh day. Therefore, *Yhwh* blessed the day of
the Sabbath.

Deut 5:13, 15 ששת ימים תעבד ועשית כל מלאכתך . . . וזכרת כי עבד היית בארץ מצרים
ויצאך יהוה אלהיך משם ביד חזקה ובזרע נטויה על כן צוך יהוה אלהיך לעשות
את יום השבת

Six days you shall labor and do all your work. . . . And you shall
remember that you were slaves in the land of Egypt, but *Yhwh*
your God brought you out from there with a strong hand and an
outstretched arm. Therefore, *Yhwh* your God commanded you to
perform the day of the Sabbath.

⁷⁴ See Lutz Doering, "Sabbath and Festivals," in *The Oxford Handbook of Jewish Daily Life in Roman Palestine* (ed. Catherine Hezser; Oxford Handbooks in Classics and Ancient History; New York: Oxford University Press, 2010), 567–68; Ryan C. Stoner, "A Sacrifice of Time: Work, Worship and the Embodiment of Sabbath in Ancient Judaism," (Ph.D. diss., University of Toronto, 2014), 22–24; and Alex P. Jassen, "Tracing the Threads of Jewish Law: The Sabbath Carrying Prohibition from Jeremiah to the Rabbis," *ASE* 28 (2011):253–78, esp. 254–56.

⁷⁵ Moshe Weinfeld, *Deuteronomy and the Deuteronomistic School* (Oxford: Clarendon, 1972), 222.

Weinfeld argues that the formulation of the Sabbath law in Exod 20:8–11 reflects the Priestly ideal that humans “re-enact” the activities of the divine sphere: “[M]an, by his Sabbath rest, re-enacts, so to speak, God’s rest on the seventh day of creation.”⁷⁶ Deuteronomy, by contrast, rejects this earlier mythical rationale for the Sabbath in favor of a social and historical justification of the law: they are to remember the historical event of their slavery.

While Weinfeld’s explanation has been criticized and revised,⁷⁷ and the direction of dependence between two Decalogues is often questioned,⁷⁸ the point to note here is that, no matter the explanation, there is no concern for the problem of the law’s vagueness. The Deuteronomy scribe chose to focus his interpretive efforts addressing theological/ideological issues, rather than practical rule-of-law concerns. This same conclusion holds if the Exodus Decalogue depends on Deuteronomy’s. When such a lack of concern for the practical application of the law is compared to the significant preoccupation with the law’s vagueness in CD (and similar texts), it is clear that something new is happening for the later scribes. This, I would argue, is clear evidence for a new binding attitude toward law for later scribes.

This same lack of attention for practical issues can be found in other reformulations of the Sabbath. For example, Israel Knohl has demonstrated that the Pentateuch’s Holiness stratum reformulates the Priestly Sabbath to associate the Sabbath’s holiness with the

⁷⁶ Weinfeld, *Deuteronomy*, 222.

⁷⁷ See, for example, Gerhard F. Hasel, “The Sabbath in the Pentateuch,” in *The Sabbath in Scripture and History* (ed. Kenneth A. Strand and Daniel André Augsburger; Washington, D.C.: Review and Herald, 1982), 28–33; and Peter T. Vogt, *Deuteronomistic Theology and the Significance of Torah: A Reappraisal* (Winona Lake, In.: Eisenbrauns, 2006), 144–50.

⁷⁸ This began with Lothar Perlitt, *Bundestheologie im Alten Testament* (WMANT 36; Neukirchen-Vluyn: Neukirchener, 1969), 78–99. He was followed by Eduard Nielsen, *The Ten Commandments in New Perspective: A Traditio-Historical Approach* (SBT 7; London: S. C. M. Press, 1968). See also Paul Hossfeld, *Der Dekalog: Seine späten Fassungen, die originale Komposition und seine Vorstufen* (OBO 45; Freiburg: Universitätsverlag, 1982). Hossfeld is followed by (his student) Christoph Dohmen, “Decalogue,” in *The book of Exodus: Composition, Reception, and Interpretation* (ed. Thomas B. Dozeman, et al.; VTSup 164; Leiden: Brill, 2014), 217–18. See also Bernhard Lang, “The Number Ten and the Iniquity of the Fathers: A New Interpretation of the Decalogue,” *ZAW* 118 (2006):218–38; and William Johnstone, *Chronicles and Exodus: An Analogy and its Application* (JSOTSup 275; Sheffield: Sheffield Academic Press, 1998), 168–97.

Sanctuary.⁷⁹ Similarly, Jeffrey Stackert argues that the Holiness authors in Leviticus 25 expanded the concept of the Sabbath as a seventh day rest for humans to a seventh year rest for the land, according to H's anthropomorphizing of the land.⁸⁰ These are both ideologically motivated reinterpretations that, just as with Deuteronomy, pay no attention to the law's requirements of vagueness or possibility. The Sabbath law is interpretively reformulated in all five major strata of the Pentateuch (Exod 16:26; 23:12; 31:12–17; 35:1–3; Lev 23:3) and yet there is no concern within any of this interpretive reasoning for what would seem obvious to the modern reader: the question of how to follow the law—with what does and does not count as compliance.

Jassen has recently offered an explanation for the lack of attention to practical issues with Sabbath observance in the Hebrew Bible. He suggests that in ancient Israel everyone knew what the Sabbath required because, prior to the Pentateuchal prescriptions, a weekly cessation of work was common practice. Because of this, there was no need to specify the requirements of the law. He writes:

[T]he varied presentations of the Sabbath in the diverse Pentateuchal sources result from the desire to infuse this reality based practice with the divine imprimatur. This understanding of the literary origins of the Sabbath in the Pentateuch thus explains the paucity of detail. As a literary response to a regularly practiced weekly cessation of labor, the Pentateuchal Sabbath laws need no further specificity. Both author and reader were generally aware of what labor was avoided on the seventh day.⁸¹

Thus the pre-existing experience with the Sabbath practices eliminated the need for specificity in its legal formulation.

⁷⁹ Israel Knohl, *The Sanctuary of Silence: The Priestly Torah and the Holiness School* (Minneapolis: Fortress, 1995), 14–19.

⁸⁰ See Jeffrey Stackert, "The Sabbath of the Land in the Holiness Legislation: Combining Priestly and Non-Priestly Perspectives," *CBQ* 73 (2011):239–50.

⁸¹ Jassen, "Threads of Jewish Law," 255.

While this explanation is appealing, it seems overly simplistic to assume that everyone “generally knew what labor was avoided.” If the Sabbath prohibition was considered as binding law, given “divine imprimatur,” then its addressees would immediately be faced with multitudinous borderline activities, where it is not clear whether or not they violate the prohibition: Can I tie my sandals on the Sabbath, or boil water, or brush my hair, or feed my livestock, or nurse my child? I would argue that such questions would arise immediately once the Sabbath was viewed as a binding norm. This is indeed what we find in the sources. Although there are a few elaborations on the Sabbath throughout the Pentateuch and the Hebrew Bible, there is not a steady and gradual increase in Sabbath interpretations that leads into the type of Sabbath *halakhah* we find in CD, 4Q265, and the Mishnah. Rather, we find virtually no concern with the practical application of the Sabbath, amidst a fair amount of interpretive activity, until the 2nd–1st centuries B.C.E., where we find an explosion of intense concern for such matters. It is difficult to deny that something dramatically different was happening with CD’s Sabbath interpretation, when compared to all of the Pentateuchal and inner-scriptural interpretation of the Sabbath law.⁸² I would argue that this dramatic change in the manner in which the Sabbath was interpreted is a clear sign of the new legally binding attitude toward the Torah.⁸³

⁸² Jassen also recognized the “dramatic” change to the Sabbath in the later Second Temple period. See Jassen, “Threads of Jewish Law,” 255.

⁸³ Others attempt to argue that there was a gradual increase in concern for Sabbath interpretation throughout the Hebrew Bible that led into the type of interpretations found in CD and its contemporaries. For example, Fishbane argues that the Sabbath interpretation in Neh 13:15–21 and Jer 17:19–27 were intended to add precision to the vagueness of the Deuteronomic Sabbath prohibition. See *Biblical Interpretation in Ancient Israel* (Oxford: Clarendon, 1988), 129–34. See also Stoner, “Sabbath in Ancient Judaism,” 24–27. He seems to assume that the various Sabbath interpretations in the Hebrew Bible were meant to add precision to the law. I, however, agree with Jassen that the instances in which specific Sabbath activities are identified in the Pentateuch “makes the lack of specificity in the other Pentateuchal Sabbath laws even more glaring.” See Jassen, “Threads of Jewish Law,” 256. Furthermore, Jassen notes that the interpretation of the Sabbath in Jer 17:19–27 was meant as a “prophetic invective,” but gives little help in determining what does and does not qualify as compliance with the norm (258). He makes a similar argument for the Sabbath discussion in Isa

This conclusion must be tempered, however, by the fact that some Pentateuchal texts indicate that the Sabbath prohibition was more than a mere recommendation. The Pentateuchal codes in general were laden with the language of obligation.⁸⁴ What is more, the Sabbath-gatherer narrative depicts a man's execution for collecting wood on the Sabbath (Num 15:32–36). While I would argue that such obligation should be understood in terms of epistemic authority, as I suggest in the Conclusion (sec. IV–V), more work is needed to explore the manner in which a text's epistemic authority was mediated in ancient Israel and Mesopotamia—Hammurabi's Prologue and Epilogue are similarly laden with language of obligation.⁸⁵ What is important to note is that, however the authority of these texts was brought to bear upon community life, they were not treated as binding obligations. There is no evidence that anyone was asking the same types of questions that the CD scribe (and his contemporaries) was asking in his Sabbath interpretation—questions that address the threats to the rule of law.

V. CONCLUSION

In this chapter I have laid out the theoretical foundations for my methodology for identifying an attitude of binding obligation toward law in interpretive sources. I have addressed two main questions that have not received critical attention. First, I have addressed the question: What is it that we are looking for when we attempt to identify a binding attitude

58:13; it provides little clarification as to what qualifies as compliance and even the Septuagint and Targums' translations do not help. See Jassen, *Scripture and Law*, 69–73.

⁸⁴ For example, the Holiness Code reads: "But if you will not obey me, and do not observe all these commandments, if you spurn my statutes, and abhor my ordinances, so that you will not observe all my commandments . . . Lev 26:14–15) and Deuteronomy states, "if you obey the commandments of the Lord your God, which I am commanding you today, by diligently observing them, and if you do not turn aside from any of the words that I am commanding you today . . . (28:13–14). Many more examples are available.

⁸⁵ For example, the Epilogue reads: "Proper laws established by Hammurabi, the able king, who made the land adopt solid principles and good conduct . . . I have written these very special words of mine on this stone . . . so that disputes may be settled in the land, so that decisions may be made in the land (E1, 8). Translation from M. E. J. Richardson, *Hammurabi's Laws: Translations and Glossary*. (London: T & T Clark, 2004).

toward law in ancient sources? My answer to this question is that we are looking for instances in which an interpretive source treats a law as a practical authority; that is, it treats the law as a reason for action that preempts all other reasoning.

Then, having specified what it is that we are looking for, I have addressed a second question: How can we tell whether or not an interpretive source treats the law as a preemptive reason for action? In order to answer this question, I provided a lengthy discussion on the legal ideal known as the rule of law, focusing particularly on the requirements of the rule of law. This discussion forms the basis for my identification of seven criteria for determining whether or not an interpretive source treats the law as a preemptive reason for action. I conclude that an interpretive source treats the law as binding if it does one or more of the following to any significant degree: 1) generalizes an under-inclusive law; 2) adds precision to an over-inclusive law; 3) adds precision to a vague standard; 4) fills a gap for a necessary practical element of the law; 5) systematizes scattered laws; 6) eliminates contradictions among the laws; and 7) provides exceptions to the law when it leads to an absurd or immoral result. Whenever an interpreter is preoccupied with one or more of these problems to any significant degree, it is an indication that he views the law as a source of binding obligation. The example of CD's interpretation of the Sabbath law provides an illustration of how this methodology works in practices.

Before moving on to PART II of this study, where I analyze interpretive sources, there are two further issues to be discussed in chapters two and three.

CHAPTER TWO: HISTORY OF RESEARCH AND THE NEED FOR A LEGAL-THEORETICAL APPROACH

In this chapter I examine past attempts to determine when written law came to be treated as legally binding. Rather than providing a systematic survey of this research, however, I will instead focus on three key debates to demonstrate the need for a legal-theoretical approach to this issue. While previous studies have made important contributions, the debate is at a stalemate because previous approaches to this issue (other than that of Bernard Jackson) have relied on conflicting assumptions about the nature of law, which has led to conflicting conclusions. Thus, the main goal of this chapter is to uncover some of these assumptions and to argue for the present legal-theoretical approach.

It must be emphasized at the outset that past scholarship's reliance on tacit assumptions concerning the nature of law can hardly be considered a failing; our intuitions about how law works are very often correct and can take us a long way in addressing problems in ancient law. It is our intuition about law's nature that caused scholars to note that it is strange that none of the court records from Mesopotamia cite the law collections; intuition about law underlies the observation that it is strange that ancient law collections were not comprehensive. It is also the reason that Ezra's use of the Torah is puzzling, because he seems to make the Torah say things that it does not say. A great many important arguments and observations concerning ancient law have been made that rely on these tacit assumptions about the nature of law, what it is and how it functions.

Furthermore, as the renowned legal philosopher Ronald Dworkin noted decades ago, even lawyers rely on their intuition concerning the nature of law, without paying any critical

attention to the question of what the law is and how it functions: “Lawyers lean heavily on the connected concepts of legal right and legal obligation . . . But our understanding of these concepts is remarkably fragile.”¹ If today’s lawyers tend to lean on ‘fragile’ assumptions about the nature of law, surely scholars of ancient literature cannot be faulted for doing the same!

Keeping all this in mind, in this chapter I argue that the best means of pushing the current debate forward is to draw from legal theory to sort out what it is that we are looking for when trying to identify the new legally binding attitude toward law. Rather than simply asking ‘when did law become binding?’ it is more productive to address more foundational questions: ‘what does it mean for a text to be binding?’ and ‘how can we tell when a text is being treated as a source of binding obligation?’

I. ARGUMENTS FOR THE NON-BINDING CHARACTER OF ANCIENT NEAR EASTERN LAW

It will be helpful to begin by providing an overview of some of the key arguments and key evidence that support the claim that the biblical and Mesopotamian law collections were not treated as sources of binding obligation. As I argue in section II of this chapter, this evidence has been interpreted in a variety of ways, depending on one’s assumptions about the nature of law. However, it is important at the outset to provide these arguments and key evidence because they are the source of the debate.

Everything begins with Assyriologists’ early observation that the legal collections from Mesopotamia were not cited in any of their multitudinous court records; all discussions begin with that observation. Although this was noted early on, it was not until 1960–61 that

¹ Dworkin, “The Model of Rules,” 14.

scholars began to suggest that the Mesopotamian legal collections were something other than binding law.² In the span of a year two articles appeared, by F. R. Kraus and J. J. Finkelstein, suggesting alternate functions for the so-called law-codes. Kraus concluded, based on a formal comparison of the law collections with the omen texts, that the ‘codes’ were a scholastic exercise of judicial-scientific literature that were copied within scribal schools.³ Finkelstein, on the other hand, based on a comparison of LH with the Edict of Ammišaduqa, and an analysis of LH’s prologue and epilogue, concluded that LH was a piece of royal propaganda meant to extol the king’s judicial wisdom.⁴ Since these two studies appeared, most Assyriologists agree with Kraus’s scholastic exercise theory, and acknowledge that Finkelstein’s royal apologia theory is likely true for the legal collections that include a prologue and/or epilogue.⁵ Additionally, Raymond Westbrook has argued that the law collections also functioned as guides in the training of judges, and as reference texts meant to

² See note 2 on page 1.

³ F. R. Kraus, “Ein Zentrales Problem des Alt mesopotamischen Rechtes: Was ist der Codex Hammurabi?,” *Genava* 8 (1960):283–96.

⁴ J. J. Finkelstein, “Ammišaduqa’s Edict and the Babylonian “Law Codes,”” *JCS* 15 (1961):91–104.

⁵ For recent treatments of this issue, see Dominique Charpin, “The Status of the Code of Hammurabi,” in *Writing, Law, and Kingship in Old Babylonian Mesopotamia* (ed. Dominique Charpin and Jane Marie Todd; Chicago: University of Chicago Press, 2010), 71–82; Gonzalo Rubio, “The Mesopotamian Law Collections: Were they Really Legal Codes?,” in *Current Issues in the History of the Ancient Near East* (ed. Gonzalo Rubio and Mark W. Chavalas; Association of Ancient Historians 8; Claremont: Regina Books, 2007), 31–34; Bruce Wells, “Law and Practice,” in *A Companion to the Ancient Near East* (ed. Daniel C. Snell; Blackwell Companions to the Ancient World; Malden, MA: Blackwell, 2005), 184–86; and Marc Van de Mieroop, *King Hammurabi of Babylon: A Biography* (Blackwell Ancient Lives; Malden: Blackwell, 2005), 100–11. For other treatments of this issue, see Jean Bottéro, “The “Code” of Hammurabi,” in *Mesopotamia: Writing, Reasoning, and the Gods* (ed.; Chicago: University of Chicago Press, 1992), 156–84; Raymond Westbrook, “Biblical and Cuneiform Law Codes,” *RB* 92 (1985):247–64; Roth et al., *Law Collections*, 4–7; Eckart Otto, “Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law,” in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development* (ed. Bernard M. Levinson; JSOTSup 181; Sheffield: Sheffield Academic Press, 1994), 160–63; Horst Klengel, *König Hammurapi und der Alltag Babylons* (Zürich: Artemis & Winkler, 1991), 184–264; and Michael Roaf, *Cultural Atlas of Mesopotamia and the Ancient Near East* (New York: Facts on File, 1990), 120–22.

guide adjudication.⁶ These three theories are not mutually exclusive, and provide influential non-legal accounts of the law collections.

One additional piece of evidence that supports these non-legal accounts of the law collections is their lack of comprehensiveness. For example, LH has no explicit law dealing with murder.⁷ Similarly, the famous laws on the goring ox (found in LH 250–52, LE 53–55, and Exod 21:28–36) deal with a specific scenario that was extremely rare; as noted by Finkelstein, there is no reference to an ox inflicting injury in any of the tens of thousands of legal records.⁸ Concerning LH, Jean Bottéro notes that there is “disturbing lacunae in legislative matters.”⁹ If the lawmakers intended these collections to function as the ‘law of the land,’ then why make them so under-inclusive? This observation actually fits with my method for identifying a binding attitude toward law: the lack of comprehensiveness indicates that lawmakers were not constrained by the generality requirement of the rule of law. If law is to provide a preemptive reason for action, then it must be general and all-inclusive. The fact that the ancient legists show no concern for this requirement suggests that they were not meant to function with preemptive binding authority. Thus, not only does the lack of citation of the law collections indicate that they were not treated as binding law, this is corroborated by the law’s lack of comprehensiveness.

⁶ See Westbrook, “Biblical and Cuneiform Law Codes,” 247–64; and Eckart Otto, *Rechtsgeschichte der Redaktionen im Kodex Ešnunna und im “Bundesbuch”*: eine redaktionsgeschichtliche und rechtsvergleichende Studie zu altbabylonischen und altisraelischen Rechtsüberlieferungen (OBO 85; Freiburg: Universitätsverlag, 1989), 181–83.

⁷ Russ VerSteeg, *Early Mesopotamian Law* (Durham: Carolina Academic Press, 1999), 109.

⁸ He writes: “[I]n all of the tens of thousands of cuneiform documents relating to legal matters which have thus far come down to us, there is hardly a single allusion to a real instance in which an ox killed or injured a person or another animal.” J. J. Finkelstein, *The Ox That Gored* (Transactions of the American Philosophical Society; Philadelphia: American Philosophical Society, 1981), 21.

⁹ Bottéro, “The Code,” 161–63.

When it comes to the Pentateuchal legal corpora, there is evidence to suggest they were also not written as binding law. First, the same lack of comprehensiveness can be found in biblical law. For example, the case of brawling men who bump into a pregnant woman and cause a miscarriage (Exod 21:22–25) deals with such a specific scenario that is it even more under-inclusive than the goring ox laws.¹⁰ Second, there is little doubt that at least an early form of one of the legal corpora from the Pentateuch (the *mišpātîm* [Exod 21:1–22:16]) participated in the same generic convention as that of Mesopotamian law.¹¹ At a minimum, the *mišpātîm*, or at least an early version of it, was written as a treatise of judicial science, which likely extolled the wisdom of the Israelite deity (much the same as LH extolled the wisdom of Hammurabi).¹²

Third, while no legal records have been preserved from ancient Israel,¹³ the numerous judicial admonitions (Exod 23:1–9; Deut 16:18–20; 17:8–11; Lev 19:15–16; and 2 Chr 19:6–7) in the Hebrew Bible make no mention of a lawbook. Instead, judges are exhorted to render verdicts according to principles of practical wisdom and justice. There appears to be no

¹⁰ For more examples, see Jonathan P. Burnside, *God, Justice, and Society: Aspects of Law and Legality in the Bible* (New York: Oxford University Press, 2011), 18–20.

¹¹ See the multitude of parallels between the *Mišpātîm* and cuneiform law noted by Shalom M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (VTSup 18; Leiden: Brill, 1970), 43–98. The literary connection between the *Mišpātîm* and cuneiform law is especially evident from the links between the miscarriage laws (Exod 21:22–23; SL 1–2; MAL 21; 50–53; HL 17–18; LH 209–214) and the goring ox laws (Exod 21:28–32, 35–36; LH 209–214; LE 50–53, esp. Exod 21:35 and LE 53). Finkelstein, for example, wrote, “[T]he specific wording of the biblical rules of the goring ox is so close to that of the cuneiform antecedents that any explanation of the resemblances other than one based on some kind of organic linkage is precluded.” See Finkelstein, *Ox That Gored*, 19. Similarly, Malul’s survey of the goring ox laws led him to suggest that the biblical author “knew first-hand the Mesopotamian work.” See Meir Malul, *The Comparative Method in Ancient Near Eastern and Biblical Legal Studies* (AOAT 227; Kevelaer: Butzon & Bercker, 1990), 125–52, esp. 52. More recently, see Wright, *Inventing God’s Law*. He compares the entire Covenant Code with LH and argues that the Covenant Code is an interpretive rewriting of LH.

¹² For an explanation as to why Israelite scribes mimicked the Mesopotamian literature, see Jonathan Vroom, “Recasting *Mišpātîm*: Legal Innovation in Leviticus 24:10–23,” *JBL* 131 (2012):35–36.

¹³ Tikva Frymer-Kensky mentions two legal ostraca that have been preserved from ancient Israel. However, she provides no discussion of them. See Tikva Frymer-Kensky, “Israel,” in *A History of Ancient Near Eastern Law. Vol 1* (ed. Raymond Westbrook and Gary M. Beckman; HOS 72; Leiden: Brill, 2003), 975. For a brief discussion, see Wells, *Law of Testimony*, 5n14.

expectation to adjudicate according to a written text.¹⁴ This point is especially clear when the admonition of Deut 17:8–11 is interpretively rewritten in the Temple Scroll:

MT		Temple Scroll 56:3-5a	
Then you shall do according to what they [the priestly judges] declare to you from that place that the Lord will choose. And you shall be careful to do according to all that they direct you.	ועשיתה על פי הדבר אשר יגידו לך מן המקום ההוא אשר יבחר יהוה ושמרת לעשות ככל אשר יורוך	ועשיתה על פי התורה אשר יגידו לכה ועל פי הדבר אשר יואמרו לכה ¹⁵ <u>מספר התורה</u> ויגידו לכה באמת מן המקום אשר אבחר לשכין שמי עליו ושמרתה לעשות ככול אשר יורוכה	Then you shall do according to the Torah that they declare to you, and according to the matter that they tell you <u>from the book of the Torah</u> . And they will declare to you in truth from the place where I will choose to cause my name to dwell. And you shall be careful to do according to all that they direct you. ¹⁶

Here it appears that the author of the Temple Scroll had a different understanding of adjudication from that of the Deuteronomic authors; for the author of the Temple Scroll, judges were required to derive their verdicts from the Torah (“you shall do what the judges decide from the Torah” versus “you shall do what they decide”).¹⁷ While the author certainly understood this Torah to be his version of the Torah—i.e. the Temple Scroll—what

¹⁴ Regarding the lack of reference to a lawbook in these admonitions, Patrick writes: “From this silence one may surmise that Israelite judges were not expected to consult the legal codes to find the rule that applied to the case before them.” See Dale Patrick, *Old Testament Law* (Atlanta: John Knox, 1985), 191. Similarly, see Bernard S. Jackson, “Legalism and Spirituality: Historical, Philosophical, and Semiotic Notes on Legislators, Adjudicators, and Subjects,” in *Religion and Law: Biblical-Judaic and Islamic Perspectives* (ed. Edwin Brown Firmage et al.; Winona Lake: Eisenbrauns, 1990), 245. He believes that these verses suggest the judges had to employ the “conventional norms of practical wisdom,” as opposed to following written rules. Furthermore, Weinfeld has noted that three elements of these admonitions (distortion of justice, partiality and favouritism, and taking bribes) are paralleled in Hittite instructions. See Moshe Weinfeld, “Judge and Officer in Ancient Israel and in the Ancient Near East,” *IOS 7* (1977):76. The fact that such judicial admonitions were common throughout the ancient Near East further suggests that adjudication was not based on written law.

¹⁵ There is a space in the scroll here, possibly to highlight the importance of the book of the Torah for adjudication, as suggested by See Steven D. Fraade, “‘If a Case is Too Baffling for You to Decide . . .’” (Deut 17:8-13): Between Constraining and Expanding Judicial Autonomy in the Temple Scroll and Early Rabbinic Scriptural Interpretation,” in *Sibyls, Scriptures, and Scrolls: John Collins at Seventy* (vol. 1.; ed. Joel Baden, et al.; JSJSup 175/1; Leiden: Brill, 2017), 417.

¹⁶ My translation.

¹⁷ Fraade writes: “TS here clearly stresses that the source of the ruling to be announced is the “book of teaching/Torah” . . . The authority of the court’s ruling derives less from its location, as important as that remains, than from the Torah text from which it rules and communicates.” See Fraade, “Judicial Autonomy in the Temple Scroll,” 416–17.

is important to note is that this Torah held practical authority for the author. The judges in Deuteronomy, however, do not seem to have been constrained by a written text, similar to Mesopotamian judges; there is no hint of need to consult a book/ספר in Deut 17:8–13.¹⁸ Furthermore, the fact that these various admonitions span several literary strata of the Hebrew Bible (JE, D, H, and Chronicles) suggests that this non-legal character of biblical law remained for much of its composition.

Finally, a fourth piece of evidence for the non-binding character of biblical law can be extracted from a number of narratives that depict adjudication.¹⁹ I will highlight the episode of the woman of Tekoa in 2 Sam 14:4–11, who presents David with a difficult (though hypothetical) legal case:

When the woman of Tekoa came to the king, she fell on her face to the ground and did obeisance, and said . . . “Alas, I am a widow; my husband is dead. Your servant had two sons, and they fought with one another in the field; there was no one to part them, and one struck the other and killed him. Now the whole family has risen against your servant. They say, ‘Give up the man who struck his brother, so that we may kill him for the life of his brother whom he murdered, even if we destroy the heir as well.’ Thus they would quench my one remaining ember, and leave to my husband neither name nor remnant on the face of the earth.”

Then the king said to the woman . . . “If anyone says anything to you, bring him to me, and he shall never touch you again.” Then she said, “Please,

¹⁸ See further A. Schremer, “[T]he[y] Did Not Read in the Sealed Book’: Qumran Halakhic Revolution and the Emergence of Torah Study in Second Temple Judaism,” in *Historical Perspectives: From the Hasmoneans to Bar Kokhba in Light of the Dead Sea Scrolls: Proceedings of the Fourth International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature, 27–31 January, 1999* (ed. David M. Goodblatt et al.; STDJ 37; Boston: Brill, 2001), 111; Jackson, “Legalism and Spirituality,” 245–47; and LeFebvre, *Collections, Codes, and Torah*, 44–47. For a counter position, see Flatto, “Early Hebraic Political Theory,” 76–77; and Levinson, “Reconceptualization of Kingship,” 518–23, esp. 523. They argue that the priestly high court judges are to interpret the book of the Torah (which the author saw as Deuteronomy itself), even though there is no mention of a Book of the Torah and there is no hint of consulting a text in Deut 17:8–13. The use of התורה in v. 11 is likely best translated as ‘instruction,’ rather than a book. This is confirmed in the next verses where an actual scroll (ספר) is featured as the object of study for the king (Deut 17:14–20). It seems most natural to understand the adjudication in Deut 17:8–13 in line with Babylonian adjudication, which relies on practical wisdom, not interpreting and “applying” a text.

¹⁹ See, for example, the ‘hard case’ legal narratives of the Pentateuch: the case of the second Passover (9:6–14); the case of the Sabbath wood gatherer (15:32–36); the case of the daughters of Zelophehad (27:1–11); and the case of the half-breed blasphemer (Lev 24:10–23). Similarly, for other narratives of adjudication in Dtr, see 2 Sam 12:1; 14:4–11; 1 Kgs 3:16–28; 20:35–43. For a more complete explanation of the lack of a law-book in these texts, see Patrick, *Old Testament Law*, 193–98.

may the king keep the LORD your God in mind, so that the avenger of blood may kill no more, and my son not be destroyed.” He said, “As the LORD lives, not one hair of your son shall fall to the ground.”

In this passage there is clearly an unwritten local custom of blood vengeance,²⁰ which is in conflict with the woman’s need to preserve her husband’s lineage. What is notable is that there is no hint whatsoever that the king was compelled to consult or apply a written code. There is no question that the king’s verdict would possess practical authority; that is, it would preempt the practical reasoning of the two parties in the dispute. There is no indication, however, that the king’s verdict was rendered as the application of a pre-existing law. In fact, in all these narratives that depict adjudication, there is never any such mention of a binding text. Patrick writes: “None of the examples [of judicial narratives] report the consultation of the lawbooks by judges or the justification of a decision by citation.”²¹ Thus the lack of lawbook consultation in the judicial narratives provides further evidence for the non-binding character of law in ancient Israel.

While there are numerous means of interpreting the evidence, the above arguments for the non-binding character of ancient Near Eastern law is the source of all debate on the issue of when it came to be treated as legally binding. This evidence is the reason why scholars question whether or not ancient Near Eastern Law was legally binding, and it is the reason there is debate over when written law came to be treated as legally binding.

II. HISTORY OF SCHOLARSHIP AND CONFLICTING ASSUMPTIONS ABOUT LAW

Arguments for when written law came to be treated as legally binding have varied widely. Some argue that the Mesopotamian law collections were always considered binding

²⁰ See Pamela Barmash, “The Narrative Quandary: Cases of Law in Literature,” *VT* 54 (2004):11–14.

²¹ Patrick, *Old Testament Law*, 197.

law, despite the above evidence to the contrary,²² while others argue that it began in ancient Israel, when the earliest Pentateuchal law collection (the Covenant Code) was ascribed to the deity,²³ or with Deuteronomic literature,²⁴ which repeatedly admonished its readers to ‘be careful to observe the words of this law.’²⁵ Numerous scholars push the origin of this attitude toward law to Ezra in the Persian period, particularly under the policy of Persian imperial authorization and the narratives that depict Torah-obedience.²⁶ Still others situate

²² See, for example, Sophie LaFont, “From the Banks of the Seine to the Bay of Chesapeake: Crossglances on Ancient Near Eastern Law,” *Maarav* 18 (2011):55–61; Charpin, “Hammurabi,” 71–82; and Klaas R. Veenhof, ““In Accordance with the Words of the Stele”: Evidence for Old Assyrian Legislation,” *Chicago-Kent Law Review* 70 (1995):1717–44.

²³ Bernard M. Levinson, *Legal Revision and Religious Renewal in Ancient Israel* (Cambridge: Cambridge University Press, 2008), 27–28. For a very similar position see Konrad Schmid, “The Genesis of Normativity in Biblical Law,” in *Concepts of Law in the Sciences, Legal Studies, and Theology* (ed. Michael Welker and Gregor Etzelmüller; Religion in Philosophy and Theology 72; Tübingen: Mohr Siebeck, 2013), 121–26.

²⁴ See Jan Assmann, “Five Stages on the Road to Canon: Tradition and Written Culture in Ancient Israel and Early Judaism,” in *Religion and Cultural Memory: Ten Studies* (ed. Jan Assmann and Rodney Livingstone; Cultural Memory in the Present; Stanford: Stanford University Press, 2006), 65–68. Assmann makes a similar argument to that of Levinson, but argues that Israel’s earliest foray into law-writing began with Josiah and Deuteronomy, not the Covenant Code. Furthermore, he argues that divine authorship of law separated the written law and the legal authority of the king; the law replaced the king, which was not the case in Mesopotamia.

²⁵ See Raymond Westbrook, “The Character of Ancient Near Eastern Law,” in *A History of Ancient Near Eastern Law. Vol 1* (ed. Raymond Westbrook; HOS 72; Boston: Brill, 2003), 20–21. Joachim Schaper also takes a similar approach. However, he does not focus on the “obey the words of this law” language. Rather, he focuses on a specific formulation in Deut 1:5; 27:3, 8, which, according to him, formally imbues a text with legal force. See Joachim Schaper, “The “Publication” of Legal Texts in Ancient Judaism,” in *Pentateuch as Torah: New Models for Understanding its Promulgation and Acceptance* (ed. Bernard M. Levinson and Gary N. Knoppers; Winona Lake, Ind.: Eisenbrauns, 2007), 225–36.

²⁶ See Raymond Westbrook, “Biblical Law,” in *Introduction to the History and Sources of Jewish Law* (ed. N. S. Hecht et al.; Oxford: Clarendon, 1996), 3–4. He writes: “[H]e [Ezra] may be credited with laying the jurisprudential foundations of Jewish Law as we understand it today. . . . Thus the legal system became based upon the idea of a written code of law interpreted and applied by religious authorities.” See also Raymond Westbrook and Bruce Wells, *Everyday Law in Biblical Israel* (Louisville: Westminster, 2009), 27–28. Here Westbrook indicates that Greek philosophy influenced this shift as well, which was not fully realized until the Mishnah; see also Bernard S. Jackson, *Studies in the Semiotics of Biblical Law* (JSOTSup 314; Sheffield: Sheffield Academic Press, 2000), 141–34. He writes: “It is in this [Ezra’s] context that we should locate the transformation of the biblical legal collections into ‘statutory’ texts, binding upon the courts and subject to verbal interpretation” (p. 142). Similarly, see Gary N. Knoppers and Paul B. Harvey Jr, “The Pentateuch in Ancient Mediterranean Context: The Publication of Local Lawcodes,” in *Pentateuch as Torah: New Models for Understanding its Promulgation and Acceptance* (ed. Bernard M. Levinson and Gary N. Knoppers; Winona Lake, Ind.: Eisenbrauns, 2007), 129–36. A variation of this theory is taken by Watts. He argues that religious/cultic aspects of the Torah were treated as binding law by the priests in the Persian period. Later on, when the priestly powers were extended, and when the theology for the scope of holiness expanded beyond the bounds of the temple, the Torah began to rule other areas of daily life. See James Watts, “The Political and

this new attitude toward law to the Greek period under Hellenistic influence,²⁷ and further to the Hasmonean period and the rise of the pharisaic tradition and their *halakhic* debates with dissenting sectarian communities.²⁸

Rather than providing a systematic critique of all these past theories, I will highlight key debates to demonstrate how many of these conflicting theories stem from conflicting assumptions concerning the nature of law's function, authority, and normativity; in other words, scholars have arrived at conflicting conclusions because they are relying on different notions of what law is, though it bears repeating that this cannot be considered a deficiency in scholarship. I will divide my discussion into three sections: 1) principle of legality versus interpretive freedom; 2) the nature of normativity; and 3) the nature of authority. Although these three discussions overlap in many ways, I will attempt to keep them separate for heuristic purposes. My discussion also relies heavily on my distinction between epistemic authority and practical authority.

A. The Principle of Legality Versus Interpretive Freedom

In the practice of law, there is an inevitable tension that arises between the principle of legality on the one hand, and interpretive freedom on the other. This is sometimes referred

Legal Uses of Scripture," in *The New Cambridge History of the Bible From the Beginnings to 600* (ed. James Carleton Paget and Joachim Schaper; Cambridge: Cambridge University Press, 2013), 345–64.

²⁷ This is the whole argument of LeFebvre, *Collections, Codes and Torah*. I will discuss his arguments at length below. Similar arguments are made by Lisbeth S. Fried, "'You Shall Appoint Judges': Ezra's Mission and the Rescript of Artaxerxes," in *Persia and Torah: The Theory of Imperial Authorization* (ed. James Watts; Atlanta: Snow Lion, 2001), 63–89. Although she does not specifically argue that the new attitude toward law emerged in the Hellenistic period, she does argue that it was not in the Persian period.

²⁸ John J. Collins, "The Transformation of Torah in Second Temple Judaism," *JSJ* 43 (2012):455–74. Although Collins acknowledges that "It is . . . indisputable that Ezra and Nehemiah invoke the authority of the Torah for new rulings" (461), he concludes, in the end, that the legal attitude toward law should be situated with the strict scrutiny of scriptural law that is found in the *halakhah* of texts like Temple Scroll, Jubilees, and MMT. See also Sarianna Metso, *The Serekh Texts* (LSTS 62; New York: T & T Clark, 2007), 61–70 esp. 66, 68–69; Sarianna Metso, "Methodological Problems in Reconstructing History from Rule Texts Found at Qumran," *DSD* 11 (2004): 332–33; and Sarianna Metso, "Problems in Reconstructing the Organizational Chart of the Essenes," *DSD* 16 (2009):390–93. Although Metso does not specifically argue for when written law came to be treated as legally binding, she does argue that the sectarian rule texts were not binding law.

to as the interpretation-legislation divide.²⁹ On the one end of the spectrum is the principle of legality, which states that there is no crime without a law and there is no punishment without a law (*nullum crimen sine lege, nulla poena sine lege*). In other words, the law, including its range of application, is entirely restricted to that which is written down, no more no less. According to this view, legal interpretation is highly constrained; only that which is written can be applied. There is no room for using interpretation to extend the law beyond its actual wording. As I demonstrate below, several scholars assume that this is how law functions. On the other end of the spectrum is the notion that creative interpretation and extension of the law is a legitimate application of the law. Judges have freedom to extend the words of the law to apply to new situations that they do not specifically cover. The two ends of this spectrum represent different approaches to answering the question: ‘when is the interpretation of the law an application of that which is written down, and when is it a creation of new law?’ It is the elusive divide between interpretation and legislation.

A classic example of this tension between interpretation and legislation discussed by legal theorists is the case of *Palmer v. Riggs*. In 1889 the New York court of appeals ruled that Elmer Palmer—who was convicted of murdering his grandfather—could not inherit his estate, even though New York law was silent on the question of murderers inheriting their victim’s property.³⁰ The fact that existing law was not easily applied to this case is clear, since it went to the court of appeals and was decided on a two-to-one vote, overturning the previous decision in favour of Palmer. On the one hand, it appears that this judgement

²⁹ Aileen Kavanagh, “The Elusive Divide between Interpretation and Legislation,” *Oxford Journal of Legal Studies* 24 (2004):259–85.

³⁰ The Opinion of the Court regarding *Palmer v. Riggs* can be found online in the New York court archives, available: http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm. For scholarly comment on this case, see Ronald Dworkin, “Law, Philosophy, and Interpretation,” in *Law and Legal Interpretation* (ed. Fernando Atria and Neil MacCormick; International Library of Essays in Law and Legal Theory; Burlington: Ashgate, 2003), 3–15, esp. 4; and Barak, *Purposive Interpretation*, 63–64.

created a new law, which did not exist prior to that judgement: murderers cannot inherit their victim's property. Indeed, the Opinion of the Court states "It is quite true that statutes . . . if literally construed . . . give this property to the murderer." Such reasoning seems to admit that the decision against Palmer created new law. On the other hand, that same court opinion also reasons that it cannot have been the intention of the legislators that murderers inherit their victims' property, and that adjudication must be governed by "fundamental maxims," such as "no one shall be permitted to profit by his own fraud." This line of argument seems to imply that their judgement—that Palmer not receive the inheritance—was arrived at through interpretation of existing law.³¹ The question of whether the judges in this case applied existing law or created new law depends on one's assumption about how law works: does law function according to the strict principle of legality or are judges free to apply creative interpretive methods?

I would suggest that one of the main reasons that scholars have been unable to agree over when written law was viewed as a source of binding obligation is because they have made conflicting assumptions about how the above question should be answered: principle of legality or interpretive freedom. What one scholar calls a legitimate application of the law, another calls a non-legal use of the law. I will highlight two examples of this: 1) Sophie LaFont's approach versus that of Raymond Westbrook; 2) Michael Fishbane's approach versus that of Michael LeFebvre.

³¹ This argument is made famous by Dworkin, "The Model of Rules," 23–31. See further my discussion in Chapter Three sec. III.

i. *SOPHIE LAFONT VERSUS RAYMOND WESTBROOK'S ACCOUNT OF THE MESOPOTAMIAN LAW COLLECTIONS*

In contrast to the majority of Assyriologists,³² Sophie LaFont argues that the cuneiform law collections are in fact positive law. She suggests that the ancient law-collections should be considered as legislation since they are promulgated by the king,³³ and that the reason that they are never cited is because they serve a *subsidiary* function. She draws the idea of subsidiarity from European Law. It refers to the interaction between local and national jurisdictions. According to this principle, national law only applies to situations where local law is insufficient to provide a satisfactory ruling.³⁴ Thus LH and the other law collections would only have bound adjudication in the royal/appellate courts, and would have no bearing upon the majority of legal cases.³⁵ In this way, even though the law collections were never cited, they were still considered legally binding.³⁶

Her position is not without merit. For example, she identifies an instance in which king Samsu-iluna (1749–12) intervened in two cases concerning the *nadîtu* (local priestesses), which is preserved in a royal letter. The first concerns the question of who supports these women (family or state), while the second concerns the question of whether or not they are protected from paternal debt. In these cases, Samsu-iluna does not simply render

³² See Rubio, “The Mesopotamian Law Collections: Were they Really Legal Codes?,” 31–34.

³³ LaFont, “Crossglances on Ancient Near Eastern Law,” 55–61.

³⁴ She writes: “La subsidiarité obéit donc à une démarche politique allant du bas vers le haut: l’entité la plus petite a la priorité aux l’entité la plus grande.” See Sophie LaFont, “Codification et Subsidiarité dans les Droits du Proche-Orient Ancien,” in *La Codification des Lois dans l’Antiquité: Actes du Colloque de Strasbourg, 27-29 Novembre 1997* (ed. Edmond Lévy; Travaux du Centre de Recherche sur le Proche-Orient et la Grèce Antiques 16; Strasbourg: Université Marc Bloch, 2000), 50–51.

³⁵ “Il s’applique à défaut d’une règle locale coutumière.” See LaFont, “Subsidiarité dans les Droits,” 51.

³⁶ She writes: “L’ineffectivité chronique des codes s’explique ainsi par leur caractère complémentaire, mais ne touche en rien leur valeur juridique.” See LaFont, “Subsidiarité dans les Droits,” 58. See also LaFont, “Subsidiarité dans les Droits,” 53–56, where she argues that the famous ‘Hammurabi’s wronged man’ passage refers to this subsidiary function. For a counter position, see Martha T. Roth, “Hammurabi’s Wronged Man,” *JAOS* 122 (2002):38–45.

a verdict that applied to the specific *nadîtu* that are named in the legal case (he rules that *nadîtu* are to be supported by family and that they are exempt from paternal debt). He also drafts a general rule, which, presumably, is meant to govern future analogous cases.³⁷ This reframing of a verdict, which deals with specific details of a case (names, place, times), to a general rule, where the details are eliminated and/or generalized, is what is known as rescript. Similarly, Veenhof has suggested this same process of moving from specific judgement to general norm for Old Assyrian law as well.³⁸ Furthermore, Charpin has identified a letter in which a goldsmith inquired to Hammurabi as to what to do with a thief whom he apprehended when he broke the wall of his house during the course of a robbery. While the verdict is unknown, the circumstances of the case are very similar to the general rule found in LH 21. Charpin suggests that this law was formed as a rescript of the verdict in that case.³⁹

These examples seem to suggest that written law had some sort of normative function, or at least a connection between the practice of law and the writing of the law collections. This supports LaFont's claim that LH served as positive law. Why would kings rescript specific judgements unless they were meant to govern future cases? And if they included (likely some of) these rescripts in the law collections, then it stands to reason that they were meant to also govern adjudication in future cases. While I do not dispute that this

³⁷ This case is parallel to LH 178–82. See Sophie LaFont, “Ancient Near Eastern Laws: Continuity and Pluralism,” in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development* (ed. Bernard M. Levinson; JSOTSup 181; Sheffield: Sheffield Academic Press, 1994), 97–100; Dominique Charpin and Jane Marie Todd, *Writing, Law, and Kingship in Old Babylonian Mesopotamia* (Chicago: University of Chicago Press, 2010), 73–73; and C. Janssen, “Samsu-Iluna and the Hungry *nadîtums*,” *Northern Akkad Project Reports* 5 (1990):10–11.

³⁸ Veenhof, “Old Assyrian Legislation,” 1735–37. See also Martha T. Roth, “The Law Collection of King Hammurabi: Toward an Understanding of Codification and Text,” in *La Codification des Lois dans l'Antiquité: Actes du Colloque de Strasbourg, 27-29 Novembre 1997* (ed. Edmond Lévy; Travaux du Centre de Recherche sur le Proche-Orient et la Grèce Antiques 16; Strasbourg: Université Marc Bloch, 2000), 27–29.

³⁹ Charpin draws a parallel of this type of generalization with the omen texts and their interpretation. See Charpin and Todd, *Writing, Law, and Kingship*, 73–77. See also W. F. Leeman, “King Hammurabi as Judge,” in *Symbolae Iuridicae et Historicae Martino David Dedicatae* (ed. J. A. Ankum and Martin David; Leiden: Brill, 1968), 107–29.

is compelling evidence for some sort of normative function for rescripted verdicts and even for the law collections in general, it is still a stretch to conclude that LH was treated as binding law, whether in local jurisdictions or national courts. This is because it assumes that judges took a highly flexible approach to legal interpretation, and were hardly governed by the principle of legality at all.

This is evident from LaFont's explanation for LH's lack of comprehensiveness (the second piece of evidence for the law's non-binding character).⁴⁰ According to LaFont's theory, anyone who was unsatisfied with a verdict in their local jurisdiction could appeal to LH. However, if this was the case then LH would have had to be able to address any legal case that was brought to the royal/appellate court, which would be difficult given its lack of comprehensiveness. To address this problem, she argues that the laws of LH ought to be considered comprehensive because they are meant to serve as paradigms that can be applied to analogous cases in the future; the spirit of its norms can be extracted and applied to future cases:⁴¹ "ces énoncés sont des paradigmes qui incitent à rechercher l'esprit de la norme."⁴²

For example, LaFont argues that although LH 129–30 only explicitly discusses two sexual offenses, it can be extended to new scenarios. The laws state:

(129) If a man's wife has been caught copulating with another male, they shall tie them up and throw them into water. If the woman's husband allows his wife to live, so similarly the king may allow his slave to live. (130) If a man has restrained another man's wife, who has known no other male, and has actually copulated with her and they have caught him, that man shall be killed, but that woman shall be innocent.

⁴⁰ See sec. I above.

⁴¹ Sophie LaFont, "L'apprentissage du Droit en Mésopotamie: Une méthode Scientifique?," in *Orient/Occident: L'enseignement du Droit* (ed. H. Guillorel; Droit et Cultures, Hors Série 2010, 2010), 25–28.

⁴² LaFont, "Droit en Mésopotamie," 25. For a similar position, see Samuel Greengus, "Some Issues Relating to the Comparability of Laws and the Coherence of the Legal Tradition," in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development* (ed. Bernard M. Levinson; JSOTSup 181; Sheffield: Sheffield Academic Press, 1994), 85–86; and Jackson, *Wisdom-Laws*, 304.

LaFont notes that these laws do not contemplate the rape of a married man's wife, or a virgin-bride's adultery. Yet, despite its silence on these two possibilities, she argues that the juxtaposition of the two provisions allows for their extended application. That is, the juxtaposition of these two laws give the criteria for rape: restraint and virginity, which can then be applied to other cases that the collection does not contemplate.⁴³ This, she argues, aligns with the interpretation of other Mesopotamian scientific literature, such as the omen texts or the medical texts.⁴⁴ Rather than being composed of abstract principles that could be applied to a range of concrete cases (like principle of equality in the American constitution can apply to many cases), Mesopotamian scientific literature was composed of lists of concrete examples, the details of which could be applied to analogous situations. This is the case with legal, divination, and medical texts.⁴⁵ In this way LH can be considered comprehensive, and able to address all cases that are brought to the royal court.

This explanation for how the law may have been applied to all manner of cases, however, clearly reveals her interpretive freedom assumption about the function of law, and her rejection of the principle of legality. For her, the analogous extension of the law to apply to cases beyond that which is written reflects the treatment of the law as a source of binding obligation.⁴⁶ When her argument is contrasted with that of Raymond Westbrook, however, it becomes apparent that they argue for virtually identical functions for the law, yet come to opposite conclusions about whether or not it was considered binding.

⁴³ LaFont, "Droit en Mésopotamie," 27–26.

⁴⁴ A point also made by Charpin, "Hammurabi," 76–77.

⁴⁵ LaFont, "Droit en Mésopotamie," 27–28. For a similar argument, see Charpin and Todd, *Writing, Law, and Kingship*, 77. He writes: "Having become proficient in the code, they [judges] entered into its spirit and must have been able to decide cases that were not anticipated in it. In that respect, they were acting no differently from their diviner colleagues."

⁴⁶ As Frederick Schauer argues, arguments from analogy actually treat the law as a source of epistemic guidance, rather than as a preemptive reason for action. See Schauer, *Legal Reasoning*, 36–60.

Westbrook has argued for what has become known as the judicial reference theory for the Mesopotamian law collections. Being part of the scientific treatise genre, the collections were meant to train and educate judges, who would consult them when deciding difficult cases. Westbrook writes,

They [the Mesopotamian law collections] were a reference work for consultation by judges when deciding difficult cases. In view of the association of most of the law codes with a king, it is reasonable to suppose that it was the king as judge, or at least the royal judges, that these lists were intended to serve. The royal courts, as supreme courts, would be called upon to decide difficult points of law and would therefore be most in need of precedents to assist them.

..

A decision of the king (or royal judge) in a difficult case would be turned into a casuistic rule of general application and, expanded with the necessary variants by extrapolation would eventually become part of a canon of such rules, which in turn were consulted in deciding new cases, and where a new decision was made it eventually would be added to the canon, and so forth.⁴⁷

This judicial reference theory comports with the other types of scientific lists from Mesopotamia, like the omens and medical texts, for which there is evidence of their consultation and interpretation by diviners and doctors.⁴⁸

It is clear that such a theory assumes that law can only function as law according to the principle of legality, since such interpretive extensions of the law treat it as a didactic source—as a source of epistemic guidance rather than a preemptive reason for action. Only that which is written can be applied and anything beyond that is not a legal use of the law.

This assumption also seems to be made by Bottéro and Finkelstein.⁴⁹

⁴⁷ Westbrook, “Biblical and Cuneiform Law Codes,” 254, 259–60.

⁴⁸ See Westbrook, “Biblical and Cuneiform Law Codes,” 253–57; and Charpin and Todd, *Writing, Law, and Kingship*, 76–77.

⁴⁹ Bottéro writes: “There are no provisions for the mother, the daughter, or for other children. Paragraphs 229f, which determine the responsibilities of the master-builder in the case of the collapse of a house built by him [stipulating that the builder shall be killed if the owner dies, and the builder’s son shall be killed if the owner’s son dies], presupposes that the house in question is inhabited by its owner, that the man has a son, that it is just that son who dies, and that the master-builder also has a son, who will be chosen as there deeming victim.” See Bottéro, “The Code,” 162. Similarly, Finkelstein, speaking of the same law writes: “For what, one may ask, would the “law” do in the event that the builder had no minor son, or even a son of any age?”

What is important to note is that Westbrook's theory for the law collection's function is almost identical to LaFont's. If, for example, the "royal courts as supreme courts" encountered the difficult case of the rape of a married man's wife, or a virgin-bride's adultery, then, according to Westbrook's theory, the judges would consult LH, which, as LaFont notes, stipulates punishment for the analogous cases of a wife's adultery and a virgin's rape. The judges would deduce the punishment for the hard case, based on what they *learn* from LH. This is precisely what LaFont would call a legislative use of LH; such a use of the law would be treating it as positive law. Yet Westbrook emphasizes that such a use of LH is "not binding. . . [but has] persuasive authority."⁵⁰ Thus the exact same theory—that judges would apply the principles of the law collections, derived through analogical reasoning, toward new cases—is used to argue for opposite conclusions: while Westbrook argues that such a use of LH would be didactic, LaFont would argue that that use would be legal (and thus treating it as a practical authority). The only difference between these two theories is their assumptions over whether judges are bound by the strict principle of legality, or whether they are free to extend the law beyond that which is written. According to the former assumption, such legal extensions would not be treating the law as a binding obligation. In fact, Westbrook clearly sees such interpretive extensions as treating the law as an epistemic authority and not a practical authority; that is, judges who consulted the law collections found a reason to render a decision that did not preempt other background reasons for that decision; it was treated as a didactic and persuasive authority and not as a binding

Would his daughter do instead? And supposing he had no daughter either? And so on. Such considerations have been taken as further evidence—and I believe justifiably so—that this paragraph states a kind of ideal principle rather than a literal rule." See Finkelstein, *Ox That Gored*, 34.

⁵⁰ Westbrook, "Biblical and Cuneiform Law Codes," 256. For very similar comments from Roman law, see Roth, "Codification and Text," 12–13.

obligation. LaFont, on the other hand, seems to assume that such interpretive extensions still treat the law as a binding obligation. I return to this issue throughout Chapter Three, and critique LaFont's approach in Chapter Five (sec. III.C).

ii. *EZRA'S USE OF THE TORAH: MICHAEL FISHBANE VERSUS MICHAEL LEFEBVRE*

This same problem of conflicting assumptions about the nature of law is evident when Michael Fishbane's approach to this issue is contrasted with that of Michael LeFebvre. Fishbane's famous monograph on inner-biblical exegesis is clearly built on the assumption that the application of law in ancient Israel and early Judaism allowed a high degree of interpretive flexibility; it did not function according to the strict principle of legality. He writes:

[D]espite the fact that the biblical legal corpora are formulated as prototypical expressions of legal wisdom [similar to the Mesopotamian collections], the internal traditions of the Hebrew Bible present and regard the covenantal laws as legislative texts. The significant result of these observations is that the various legal collections in the Hebrew Bible were each subject to repeated exegetical revision; that the later collections reflect (in many places) that they are (in part) exegetical revisions or clarifications of earlier ones; and that the biblical legal traditions developed a body of legal exegesis preserved in non-legal texts. Where the scope of the received law(s) was incomprehensive, it was supplemented so as to include other vital areas of social-religious life; where the formulations of the received laws were incomprehensible or ambiguous, for all practical purposes, their verbal or semantic sense was qualified; and finally, where the received laws were sufficient for certain circumstances, but required modification or expansions in the light of new considerations, they were appropriately emended so as to make them viable once again.⁵¹

This lengthy statement reveals not only that Fishbane viewed the biblical legal corpora as legally binding in Ancient Israel, but also that all interpretive activity of this material within the Hebrew Bible (so-called inner-biblical exegesis) was motivated by the need to apply the limited (non-comprehensive) legal corpora to new situations; in other words, in order to

⁵¹ Fishbane, *Biblical Interpretation*, 96–97.

apply the law, judges, priests and even kings had to creatively interpret it to apply to new situations, which for Fishbane is treating the law as a source of binding obligation. He assumes that law can be applied with interpretive freedom, and not according to the principle of legality.

For example, Fishbane makes this creative interpretation argument for the case of Ezra 9–10 in which Ezra renders a verdict to expel all foreign wives and children from the *Yehud* community, which was done “according to the law” (Ezra 10:3). Although there is no such command in any known version of the Torah, Fishbane (along with others) argues that Ezra was able to arrive at that decision through interpretive methods, similar to the type of *midrashic* interpretation found in the Mishnah.⁵² He argues this based on a few citations of the Torah’s prohibitions on forbidden unions in the narrative.⁵³ Through interpretation of these texts, Ezra was able to extend the law to address a new situation: what to do with current mixed marriages. Thus Fishbane assumes that law can function according to the model of interpretive freedom.

By contrast, Michael LeFebvre, who wrote the most recent monograph on the emergence of a binding attitude toward law, clearly assumes that law can only function according to the principle of legality. He argues that this shift in attitude toward law occurred as a result of Hellenistic influence some time in the Greek period.⁵⁴ Since Athens is

⁵² See Fishbane, *Biblical Interpretation*, 114–23; H. G. M. Williamson, *Ezra and Nehemiah* (OTG; Sheffield: JSOT Press, 1987), 95–96; and Juha Pakkala, “The Quotations and References of the Pentateuchal Laws in Ezra-Nehemiah,” in *Changes in Scripture: Rewriting and Interpreting Authoritative Traditions in the Second Temple Period* (ed. Hanne von Weissenberg et al.; BZAW 419; Berlin: De Gruyter, 2011), 195–97. For a recent summary of such interpretive explanations, see Katherine Southwood, *Ethnicity and the Mixed Marriage Crisis in Ezra 9–10: An Anthropological Approach* (Oxford Theological Monographs; Oxford: Oxford University Press, 2012), 75–78. For a very recent interpretive explanation, see Hannah K. Harrington, “The Use of Leviticus in Ezra-Nehemiah,” *JHS* 13 (2013):7–9.

⁵³ For a more complete explanation of the legal citations, see Chapter Seven sec. III.A.ii.

⁵⁴ See LeFebvre, *Collections, Codes and Torah*, 259–60 for a summary.

considered the birthplace of the rule of law,⁵⁵ and since the Mishnah treats the Torah as legally binding,⁵⁶ he surmises that the shift in attitude toward law should be dated to some point in the Greek period. He specifically argues for the time of Ptolemy II since, as is evident in Egyptian papyri, he instituted legal reforms that allowed local jurisdictions to apply their native legal traditions. In other words, LeFebvre swaps a Persian imperial authorization for a Ptolemaic imperial authorization to explain the recharacterization of the Torah.⁵⁷

On the one hand, LeFebvre shows an awareness of the tension between the principle of legality and the need for interpretive freedom. He writes:

When a text is itself the law, legal practice will derive from the provisions written. The sanctions as written will be the sanctions applied. Furthermore, where sanctions other than those written are deemed preferable, some process of exegetical interpretation (or textual amendment) would become necessary in order to justify variation from the text's stipulation.⁵⁸

Although he acknowledges that exegetical interpretation is a valid means of applying the law such that “sanctions other than those written are deemed preferable,” he still seems to assume the principle of legality; that is, he assumes that when the law is treated as a source of binding obligation then “[t]he sanctions as written will be the sanctions applied.”

For example, when LeFebvre examines the case of Ezra and the foreign wives, he argues that Ezra treated the Torah not as a prescriptive law code, but as a historic/descriptive ideal from which Ezra modeled his new decision. He writes:

When Ezra finds how Moses applied divine justice to circumstances similar to his own [the Pentateuchal prohibitions against foreign unions], Ezra makes a customized application of the same practice for his own day. His reference to

⁵⁵ LeFebvre, *Collections, Codes and Torah*, 18–23. See also Harris, *The Rule of Law in Action in Democratic Athens*, 3–4.

⁵⁶ LeFebvre, *Collections, Codes and Torah*, 242–48.

⁵⁷ LeFebvre, *Collections, Codes and Torah*, 146–82.

⁵⁸ LeFebvre, *Collections, Codes and Torah*, 28.

the Mosaic law book is not as a source code of stipulations, but as an exemplar—a role model.⁵⁹

For LeFebvre, such a use of the Torah treats it as an epistemic authority, with didactic and persuasive authority and not as binding law. Although he acknowledges that there is exegetical attention given to the Torah's laws on intermarriage in Ezra 9–10, the fact that Ezra applied a sanction that was not actually in the Torah led him to conclude that Ezra was not treating the Torah as binding law. In other words, the Torah was not law for Ezra because the sanctions as written were *not* the sanctions applied. LeFebvre therefore assumes (or at least strongly favors) the principle of legality.

What is important to note here is that once again, just as with the comparison of LaFont and Westbrook's approach to the function of Mesopotamian law, both LeFebvre and Fishbane argue for almost identical functions of the law, and yet wind up with opposite conclusions over whether or not Ezra considered the Torah to be legally binding. This is because LeFebvre assumes the principle of legality while Fishbane assumes law can be applied with interpretive freedom. Fishbane writes: “[T]he mechanism for prohibiting intermarriage with the Ammonites, Moabites, etc. was an exegetical extension of the law in Deut. 7:1–3 effected by means of an adaptation and interpolation of features from Deut. 23:4–9.”⁶⁰ This is precisely what LeFebvre calls a non-binding ‘precedential’ use of the law; for him, such analogical extension of the law does not fit with a binding attitude toward the law: he assumes the principle of legality.

I return to the question of the *Yehud* community's attitude toward the Torah in Chapter Seven, where I modify Fishbane's conclusion. The point to note here is that the

⁵⁹ LeFebvre, *Collections, Codes and Torah*, 115.

⁶⁰ Fishbane, *Biblical Interpretation*, 117.

debate over whether or not the *Yehud* community considered the Torah to be legally binding cannot move forward until scholars pay critical attention to their assumptions concerning the nature of law. We cannot identify a binding attitude toward law until we have a firm grasp on what it is that we are looking for in the sources, hence the need for a legal-theoretical approach to this issue.

B. The Nature of Normativity

The second way in which scholars' assumptions about law have led to conflicting or imprecise conclusions over when law became binding concerns the nature of normativity. Specifically, scholars have assumed that normativity is an either-or phenomenon. This assumption is most evident in the so-called dichotomy between prescriptive functions for law, and descriptive functions for law, which is emphasized primarily by LeFebvre (though there are others).⁶¹ He explicitly argues that law, in the modern sense, is *prescriptive*, and that any other functions for a legal text, such as those of Mesopotamia and ancient Israel, served *descriptive* functions. In his assessment of the EN Torah-obedience narratives, he concludes that Ezra's use of the Torah was descriptive, not prescriptive. He summarizes:

Ezra did not view written law as binding (i.e prescriptive). He used (and cited) the Torah as a preeminent description of Yahwistic ideals as practiced by Moses, yet he freely applied Torah's ideals without obligation to Torah's stipulations. In other words, Ezra used the Pentateuch as a descriptive law collection, not prescriptions to be enforced.⁶²

Elsewhere he writes:

⁶¹ See for example Kurt A. Raaflaub, "Early Greek Political Thought in its Mediterranean Context," in *A Companion to Greek and Roman Political Thought* (ed. Ryan K. Balot; Blackwell Companions to the Ancient World; Malden: Wiley-Blackwell, 2009), 43; Raymond Westbrook, "Codification and Canonization," in *Ex Oriente Lex: Near Eastern Influences on Ancient Greek and Roman Law* (ed. Kurt A. Raaflaub and Deborah Lyons; Baltimore: Johns Hopkins University Press, 2015), 181–93; Wells, "Law and Practice," 186; Philip R. Davies, *Scribes and Schools: The Canonization of the Hebrew Scriptures* (Library of Ancient Israel; Louisville, Ky.: Westminster John Knox, 1998), 90–92; and Fitzpatrick-McKinley, *The Transformation of Torah*, 96–100.

⁶² LeFebvre, *Collections, Codes and Torah*, 105.

Ezra-Nehemiah does not display concern for the enforcement of Torah's stipulations. What the records show is a concern to demonstrate that the post-exilic *cultus* was reformed in harmony with the Mosaic religion. The expression "according to the book of Moses," does not mean the Mosaic *stipulations* are being applied; it means Ezra's *new stipulations* are crafted in keeping with Mosaic Yahwism (*italics original*).⁶³

Thus, LeFebvre assumes that normativity is an either-or phenomenon; written law is either prescriptive or descriptive.

The problem with this view is that the normative universe occupies a vast array of 'oughts,' such as law, advice (even authoritative advice), requests, moral and ethical duties, and so forth (see Chapter One sec. I). Since LeFebvre clearly assumes that Ezra and the *Yehud* community treated the Torah as a text with normative value (a historic ideal, precedential model etc.), his prescriptive-descriptive dichotomy is imprecise. Frederick Schauer, for example, provides a much more helpful account of prescriptive statements:

[P]rescriptive rules ordinarily have normative semantic content, and are used to guide, control, or change the behavior of agents with decision-making capacities. 'Thou shalt not kill.' 'Seat belts must be fastened at all times.' 'You are to be in bed by ten o'clock every evening unless I say otherwise.' Even when they take the form of declarative sentences—'Dogs will be leashed in this park'—prescriptive rules are not used to describe. 'No smoking until after the toast to the Queen' is not an empirical report of high table behavior. Prescriptive rules are employed not to reflect the world but to apply pressure to it.⁶⁴

Prescriptive rules, according to Schauer, are all those statements that have 'normative content' and, as a result, 'apply pressure' to their addressees' behavior. Binding obligations—what Schauer calls mandatory rules—are just one type of norm.⁶⁵

Although LeFebvre frames his methodology according to this prescriptive-descriptive dichotomy, he does in fact show an awareness of the multivalent nature of normativity, since

⁶³ LeFebvre, *Collections, Codes and Torah*, 129.

⁶⁴ Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Clarendon Law Series; Oxford: Clarendon, 1991), 2.

⁶⁵ See Schauer, *Playing by the Rules*, 3–10.

his ‘descriptive’ function for law includes ‘precedential’ and ‘didactic’ functions.⁶⁶ Framing his evaluation of the evidence according to this dichotomy is imprecise, however. It hampers one’s ability to identify a binding attitude toward law in those borderline cases when there is an interplay between epistemic authority and practical authority, which is exactly what I argue in the Torah-obedience narratives of EN (Chapter Seven). A prescriptive-descriptive dichotomy lacks the precision to account for this nuance and oversimplifies a much more complex issue.

C. The Nature of Authority

Finally, the third assumption about law that scholars have made concerns the nature of authority. Specifically, much like the above normativity problem, scholars have assumed that *authority* is an either-or phenomenon: If a legal text (or any text that contains directives) is authoritative, then it will be treated as a source of binding obligation. As I demonstrate in Chapter One, however, there are two types of authority: epistemic authority and practical authority. While both are real types of authority, only the latter possesses preemptive force; only the latter is law, in the proper sense. Without the ability to distinguish between these two types of authority, any evidence for a text’s authority can be used to identify a binding attitude toward law, whether or not it possesses practical authority.

For example, Sophie LaFont’s theory that LH was considered binding law (according to its subsidiary function) is built on the fact that it originated from the king. She writes: “legislation is defined not by its form but by its origin. Statute law is the legal act issued by the authority that has the power to do so, namely, the king in the ancient Near East.”⁶⁷ While

⁶⁶ Though LeFebvre’s ‘precedential’ function is incorrect, since precedents are binding—they provide a preemptive reason for action. See Schauer, *Legal Reasoning*, 33–38 and my discussion in Chapter Five sec. III.C.

⁶⁷ LaFont, “Crossglances on Ancient Near Eastern Law,” 57.

this is correct, the fact that LH emanates from the king—an authoritative source—does not automatically lead to the conclusion that it must have been binding law; it could have held epistemic authority. In fact, the Israelite wisdom tradition provides an ancient example of non-binding directives that emanate from a king, or at least from the palace administration. Proverbs, or its pre-exilic predecessor, is filled with such practical directives.⁶⁸ Those directives were clearly meant to have authority.⁶⁹ Yet, being part of the wisdom tradition, they were not binding. That is, they did not hold preemptive force over their subjects' practical reasoning. Their authority was meant to influence how their subjects thought about a range of issues, like marriage, money, friendship, family etc. They were not meant to provide commands with preemptory force.

In fact, as has long been noted, the description of Hammurabi as the king of justice (*šar mīšari*) indicates that LH may have functioned as a legal treatise (through the use of concrete examples)' on the concepts of truth and justice (*kitti u mīšari*).⁷⁰ This indicates that LH held epistemic authority, since it was meant to influence its addressees' thinking: how they thought about the king as one who promotes truth and justice in the land.⁷¹ If such was the case, then LH would still possess authority, but it would be epistemic rather than practical authority.

⁶⁸ While I recognize that Solomon did not write Proverbs, there is enough evidence to suggest a connection between the palace administration in ancient Israel and the sagely instruction of the wisdom tradition reflected in the book of Proverbs. While there is no early explicit connection between a king and wisdom, it likely emanated from royal educational circles, which were endowed with the authority of the king. See Leo G. Perdue, *The Sword and the Stylus: An Introduction to Wisdom in the Age of Empires* (Grand Rapids, Mich.: Eerdmans, 2008), 86–89.

⁶⁹ It should be noted that the vast majority of aphorisms in Proverbs are stated descriptively; they are not framed as directives. Nevertheless, they are functionally the same, containing non-binding normative content.

⁷⁰ Finkelstein, "Ammissaduqa's Edict," 91–104.

⁷¹ See Charpin, "Hammurabi," 77–79; Martha T. Roth, "Mesopotamian Legal Traditions and the Laws of Hammurabi," *Chicago-Kent Law Review* 71 (1996):13–37; and Bottéro, "The Code," 182–84.

Given the fact that there is no evidence whatsoever that LH or any other Mesopotamian law collections were applied or interpreted as practical authorities (which address the threats to the rule of law), while the omen literature was extensively interpreted,⁷² it seems highly unlikely that LH was ever treated as a practical authority. In fact, there is even evidence of interpretive activity being applied in the development of the law collections,⁷³ and even interpretive changes made during its transmission. Yet not a single interpretation of LH amidst its many preserved copies gives any indication that it was ever treated as a practical authority; the threats to the rule of law were never addressed.⁷⁴ Therefore, if one simply assumes that authority is an either-or phenomenon, then this assumption can be used to argue that LH was binding law, even though there is ample evidence to suggest otherwise. When the two types of authority are recognized, then the fact that LH was authoritative, even emanating from the sovereign, does not necessarily mean that it was binding law.

A similar assumption on the nature of authority is made by Bernard Levinson and Jan Assmann. They argue that the binding attitude toward law began in ancient Israel, with the divine voicing of law. Even though the Mesopotamian collections were obviously venerated, they were still only attributed to the (human) monarch. In ancient Israel, however, the pre-exilic legal collections (the Covenant Code and Deuteronomy 12–26) were ascribed divine

⁷² Eckart Frahm, *Babylonian and Assyrian Text Commentaries: Origins of Interpretation* (Guides to the Mesopotamian Textual Record 5; Münster: Ugarit-Verlag, 2011).

⁷³ Charpin, "Hammurabi," 72–73. See also David P. Wright, *Inventing God's Law: How the Covenant Code of the Bible Used and Revised the Laws of Hammurabi* (New York: Oxford University Press, 2009).

⁷⁴ Russell Hobson, "The Exact Transmission of Texts in the First Millennium B.C.E.: An Examination of the Cuneiform Evidence from Mesopotamia and the Torah Scrolls from the Western Shore of the Dead Sea" (Ph.D. Dissertation, University of Sydney, 2009), 159–209. Hobson evaluated all the variants among the 54 preserved copies of LH and only identified three hermeneutic variants that were all found in the prologue and epilogue (207–09). He writes "there are no large-scale interpolations or hermeneutic variations attested in the law section, whereas the poetic sections show significant variations of these types (469)."

authorship. Levinson notes: “The [Mesopotamian] scribes locate the laws not in cosmic history but in human history.”⁷⁵ This distinction in authorship between Mesopotamian and Israelite law appears to be where he identifies the point of change for the function of written law in the Near East. He writes,

[I]t was not the legal collections as a literary genre but the voicing of publicly revealed law as the personal will of God that was unique to ancient Israel. . . . [A]ttributing a legal text to God literally gives that text ultimate authority.⁷⁶

Similar arguments are made by Schmid, Assmann, and Fishbane;⁷⁷ the authority that is conferred upon the biblical legal corpora is of such an esteemed nature that it must have produced a binding obligation. Furthermore, LH was not binding because the stele only served to point its addresses back to the monarch, who is the ultimate legal authority. When the king dies, so does the authority of the law. By contrast—so this argument goes—when the law is associated with the deity, its authority becomes autonomous, enduring, and therefore binding.⁷⁸

While there is appeal to this argument, it is built on the assumption that an authoritative text must impose a binding obligation. As noted in the case of the inner-Pentateuchal interpretations of the Sabbath discussed in Chapter One, there is no evidence whatsoever that the Torah’s legal provisions were treated as practical authorities. Among all of the Holiness Code’s interpretive reworking of P and the Covenant Code, and among all Deuteronomy’s reworking of the Covenant Code, they are primarily ideologically

⁷⁵ Bernard M. Levinson, “The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy,” *Cardozo Law Review* 27 (2006):1864–65.

⁷⁶ Levinson, *Legal Revision*, 27–28.

⁷⁷ See Schmid, “The Genesis of Normativity in Biblical Law,” 119–35, esp. 121–36; Assmann, “Five Stages on the Road to Canon: Tradition and Written Culture in Ancient Israel and Early Judaism,” 65–68; and Fishbane, *Biblical Interpretation*, 96.

⁷⁸ In addition to Levinson, Schmid, and Assmann, see Westbrook, “Codification and Canonization,” 181–93.

motivated,⁷⁹ with hardly any attention given to practical considerations on how to follow the stipulations of the earlier codes; this was demonstrated with the inner-scriptural Sabbath interpretations in Chapter One (sec. IV). This all indicates that the Covenant Code, Deuteronomy, Priestly law, and the Holiness Code were not considered practical (binding) authorities. Yet, if all authoritative texts were binding, then one is forced to conclude that the biblical legal corpora were binding, despite evidence to the contrary (noted above). By contrast, when the possibility of epistemic authority is recognized, then it is possible to see the biblical legal corpora (and LH) as authoritative texts that were not binding.

In fact, there is ample evidence to suggest that the biblical legal corpora were meant to serve a didactic function, enlightening the mind, rather than as practical authorities that usurp its addressees practical reasoning. For example, numerous scholars have argued that Deuteronomy did not function as a binding law-code base on its hortatory style and its prolific use of motive clauses (motive clauses are a strong indication that D was considered an epistemic authority).⁸⁰

⁷⁹ While this claim requires more attention, it can be provisionally made. For example, Levinson has effectively shown that Deuteronomy's reworking of the Covenant Code was primarily motivated by the ideology of cult centralization. No real attention was given to the practical application of its specific formulations (threats to the rule of law). For example, when Deuteronomy reinterpreted the altar law of Exod 20:20–26 in Deuteronomy 12, the only concern was to ensure that all sacral activity was performed at the central sanctuary. There was no question of iron tools, or how big to build an altar, where to build an altar, or how to avoid showing nakedness before the altar—all questions that deal with the altar law's open texture, what it means to follow the law. Rather, it was an ideologically motivated recasting of the law. See Bernard M. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (New York: Oxford University Press, 1997). Similarly, Vroom has shown how the Holiness Code's reworking of the Covenant Code (and P) was motivated by a concept of the holiness of the land, and not by practical considerations on how to follow the law. See Vroom, "Recasting *Mišpātīm*," 32–33.

⁸⁰ See, for example, Bruce Wells, "Is it Law or Religion? Legal Motivations in Deuteronomy and Neo-Babylonian Texts," in *Law and Religion in the Eastern Mediterranean from Antiquity to Early Islam* (ed. Anselm C. Hagedorn and Reinhard Gregor Kratz; Oxford: Oxford University Press, 2013), 287–309; and Patrick D. Miller, "Constitution or Instruction? The Purpose of Deuteronomy," in *Constituting the Community: Studies on the Polity of Ancient Israel in Honor of S. Dean McBride, Jr* (ed. S. Dean McBride et al.; Winona Lake: Eisenbrauns, 2005), 125–41.

Therefore, scholars such as Levinson, and Assmann have concluded that the biblical legal corpora were considered legally binding because they have relied on imprecise notions of authority. A text's divine status or a text's royal status may give it authority in the eyes of its audience. However, that authority is not necessarily the type of practical authority that produces a binding obligation within its subjects. The best means of determining whether or not a text was treated as a binding obligation is to determine whether or not its interpreters were sensitive to the threats to the rule of law; the imputed source of the law, whether royal or divine, does not determine its function. Its function can only be determined by observing how it was treated by its subjects.

III. CONCLUSION

In this chapter I have demonstrated that the underlying reason for the lack of scholarly consensus on the question of when law came to be treated as legally binding is that scholars have relied on conflicting assumptions about the nature of law, what it is and how it functions. While this is hardly a failing of past scholarship—even modern lawyers rely on fragile assumptions about the nature of legal obligation—it does point to the need for a legal-theoretical approach to this issue. It is not possible to determine when written law became legally binding until we have a firm grasp of what it means for a text to produce a binding obligation upon its subjects, and until we have a clear picture of what it looks like when a text is treated as a binding obligation by its subjects. In other words, the best means of pushing the current debates forward is to draw from contemporary legal theory to determine what it is that we are looking for and to provide a means of identifying this in our available sources.

CHAPTER THREE: AUTHORITY AND PROBLEM OF INTERPRETATION

In this chapter I provide a theoretical framework for understanding the nature of legal interpretation and the nature of interpreting authoritative texts more broadly. This is necessary for my textual analysis in the following chapters. In Chapter One I discussed the nature of authority. In Chapter Two I briefly discussed the nature of interpretation (and its tension with the principle of legality). In this chapter I bring these two issues together and explore their implications for understanding scriptural interpretation in early Judaism. Legal theorists are intensely occupied with the relationship between these two phenomena—between authority and interpretation.¹ My goal in this chapter is to bring this discussion from legal theory to bear upon the field of early Jewish scriptural interpretation.

I. DEFINING INTERPRETATION, AUTHORITY, AND SCRIPTURE

Since legal interpretation and early Jewish interpretation are complex and much discussed issues, it is necessary to begin by explicitly limiting the scope of my discussion by providing some working definitions.

A. *Interpretation*

First, I will limit what I mean by the word interpretation. By interpretation I mean the act of *giving meaning to a text*. According to this definition, interpretation is that act of saying “A means B” or “this means that.” The point I want to highlight is that interpretation, according to this definition, claims a relationship of continuity and even identity between A and B. It says that, even though A is not B, A should be understood as B, and, furthermore, A

¹ This is evident from the title of Raz’s book, which is a collection of his essays that reflect on the nature of law: Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009).

should not be understood as anything but B. This type of interpretation, therefore, is exclusionary: “A should be understood to mean B, rather than C, D, E, and so forth.”² For example, even though Exod 23:19 does not say “you shall not mix meat and dairy,” the tannaitic sages claim that that is what it means (m. *Hul* 8), to the exclusion of other meanings, including the plain sense of the text.³ They do not simply say “don’t mix meat and dairy.” They actually claim that the Torah prohibits mixing meat and dairy, even though the Torah only states “you shall not boil a kid in its mother’s milk” (Exod 23:19, 34:26; and Deut 14:21).

It is important to note that, even though I define interpretation as giving meaning to a text (saying A means B), interpretation does not have to take the form of “this means that.” For example, in the case of the m. *Hul* 8, there is no explicit citation of Exod 23:19 followed by an interpretive explanation of why it should be understood to prohibit mixing meat and dairy. There is no doubt that the *Tannaim* wanted their audience to think that that is a Torah-command, and not their own invention. An A-means-B approach to the Torah underlies much of the Mishnah, even without explicit citation.⁴ Similarly, even though the Temple Scroll is not presented in the form of “this is what the Torah means,” it is still, as Lawrence Schiffman states, “fundamentally a work of biblical exegesis.”⁵ It is produced through deep

² This is similar to the first of Kugel’s four assumptions of ancient interpreters. He writes: “They [ancient interpreters] assumed that the Bible was fundamentally a cryptic text: that is, when it said A, often it might really mean B.” See James L. Kugel, *How to Read the Bible: A Guide to Scripture, Then and Now* (New York: Free Press, 2007), 14.

³ See the discussion in my Introduction (sec. I).

⁴ For the extent of the Mishnah’s interpretive basis, see Alexander Samely, *Rabbinic Interpretation of Scripture in the Mishnah* (Oxford: Oxford University Press, 2002).

⁵ Lawrence H. Schiffman, “The Case of the Day of Atonement Ritual,” in *The Courtyards of the House of the Lord: Studies on the Temple Scroll* (ed. Lawrence H. Schiffman and Florentino García Martínez; STDJ 75; Leiden: Brill, 2008), 333.

interpretive engagement with the Torah, and it is meant to be thought of as an actual expression of Torah.

A second point of distinction concerns the relationship of continuity and identity between the ‘A’ and ‘B’ elements of interpretation. The type of interpretation that I discuss in this chapter (and in my Textual Analysis) concerns only those which claim this type of relationship. This stands in distinction to mere allusions to scriptural language. For example, Judith Newman has highlighted what she calls the “scripturalization of prayer” in Second Temple Judaism. This refers to “the reuse of biblical texts or interpretive traditions to shape the composition of new literature.”⁶ She is specifically concerned with the fact that “scriptural tradition increasingly came to be woven into the fabric of many prayers.”⁷ While such engagement with scriptural texts is certainly an interpretive activity, this is not the type of interpretation that I am concerned with. The difference is the relationship between the new composition and the object of interpretation—the relationship between B and A. With this type of interpretive activity, the authors of the new compositions—the scripturalized prayers in Newman’s study—did not intend them to be identified with their interpreted object; they were not saying ‘A means B.’ Rather, they were overtly creating something new—generically distinct—that was clothed in scriptural language. This type of interpretation falls outside of the purview of this chapter.⁸

⁶ Judith H. Newman, *Praying by the Book: The Scripturalization of Prayer in Second Temple Judaism* (EJL 14; Atlanta: Scholars Press, 1999), 12–13.

⁷ Newman, *Scripturalization*, 202.

⁸ With this type of interpretation, the voice of the new writer/speaker exists in harmony with the old words. For more on this, see Mikhail Bakhtin and Caryl Emerson, *Problems of Dostoevsky’s Poetics* (Theory and History of Literature 8; Minneapolis: University of Minnesota Press, 1984), 187–89. For this phenomenon in Job, see Carol A. Newsom, *The Book of Job: A Contest of Moral Imaginations* (New York: Oxford University Press, 2003), 130–31.

B. Authority and Scripture

I define scripture according to my discussion on authority in Chapter One (sec. I.A–C). Scripture is a text that possesses religious authority. As discussed in Chapter One, the law’s authority is not a function of the state’s coercive powers. Rather the law is considered authoritative by those who recognize it as such; this is H. L. A. Hart’s rule of recognition (see sec. I.A.). Similarly, scripture’s authority comes from its being recognized as sacred by a community. Thus, Hart’s rule of recognition applies to scripture as well. The recognition of law’s authority, however, is based on its political and institutional pedigree.⁹ By contrast, scripture’s authority lies in its perceived divine pedigree.

Furthermore, the distinction between practical and epistemic authority also applies to scriptural texts in early Judaism. This, along with Hart’s rule of recognition, can be found in Eugene Ulrich’s definition of scripture:

A book of Scripture is a sacred authoritative work believed to have God as its ultimate author, which the community, as a group and individually, *recognizes* and accepts as *determinative* for its *belief* and *practice* for all time and in all geographical areas (emphasis mine).¹⁰

Notice the fact that authority only exists when it is recognized as such; this is akin to Hart’s rule of recognition. More importantly, however, the fact that a book of scripture is determinative for both belief and practice shows a striking resemblance to Raz’s preemption thesis and the distinction between practical and epistemic authority. The fact that belief and practice are ‘determined’ indicates that the text provides a preemptive reason for belief and action; it is to be believed and obeyed based on its mere say-so—based on its divine

⁹ For Dworkin’s pedigree thesis, see Dworkin, “The Model of Rules,” 17.

¹⁰ Eugene Ulrich, *The Dead Sea Scrolls and the Developmental Composition of the Bible* (VTSup 169; Leiden: Brill, 2015), 274.

pedigree. Thus, scripture's authority is different from legal authority in that legal authority is only practical; scriptural authority is both practical and epistemic.¹¹

II. AUTHORITY AND THE PROBLEM OF INTERPRETATION

A. *Uncle-Niece Relations in CD 5:7–11 as an Example*

The relation between authority and interpretation is a crucial issue in legal scholarship. This is because there is a tension inherent within the act of interpreting an authoritative text. This tension can be illustrated with the example of the uncle-niece sexual prohibition found in the Damascus Document, which I discuss in Chapter One (sec. II.C.i). CD 5:7–11 attests to an interpretation of the list of prohibited sexual unions found in Lev 18:6–20. While the text from the Torah does not explicitly prohibit uncle-niece relations, the CD author argues that the Torah does, in fact, make such a prohibition. His reasoning is as follows: The Torah prohibits relations with one's aunt, and the reason for this prohibition is because "she is the kin of your mother" (שאר אמך היא; Lev 18:13/CD 5:9). Since uncle and niece are also kin, the law should apply there too: "The law on forbidden union was written for men, but also applies to women. If the daughter of a brother uncovers the nakedness of the brother of her father, she is near kin" (ומשפט העריות לזכרים הוא כתוב וכהם הנשים ואם תגלה בת) (אביה והיא שאר האח את ערות אחי; CD 5:9–11). Here the CD interpreter argues that since kinship applies as much to uncle-niece relations as it does to aunt-nephew relations, the prohibition should also apply. Thus, even though the Torah does not explicitly prohibit such a union, there is strong reason to suggest that such a union should be prohibited.

¹¹ In a recent article, Francis Borchardt applied a dictionary definition of the word authority to argue that "a text becomes an authority once it is acknowledged or alleged to have the power to influence action, opinion, or belief." This definition also recognizes the practical and epistemic aspect of scriptural authority. See Francis Borchardt, "Influence and Power: The Types of Authority in the Process of Scripturalization," *SJOT* 29 (2015):183. By contrast, Hanne von Weissenberg appears to conflate belief and action. See Hanne von Weissenberg, "Defining Authority," in *In the Footsteps of Sherlock Holmes: Studies in the Biblical Text in Honour of Anneli Aejmelaeus* (ed. Kristin De Troyer; CBET 72; Leuven: Peeters, 2014), 290.

This is strong interpretive argumentation on the part of the CD scribe. His interpretation seems valid, well reasoned, and engages his interpreted object cogently. However, no matter how well-reasoned the argument, the fact is, the Torah does not make such a prohibition. One may argue that that is what the Holiness author would have intended, or that it is obvious, or implicit within the text. But it is not what the Torah says. This raises a number of questions: Is it the Torah that prohibits uncle-niece relations, or it is the Damascus Document? Does the CD scribe want his readers to treat the uncle-niece prohibition as a Torah-prohibition? Does the uncle-niece prohibition hold the same authority—the preemptive reason-giving power—as the Torah? If the Torah passage does not actually prohibit that union, then the interpreter is forced to rely on his own reasoning—reasoning that is external to the text—which is precisely what one should not do with binding norms. Binding norms are meant to preempt all other reasoning.

On the one hand, CD's interpretation creates new law; it says something new that is not in the Torah. Even though the scribe engages and invokes the text of the Torah, this new prohibition is based on his own reasoning which is external to the text: 'If law X applies to situation A, and situation A is similar to situation B, then law X should apply to situation B.' On the other hand, the CD author is claiming that his new prohibition is not actually new; he is claiming that the uncle-niece prohibition is a Torah command and not his own invention.

This is the paradox of legal interpretation; it simultaneously preserves its interpreted sources while departing from them; it claims continuity with existing authoritative texts while at the same time making them say something somehow more or different than that which is in the text. As Wittgenstein puts it, "we ought to restrict the term 'interpretation' to

the substitution of one expression of the rule for another.”¹² While it is tempting to focus on one aspect over the other—continuity over innovation or innovation over continuity—the fact is, both are necessarily present in the act of interpretation. Aharon Barak writes:

On one end of the spectrum is the opinion that, through interpretation, a judge just repeats the language of the statute. The judge is, in Montesquieu’s words, the “mouth” of the legislator. Judicial interpretation does not create a new norm. It simply declares what already exists in the system. . . . On the other end of the spectrum is the belief that all interpretation is creation or lawmaking. The meaning of the text is whatever meaning the interpreter gives it. The interpreter holds the power. . . . I think the truth lies somewhere between these two extremes.¹³

The point here is that it is misguided to emphasize innovation over continuity or vice versa.

As Raz writes:

Interpretation straddles the divide between the identification of existing law and the creation of a new one. Where interpretation is concerned that distinction does not apply.¹⁴

This is the inherent tension within interpretation; it is necessarily comprised of two seemingly mutually exclusive components, fidelity to pre-existing authority and departure from that authority. This is just as evident in CD’s interpretation of Leviticus 18 as it is in legal systems today.

B. Creativity and Constraint in the Act of Interpretation

In order to better understand this tension, it will help to unpack Timothy Endicott’s comments on the nature of interpretation. He writes:

An interpretation is an answer to the question, “What do you make of this?” Interpretation is the process of coming up with an answer. *Creativity and constraint complement each other in that process.* If I ask, “What do you make of this?” I ask you to make something, but it must be something made of *this*. As a result, there are critical differences and critical similarities between

¹² Wittgenstein, *Philosophical Investigations*, 201.

¹³ Barak, *Purposive Interpretation*, 52–53.

¹⁴ Joseph Raz, “Why Interpret?,” in *Law and Legal Interpretation* (ed. Fernando Atria and Neil MacCormick; International Library of Essays in Law and Legal Theory; Burlington: Ashgate, 2003), 18.

interpretation and understanding, and between interpretation and invention (emphasis mine).¹⁵

The interplay of creativity and constraint, of which Endicott writes, concerns the fact that *an interpretation makes its interpreted object say something better than, more than, or other than it does on its own*. In the example discussed above, the CD scribe made the Torah's passage on sexual prohibitions say something more than it says on its own. This is the creativity element of interpretation. The fact that that added meaning must be tied to the object of interpretation is the *constraint* element of interpretation; the CD author is claiming that it is the Torah that prohibits uncle-niece relations. If it is not tied to the object, then it is simply something new; it is an invention rather than an interpretation. As Endicott states, "If I ask, "What do you make of this?" I ask you to make something, but it must be something made of *this*."¹⁶ The "something" is the creative element, and the fact that it has to be "something made of this" is the element of constraint.

When it comes to interpretation in early Judaism, such as the interpretive sources I examine in the next chapters, things are no different. Scribes sought to interpretively rewrite existing authoritative traditions, and those interpretive rewritings exhibit a great deal of creativity. Yet at the same time, these texts—such as the Temple Scroll—claim a relationship of identity with their interpreted sources; the Temple Scroll claims to be Torah. Before further discussing early Jewish interpretation, however, two more issues that are relevant to modern law must be discussed.

¹⁵ Timothy Endicott, "Putting Interpretation in its Place," *Law and Philosophy* 13 (1994):451.

¹⁶ Endicott, "Putting Interpretation in its Place," 451.

III. AUTHORITY TRANSFER AND THE LIMITS OF INTERPRETATION IN MODERN LAW

When the interpretation of an authoritative text is accepted as valid, that text's authority is *transferred* to the interpretation and that interpretation enjoys the same status as its interpreted object. I will call this *the principle of authority-transfer*. This is always the goal of A-means-B interpretation. The challenge to achieving this authority-transfer, however, comes from the fact that *every* interpretation involves creativity; every interpretation brings some new or added meaning that is not in the interpreted object on its own (otherwise there would be no need for interpretation). Therefore, the crucial question is "how much creativity can be smuggled into an interpretation without threatening its goal of authority-transfer?" This is a question of the limits of interpretation. How far can an interpreter stretch beyond the words of a text without threatening their interpretation's claim to authority—without risking the transfer of authority to the interpretation?

As discussed in Chapter Two (sec. II.A), the appellate judges in the case of *Palmer v. Riggs* framed their decision as an interpretation of existing law. Even though the law at the time said nothing about prohibiting murderers from inheriting their victims' property (which they acknowledged), they state:

It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds . . . it cannot be doubted that they would have provided for it. It is a familiar canon of construction that *a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter*; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers (emphasis mine).¹⁷

¹⁷ For the full Opinion of the Court, see: http://www.courts.state.ny.us/reporter/archives/riggs_palmer.htm.

The point to note here is that the judges framed their decision as if it was in continuity with existing law; even though the law does not explicitly prohibit Palmer from inheriting his murdered grandfather's property, the law-makers would have intended such an outcome; and the intention of the law-makers "is as much within the statute as if it were within the letter." The fact that their interpretation is creative is inescapable; the judges attempted to make their interpreted object—the current body of inheritance laws—say something that it does not actually say. While legal theorists debate whether their decision should be considered an interpretation (as opposed to an invention),¹⁸ the fact is, they framed their decision as if it were in keeping with the existing statutes, and not as an invention of their own making. In so doing, the appellate judges sought to legitimize their innovative and ground-breaking decision with the preemptive reason-giving authority of existing law; this is the nature of authority-transfer.

In fact, it is very typical that judges seek the pre-existing authority of their interpreted object to be transferred to the creative element of their interpretation, because for a judge, interpretation is a legitimate activity; creating law is not. If the judges in *Palmer v. Riggs* could make their law-creating decision seem as if it was an application of existing law, then it would be treated with the same authority as the law itself; they wanted the authority of the existing statutes to be transferred to their decision. This is what Timothy Endicott calls the "charm of interpretation." He writes,

Judges, instead of claiming authority to invent a resolution to a dispute, have a natural inclination to see what they are doing as interpreting what others have decided (the parties, the legislature, framers of a constitution, states that signed a treaty, previous courts...). Conversely, when judges are moved (legitimately or illegitimately) to depart from what others have decided, they have a natural

¹⁸ Dworkin, "Law, Philosophy, and Interpretation," 3–15, esp. 4; and Rodger Beehler, "Legal Positivism, Social Rules, and *Riggs v. Palmer*," *Law and Philosophy* 9 (1990):285–93.

inclination to see what they are doing as interpreting what those others have done, instead.¹⁹

Similarly, Aahron Barak notes that judges tend

to present all their actions as interpretive. They presume that, in doing so, they will enjoy the legitimacy that interpretation confers on judicial activity. Judges sometimes “cram” noninterpretive activities into interpretative limits, blurring the distinction between giving meaning to a text and acting beyond it.²⁰

Thus, modern judges tend to mask their law-creating decisions in the garb of interpretation, because interpreting the law is a legitimate activity, creating new law is not. As I argue below, things were no different for Second Temple scribes.

As a result of this tension, the crucial question is: “what are the limits of interpretation?” If all interpretation is to some degree creative—otherwise there is no need to interpret—then when does an interpretation become an invention? In legal scholarship the limits of interpretation is a much discussed topic. While there are numerous theories of interpretation that yield different answers to this question,²¹ many scholars argue that interpretation is limited by the semantics of the legal text. Barak, for example, writes, “The semantic meaning of a text is the totality of all meanings that may be attached to the language of the text.” He goes on to write, “Giving a text a meaning beyond its semantic

¹⁹ See Marmor, “The Nature of Law: An Introduction,” 3–4; and Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), 182–84 (where he refers to the same principle as “the charm of legalism”).

²⁰ Barak, *Purposive Interpretation*, 17. This tendency to hide innovation in the guise of interpretation relates to a debate between formal and substantive argumentation. Harm Kloosterhuis notes that judges often hide their substantive arguments under a thin veil of formal argumentation. See Kloosterhuis, “The Strategic Use of Formal Argumentation in Legal Decisions,” 496–506, esp. 497–98.

²¹ For example, some argue that legal interpretation should be governed by the intentions of the law-makers (intentionalism), the original meaning of the words (originalism), the world of the text (textualism), or the purpose of the law (purposivism). For an assessment of these systems, see Barak, *Purposive Interpretation*, 265–85.

meaning is not an act of interpretation.”²² In other words, “Judges cannot give the text of a statute a meaning that its language cannot bear.”²³ Similarly, Matthias Klatt writes,

As soon as an application of a legal norm cannot be reconciled with its wording, this application is not an interpretation but rather a further development of the law. Therefore, semantic limits enable the separation between the interpretation of the law and the further development of the law.²⁴

Thus, in modern legal systems, the limits of interpretation—the conditions necessary for successful authority-transfer—are (typically) limited by the legal text’s range of semantic possibilities.

IV. AUTHORITY AND INTERPRETATION IN ANCIENT ISRAEL AND EARLY JUDAISM

The concept of authority-transfer also applies to scriptural interpretation in early Judaism, though the limits of interpretation were much different in the ancient world. Endicott’s charm of interpretation is very similar to comments made about the Pentateuchal sources and so-called rewritten Bible compositions.²⁵ For example, Bernard Levinson has written extensively on the innovative elements of legal sources in the Pentateuch, where scribes sought to mask the creative elements of their interpretation and present them as reflecting continuity with existing authoritative texts. He writes:

There clearly exists an inherent tension within biblical laws between renewal and conservatism: between the need to amend laws or create new ones in light of inevitable historical change and the desire to preserve the authority of laws claiming divine origin. As a result of this tension, it was necessary . . . to present new law as not in fact involving the revision or annulment of older laws. The biblical authors developed what may best be described as a rhetoric of concealment, one that served to camouflage the actual literary history of the laws.²⁶

²² Barak, *Purposive Interpretation*, 7, 18.

²³ Barak, *Purposive Interpretation*, 251.

²⁴ See Matthias Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation* (European Academy of Legal Theory 7; Oxford: Hart Publishing, 2008) 5. It is important to note, however, that Klatt here does not call “development of the law” judicial legislation (as distinct from judicial interpretation). Rather, Klatt identifies a middle ground between interpretation and legislation, which he calls “judicial development.”

²⁵ I discuss the phenomenon of rewritten Bible below.

²⁶ Levinson, *Legal Revision*, 48.

Elsewhere he writes:

The reworking of tradition presents itself as the original significance of tradition; the challenge to the source is read back into the source; the author renders his own voice silent by attributing that voice to the authoritative source.²⁷

These comments sound startlingly similar to those of legal theorists; this is precisely what the appellate judges in *Palmer v. Riggs* did. Just as judges are reluctant to claim authority for themselves, so too were ancient scribes. As a result, they were naturally inclined to present their interpretations as continuous with a pre-established authority. In other words, they sought to transfer the authority of an existing text to the creative element of their interpretation—that which makes their interpreted object say something more than, better than, or other than it says on its own. In-so-doing, their own voices, which do not possess the pedigree of their sources, are concealed within that which does.

In order to demonstrate how authority-transfer applies to early Jewish scriptural interpretation, one complicating factor with ancient interpretive practices must be discussed: the form of interpretation.

A. The Form of Interpretation in Early Judaism

Despite the similarity between interpreting authoritative texts in early Judaism and modern legal systems, there is an important difference. This has to do with the fact that interpretation did not typically take the form of ‘A means B’ statements. Rather, interpretation was typically implicit, rather than explicit.²⁸

²⁷ Levinson, *Legal Revision*, 90.

²⁸ For more on the distinction between implicit and explicit interpretation, see George J. Brooke, ““4Q252” As Early Jewish Commentary,” *RevQ* 17 (1996):385–401.

i. *IMPLICIT INTERPRETATION*

One of the most significant insights that has emerged since the discovery of the Dead Sea scrolls concerns the nature of scriptural transmission in the Second Temple period. The lines have dissolved that were once drawn to distinguish between the composition of a text, its transmission, and its reception. For example, it is now apparent that a single community preserved multiple versions of the same texts, such as Exodus, Joshua, and Jeremiah; although some scribes would simply copy their scriptural texts, with only minor variation, many would add, omit, and rearrange material, thus creating alternate versions of the same text.²⁹ Additionally, there were other interpretive rewritings of scriptural texts, particularly of the Torah, that present it in a new narrative setting.³⁰ These texts, of which Jubilees and the Temple Scroll are prime examples, are often termed ‘rewritten Bible.’³¹ Although they also

²⁹ This phenomenon, often referred to as the “pluriformity” of the biblical text, has been chiefly promulgated by Eugene Ulrich and generally agreed upon by the majority of scholars. For a recent contribution, see Eugene Ulrich, “The Evolutionary Production and Transmission of the Scriptural Books,” in *Transmission of Traditions and Production of Texts in the Dead Sea Scrolls* (ed. Sarianna Metso; STDJ 92; Leiden: Brill, 2010), 209–25. For a collection of his earlier contributions to this subject, see Eugene Ulrich, *The Dead Sea Scrolls and the Origins of the Bible* (Studies in the Dead Sea Scrolls and Related Literature; Grand Rapids: Eerdmans, 1999). For the impact of Ulrich’s work on the nature of the biblical text in the Second Temple period, see Eugene Ulrich et al. eds., *Studies in the Hebrew Bible, Qumran, and the Septuagint Presented to Eugene Ulrich* (VTSup 101; Leiden: Brill, 2006).

³⁰ Michael Segal has identified several external characteristics to identify rewritten Bible compositions. The most distinctive is the new narrative setting. See Michael Segal, “Between Bible and Rewritten Bible,” in *Biblical Interpretation at Qumran* (ed. Matthias Henze; Grand Rapids: Eerdmans, 2005), 17–28.

³¹ Scholarship on this issue has reached a fever pitch over the past decade. See Molly M. Zahn, *Rethinking Rewritten Scripture: Composition and Exegesis in the 4Q Reworked Pentateuch Manuscripts* (STDJ 95; Leiden: Brill, 2011); Sidnie White Crawford, *Rewriting Scripture in Second Temple Times* (Grand Rapids: Eerdmans, 2008); Michael Segal, *The Book of Jubilees: Rewritten Bible, Redaction, Ideology and Theology* (JSJSup 117; Leiden: Brill, 2007); Daniel K. Falk, *The Parabiblical Texts: Strategies for Extending the Scriptures in the Dead Sea Scrolls* (CQS 8; London: T&T Clark, 2007); D. Andrew Teeter, “On “Exegetical Function” in Rewritten Scripture: Inner-Biblical Exegesis and the Abram/Ravens Narrative in Jubilees,” *HTR* 106 (2013):373–402; George J. Brooke, “Hypertextuality and the “Parabiblical” Dead Sea Scrolls,” in *Reading the Dead Sea Scrolls: Essays in Method* (ed. George J. Brooke and Nathalie LaCoste; EJM 39; Atlanta: SBL, 2013), 43–64; Molly M. Zahn, “Genre and Rewritten Scripture: A Reassessment,” *JBL* 131 (2012):271–88; Daniel Machiela, “Once More, with Feeling: Rewritten Scripture in Ancient Judaism - A Review of Recent Developments,” *JSJ* 61 (2010):308–20; Anders Klostergaard Petersen, “Rewritten Bible as a Borderline Phenomenon: Genre, Textual Strategy, or Canonical Anachronism,” in *Flores Florentino: Dead Sea Scrolls and Other Early Jewish Studies in Honour of Florentino García Martínez* (ed. A. Hilhorst et al.; JSJSup 122; Leiden: Brill, 2007), 285–306; and Moshe J. Bernstein, ““Rewritten Bible”: A Generic Category which has Outlived its Usefulness?,” *Textus* 22 (2005):169–96.

added, omitted, and rearranged material from their source, they seem to have been considered distinctly new compositions, even though they sought to be identified with the Torah.³² What is more, there are other texts, such as the 4QP manuscripts (formerly termed 4QRP), that resist such categorization; although they creatively rewrite the Torah, like the rewritten scripture texts, they do not reflect a distinct narrative setting and seem to have been considered as alternate editions of the Torah.³³

However one categorizes these compositions' relation to their source texts (copies, variant literary editions, new compositions, etc.), it is clear that they all share a common compositional strategy; they were all produced through the process of copying that was

³² On the one hand, through pseudonymous attribution, these texts claim to be Torah. Thus, some have argued that they were intended to replace the Torah. See Phillip Michael Sherman, *Babel's Tower Translated: Genesis 11 and Ancient Jewish Interpretation* (BibInt 117; Boston: Brill, 2013), 90–91; Simone Paganini, “Die Deuteronomische Fassung des Königsgesetzes und ihre Interpretation Innerhalb der Tempelrolle: Rechtshermeneutische Beobachtungen,” in *The Qumran Legal Texts between the Hebrew Bible and its Interpretation* (ed. Kristin De Troyer and Armin Lange; CBET 61; Leuven: Peeters, 2011), 76–77; Simone Paganini, “Nicht darfst Du zu diesen Wörtern etwas hinzufügen.” *Die Rezeption des Deuteronomiums in der Tempelrolle: Sprache: Autoren und Hermeneutik* (BZABR 11; Wiesbaden: Harrassowitz, 2009); Richard A. Horsley, *Scribes, Visionaries, and the Politics of Second Temple Judea* (Louisville, Kentucky: Westminster, 2007), 118; and Ben Zion Wacholder, “Jubilees as the Super Canon: Torah-Admonition Versus Torah-Commandment,” in *Legal Texts and Legal Issues. Proceedings of the Second Meeting of the International Organization for Qumran Studies, Cambridge 1995* (ed. Moshe J. Berstien et al.; Leiden: Brill, 1997), 195–211. On the other hand, numerous other scholars have argued that these texts could not have been intended to replace such a venerated text; they must have been considered interpretive texts that were meant to accompany the Torah. See Hindy Najman, *Seconding Sinai: The Development of Mosaic Discourse in Second Temple Judaism* (JSJSup 77; Boston: Brill, 2003). This debate has somewhat subsided, however. Most scholars seem to accept that the rewritten Bible texts are paradoxical, simultaneously claiming to be something new and something old. See for example, Segal, “Between Bible and Rewritten Bible,” 11–12; and my comments in Vroom, “Recasting *Mišpātīm*,” 44n54.

³³ On the problem of categorizing these texts, see Molly M. Zahn, “The Problem of Characterizing the 4QReworked Pentateuch Manuscripts: Bible, Rewritten Bible, or None of the Above?,” *DSD* 15 (2008):315–39; Emanuel Tov, “From 4QReworked Pentateuch to 4QPentateuch,” in *Authoritative Scriptures in Ancient Judaism* (ed. Mladen Popović; JSJSup 141; Leiden: Brill, 2010), 73–91; and Hans Debel, “Rewritten Bible, Variant Literary Editions and Original Text(s): Exploring the Implications of a Pluriform Outlook on the Scriptural Tradition,” in *Changes in Scripture: Rewriting and Interpreting Authoritative Traditions in the Second Temple Period* (ed. Hanne von Weissenberg et al.; BZAW 419; Berlin: De Gruyter, 2011), 65–91. The Book of Chronicles, which creatively rewrites much of the Deuteronomistic History, adds to the problem of characterizing these texts. The reception history of the Hebrew Bible demonstrates that the Deuteronomistic History and Chronicles were distinct literary works, which would indicate that Chronicles is an example of rewritten Bible. However, Chronicles is not based on a new narrative setting, which is often used to distinguish between rewritten Bible and alternate editions. See Gary N. Knoppers, “Of Rewritten Bibles, Archaeology, Peace, Kings, and Chronicles,” in *New Studies in Chronicles: A Discussion of Two Recently-Published Commentaries* (ed. Melody Knowles; JHS, 2005), 74–79.

intermingled with interpretive changes. By means of rewriting, scribes would give meaning to their venerated texts such that they would say something better than, more than, or other than their text would say without any scribal intervention. In other words, their goal was the same as any other act of interpretation—at least as I use the term—exhibiting the tension between creativity and constraint, innovation yet continuity with tradition. Even though they do not take the form of A-means-B, they are functionally the same.³⁴

ii. *EXPLICIT INTERPRETATION*

The other form that interpretation would take in Second Temple texts is explicit interpretation. This is found in the *pesharim*, and other texts like CD or 4QMMT. According to this approach, an excerpt of words from the received text (the interpreted object) is explicitly cited (with some sort of quotation formula) and a specific meaning is imputed to those words; in other words, it is the familiar A-means-B form of interpretation.³⁵ Just as with implicit creatively rewritten texts, the ‘B’ is somehow different from ‘A,’ while claiming a relationship of continuity and identity with it.

B. The Relationship between Interpretation and Interpreted Object

The main difference between implicit and explicit interpretation is that, while explicit interpretation distinguishes between an interpretation and its interpreted object—between A

³⁴ Jassen similarly argues that this authority-transfer principle is just as operative in Rabbinic literature (both Mishnah and midrash) as it is in Second Temple literature. See Jassen, *Scripture and Law*, 18–40, esp. 35–40. He writes: “Both processes (interpretation through reformulation and interpretation through commentary) succeed only because the earlier text has attained a degree of *authority, which is then transferred to the new texts*” (41; italics mine).

³⁵ There is debate on the origin of this method of interpretation. Bockmuehl argues that commentary as a form of interpretation originated in Greece and influenced the Essenes through Hellenism. See Markus Bockmuehl, “The Dead Sea Scrolls and the Origins of Biblical Commentary,” in *Text, Thought, and Practice in Qumran and Early Christianity: Proceedings of the Ninth International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature, Jointly sponsored by the Hebrew University Center for the Study of Christianity, 11-13 January, 2004* (ed. Ruth Clements and Daniel R. Schwartz; STDJ 84; Leiden: Brill, 2009), 4–29. By contrast, Jassen argues that the origin of the commentary method found in the *pesharim* should be traced back to Mesopotamia (particularly the commentaries on the omen texts). See Alex P. Jassen, “The Pesharim and the Rise of Commentary in Early Jewish Scriptural Interpretation,” *DSD* 19 (2012):363–98.

and B—implicit interpretation does not. If interpretation is an answer to the question “what does this mean?” then explicit interpretation simply gives an answer to that question: “A means B.” With implicit interpretation, however, a scribe tries to eliminate that question for future readers and presents B as if it were A.

It must be emphasized that the goal of both implicit and explicit interpretation is the same: to make their interpreted objects say something more than, better than, or other than they say on their own. In this way, all interpretations seek to, at least in some sense, replace their interpreted objects—just as they both seek a relationship of continuity and identity with them.³⁶ For example, although the Damascus Document’s interpretation of Leviticus 18’s sexual prohibitions is explicit—it distinguishes between A and B—the goal is to inject new meaning into that passage. The CD audience, therefore, is meant to replace their pre-existing understanding of that Torah passage—or its plain sense perhaps—with the meaning imputed to it by the interpretation: A means B. The same can be said for the tannaitic interpretation of Exod 23:19 reflected in m. *Hul* 8. The intuitive understanding of the directive “you shall not boil a kid in its mother’s milk” is meant to be replaced by the new meaning “you shall not mix meat and dairy.” The very act of saying ‘A means B’—whether implicitly or explicitly— involves a sense of replacement (and continuity).

The fact that this element of replacement applies to both implicit and explicit interpretation is evident from the Temple Scroll’s interpretation of Lev 18:6–20; it gives the

³⁶ For more on the debate over whether interpreters meant to replace or supplement their sources, see Vroom, “Recasting *Mišpātīm*,” 43–44 and the notes therein.

Same interpretation as that of CD.³⁷ In the case of the Temple Scroll, the author simply adds the law right next to the prohibition of aunt-nephew relations (Lev 18:13):³⁸

A man shall not take his father's sister or his mother's sister, for this is immoral.
A man shall not take the daughter of his brother or the daughter of his sister for this is abominable (TS 66:15-17).

Thus, the goal of both CD and the Temple Scroll's interpretation is the same: to make Lev 18:6–20 also prohibit uncle-niece relations: to assert that A should be understood to mean B (rather than just A). In both cases, this claim necessarily involves a degree of replacement. Both types of interpretation involve, as Wittgenstein states, “the substitution of one expression of the rule for another.”³⁹

C. Authority-Transfer and Constraints on Interpretation

Another important difference between implicit and explicit interpretation has to do with authority-transfer and the limits of interpretation. In the case of explicit interpretation, where there is an overt distinction between the interpretive conclusion and the object of interpretation, the interpreter must convince the reader of the interpretation—that A should be understood to mean B. Authority-transfer, therefore, involves an additional step: persuasion. In the case of CD's interpretation of the Holiness Code's incest laws, the scribe had to rely on formal argumentation: ‘If law X applies to situation A, and situation A is like situation B, then law X should apply to situation B.’⁴⁰ In order for the authority of the

³⁷ This is also noted in Zahn, *Rethinking Rewritten Scripture*, 12–17; and Sidnie White Crawford, “The Use of the Pentateuch in the Temple Scroll and the Damascus Document in the Second Century B.C.E.,” in *Pentateuch as Torah: New Models for Understanding its Promulgation and Acceptance* (ed. Bernard M. Levinson and Gary N. Knoppers; Winona Lake: Eisenbrauns, 2007), 307–16.

³⁸ It should be noted that TS does not simply repeat Lev 18:13; the author recasts the law in Deuteronomic language that matches Deut 23:1, which the author took as a restatement of Lev 18:8. See Schiffman, “Women in the Temple Scroll,” 536–37.

³⁹ Wittgenstein, *Philosophical Investigations*, 201.

⁴⁰ For an account of formal argumentation, and its distinction from substantive argumentation see Kloosterhuis, “The Strategic Use of Formal Argumentation in Legal Decisions,” 496–506.

Torah—with its preemptive reason-giving power—to be transferred to the interpretation—CD’s claim that Lev 18:13 should also be understood to prohibit uncle-niece relations—then the readers will have to be persuaded by their argument. Similarly, the Opinion of the Court in the case of *Palmer v. Riggs* was intended to persuade its readers that the current inheritance statutes should be understood to prohibit murderers from inheriting their victims’ property.⁴¹ Such interpretive argumentation, however, is not immediate. Thus, their interpretive conclusions were only considered on par with their scriptural sources to the degree that they were persuasive.

This type of persuasion, however, is not the type that is typically associated with epistemic authority, because it does not call its listeners to accept their conclusion based on the interpreter’s say-so. In other words, the interpretive argumentation found in CD 5:7–11 and in *Palmer v. Riggs* is not meant to provide preemptive reasons for belief (like typical epistemic authorities do). Rather, they are meant to persuade based on argumentation and formal engagement with their interpretive sources.

Not all explicit interpretations in early Judaism relied on persuasive (*midrashic*) argumentation however. In fact, very little did.⁴² Rather, much interpretation relied on the epistemic authority of the interpreter: the interpreter as expert who is to be believed based on his mere say-so. For example, a number of scholars note that interpretation in Qumran and other Second Temple literature is based on prophetic revelation. That is, the meaning of ancient texts is revealed to select scriptural interpreters, rather than through exegetical textual

⁴¹ This position is also argued by Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986), 15–20.

⁴² Steven D. Fraade, “Looking for Legal Midrash at Qumran,” in *Biblical Perspectives: Early Use and Interpretation of the Bible in Light of the Dead Sea Scrolls: Proceedings of the First International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature* (ed. Michael E. Stone and Esther G. Chazon; STDJ 28; Leiden: Brill, 1998), 59–79.

engagement.⁴³ 1QPeshHabakkuk is the prime example of this, where the Teacher of Righteousness is said to have been revealed the true meaning of ancient prophecy (col. 2:2–3; 7:4–5).⁴⁴

In contrast to *midrashic* argumentation, which relies on persuasive reasoning, the revelatory nature of interpretation in texts like 1QPeshHab serves as epistemic authorities. That is, because the interpretations are divinely revealed, it is expected that they will be believed based on their mere say-so: “A means B because that is what God told me.” CD’s audience is led to its interpretive conclusion through reasoning; rather than preempting reason it engages its audience’s ‘if-this-then-that’ reasoning. By contrast, the 1QPeshHab audience is expected to adopt their ‘this means that’ claims simply based on their supposed pedigree. In this way, there is less distance between the interpretation and the interpreted object in *peshet*-type interpretation. The transfer of authority from the ancient prophetic text to the interpretive claim is more immediate than that of *midrash*-type reasoning.

When it comes to implicit interpretation, there is even less mediation between the interpretation and interpreted object—between A and B. This is because texts such as the Temple Scroll, which I examine in the next chapter, are presented as Torah (‘this law’: TS 50:5, 17; 56:20–21), given to Moses from Sinai.⁴⁵ Thus, even though TS is produced through interpretive engagement with the (or a) Torah, it is presented as an authentic Torah itself: B is simply given as A. This relationship of identity with its interpreted object makes authority-transfer almost immediate. The audience is not called to evaluate any interpretive reasoning,

⁴³ For example, see Alex P. Jassen, *Mediating the Divine: Prophecy and Revelation in the Dead Sea Scrolls and Second Temple Judaism* (STDJ 68; Leiden: Brill, 2007), 379–83.

⁴⁴ See Fraade, “Looking for Legal Midrash at Qumran,” 75–76.

⁴⁵ See Sidnie White Crawford, *The Temple Scroll and Related Texts* (CQS 2; Sheffield: Sheffield Academic Press, 2000), 18–19; and John J. Collins, “Changing Scripture,” in *Changes in Scripture: Rewriting and Interpreting Authoritative Traditions in the Second Temple Period* (ed. Hanne von Weissenberg et al.; BZAW 419; Berlin: De Gruyter, 2011), 38–39.

nor to accept or reject the pedigree of a divinely revealed interpretation. Rather, they are meant to simply accept TS as Torah. Authority-transfer is almost immediate, if the audience accepts its claim to Torah.

It must be noted, however, that, because the Temple Scroll—and other such texts like Jubilees—differs so significantly from their interpreted sources, authority transfer also depends on their pseudepigraphic claims.⁴⁶ Temple Scroll is not presented as Moses proclaiming the law from Moab. It is given divine voicing; God speaks in the first person. Such pseudepigraphic attribution functions similarly to the revelatory nature of the *peshet*; they function as epistemic authorities. Because of their pedigree—because the interpretations come from God—the imputed meaning of the sacred text is meant to be taken based on its mere say-so: this is what the text means because God says so! In Chapter Seven I make the same argument for Ezra’s use of the Torah. Because of Ezra’s status as Torah-expert, he is able to make the Torah say things it does not say, and those declarations were considered as Torah itself because of his status; he provided self-sufficient preemptive reasons for believing that his declaration of what the Torah said is the actual meaning of the Torah: “B is A because I said so!”

Finally, when it comes to copies of a text that exhibit small interpretive changes, the transfer of authority is immediate.⁴⁷ For example, in Chapter Five I examine a series of minor changes made to a selection of laws from the Samaritan Pentateuch’s Covenant Code. Although these interpretive changes are small, they reveal their scribe’s legal thought. These changes were made among copies of the Samaritan’s Pentateuch. They were minor enough

⁴⁶ For discussion on this phenomenon, see Najman, *Seconding Sinai*, 43–53.

⁴⁷ See also David Andrew Teeter, *Scribal Laws: Exegetical Variation in the Textual Transmission of Biblical Law in the Late Second Temple Period* (FAT 92; Tübingen: Mohr Siebeck, 2014), 180.

so as not to warrant a new narrative setting or pseudepigraphic attribution. Authority-transfer for these changes would have been immediate.

Another factor must be considered when it comes to the form of interpretation. Although, implicit-interpretive texts, like Temple Scroll, would have achieved fairly immediate authority-transfer—as long as the divine fiction is accepted—they are more limited in how far they can stray from their source. One of the main strategies for an implicit interpretive text is the verbatim reuse of large portions from its source; in order for the Temple Scroll to be accepted as Torah it had to sound like Torah. This, however, limits the degree to which it can stray from the words of the Torah—the degree to which it can make the Torah say something more than, better than, or other than it does on its own.

This can be illustrated with a couple examples. In the case mentioned above of TS 66:15–17, the author could easily add a prohibition against uncle-niece relations using the same language as the prohibition for nephew-aunt relations. It would be easy to see how such an interpretive addition could be identified with the Torah itself. In such a case, because the language-use was almost identical to the Torah, an audience would ascribe the interpretive addition with the same authority as the Torah itself; authority-transfer would be immediate. However, an author would not be able to so easily attain authority-transfer for an interpretation that strays too far from its source. For example, a scribe would not be able to enumerate all the prohibited Sabbath activities that are listed in CD 10–11 (which span 20 lines) and pass them off as if they were part of the actual prohibition. Similarly, a scribe could not substitute “you shall not cook a young goat in its mother’s milk” with the line “you shall not mix meat and dairy.” While the latter is an interpretation of the former, the

interpretation is too different to pass it off as the original prohibition itself. Thus implicit interpretation has limits.

Explicit interpretation is needed when an interpretation strays too far from the wording of its source. Thus the CD scribe's enumeration of all the activities that were considered a violation of the Sabbath was given an explicit interpretation. Although the burden of authority-transfer provides a greater challenge for explicit interpretations, it allows for greater flexibility when it comes to making an authoritative text say something more than, better than, or other than it does on its own. By contrast, implicit interpretation, if successful, can side-step the inherent challenge to the authority-transfer goal (passing of an innovation as if it was there all along), but is limited in how far it can stretch the text of its source.

V. INTERPRETIVE METHODS AND MOTIVES

One final issue must be clarified at this point: in this study I am much more concerned with the *motives for interpretation*, rather than identifying *methods of interpretation*. A number of studies that examine interpretive texts in early Judaism focus much more on interpretive methods. These studies tend to focus on terms such as addition, omission, rearrangement, harmonization, conflation, unification, homogenization, and paraphrase.⁴⁸ For example, Molly Zahn, in her 2011 monograph, is expressly focused on the methods of interpretation, rather than the motives. She examines the textual changes in a number of rewritten scripture texts and distinguishes them according to the categories of addition, omission, and alteration.⁴⁹ These categories of textual change refer to a scribe's "compositional techniques," which must be distinguished from "exegetical techniques."⁵⁰

⁴⁸ For scholars who have applied these terms to the Temple Scroll, see below Chapter Four (sec. I.B esp. note 21).

⁴⁹ See Zahn, *Rethinking Rewritten Scripture*, 12–19.

⁵⁰ Zahn, *Rethinking Rewritten Scripture*, 12–15.

For Zahn, the former is much more “empirical” and objective, and, presumably, will yield more productive results. She writes:

Compositional techniques can be identified by comparison of the rewritten text with its scriptural source; that is, by a fairly empirical process. On the other hand, determining the exegetical or theological purpose behind a particular change is a much more subjective procedure, involving judgments about the concerns or goals of the author.⁵¹

While Zahn is careful to note that both compositional and exegetical techniques must be taken into account,⁵² her entire methodology is focused on methods of interpretation—what the scribes did with the text—rather than motives for interpretation—why scribes did what they did with the text. She clearly places more weight on methods rather than motives. Zahn’s emphasis reflects this general tendency in much scholarship.⁵³

While the methods of interpretation are no doubt important, in this study I am much more interested in the question of motive. If an interpretation is the answer to a question, then I am concerned with investigating causes as to why a question was asked in the first place. For example, in the case of the Damascus Document’s extensive interpretation of the Torah’s Sabbath law, it is clear that the scribe was seeking to answer questions dealing with the law’s vagueness: what does and does not qualify as compliance? What constitutes work? My focus in this study is asking why such questions were asked in the first place. It is clear that these vagueness-related questions were not being asked in earlier inner-scriptural interpretations of

⁵¹ Zahn, *Rethinking Rewritten Scripture*, 14.

⁵² She writes “For a full understanding of works that rewrite Scripture, both aspects—the compositional and the exegetical—must be taken into account.” See Zahn, *Rethinking Rewritten Scripture*, 16.

⁵³ For example, as I discuss further in Chapter Five (sec. II.B), Teeter’s recent monograph is entirely focused on reconstructing the method’s, or “laws,” that underlie scribal change in the transmission of biblical law. This is especially evident in the title of his book: *Scribal Laws: Exegetical Variation in the Textual Transmission of Biblical Law in the Late Second Temple Period*. Similarly, Jassen’s analysis of Sabbath interpretation in CD (and beyond) is primarily concerned with the question of how a scribe arrived at an interpretive conclusion, rather than the question of why a scribe chose to interpret the Sabbath law in a given way in the first place. See below Chapter Three (sec. IV).

the Sabbath. As I argue in Chapter One (sec. IV), the reason for this is because the CD scribe's interpretation was driven by his binding attitude toward law, while previous interpretations were driven by ideological/theological (non-legal) concerns.

This focus on interpretive motives stands in contrast to, for example, Jassen's approach to CD's Sabbath interpretation. While it is clear that he does address the issue of interpretive motives, this is not his focus. For example, he repeatedly asserts that the impetus behind the Sabbath interpretations of CD was to "update" the law according to changing circumstances; in fact, he seems to assume that all scriptural interpretation within the Bible and beyond was driven by the need to "update."⁵⁴ Concerning tannaitic and Second Temple interpreters of law he writes:

The rabbis shared the view of the Second Temple-period legists that the key to the effective and authoritative *updating* of ancient Israelite law lay with an intense engagement with scripture, even as the ideological basis and hermeneutic technique differed [italics mine].⁵⁵

Despite this attention to interpretive motives, however, Jassen's main goal is to recover the interpretive methods that underlie the Sabbath interpretations in Second Temple sources. He writes:

[S]ectarian legal formulation and inspired scriptural exegesis represent complementary enterprises in the quest to update and expand scriptural law. Scholars must engage in a process of "reverse engineering" in order to identify the exegetical relationship between the legal material and its scriptural foundations and locate this process within a larger framework of legal-exegetical principles.⁵⁶

While "updating" the law may provide the impetus for interpretation, the identification of these "legal-exegetical principles" is Jassen's primary concern.

⁵⁴ See Jassen, *Scripture and Law*, 15, 19, 22, 24–26, and 60.

⁵⁵ Jassen, *Scripture and Law*, 35.

⁵⁶ Jassen, *Scripture and Law*, 14–15.

While Jassen is surely correct that the impetus for legal interpretation in CD is to update the law, this explanation must be problematized further. After all, most interpretation is driven by the need to update an old text to accommodate changing circumstances. I suggest it is more productive to seek to identify what those changing circumstances are, to determine what brought about the need to interpret in the first place. In the case of CD's Sabbath interpretation, the thing that changed, which brought about the need for the vagueness-oriented interpretation, is a development in legal thought. Therefore, in this study I am more interested in interpretive motives than interpretive methods.

One further point must be made in relation to this discussion of interpretive motives. This has to do with the question of whether the legal interpretations I discuss in the following chapters were instigated by practical needs, or whether they only existed on a theoretical/literary level. For example, did the members of CD's community actually count off 1000 cubits beyond their towns (CD 10:21)? Or was that interpretation the result of theoretical debates based on Torah-study? Similarly, were there so many people falling in pits on the Sabbath that they had to instruct the people how to rescue someone without violating the Sabbath (CD 11:16–17)? This, I would suggest, is unlikely. While some interpretive activity was likely the result of real-life practical experience, much interpretation was more theoretical. Even though the legal interpretations I examine in the following chapters are intensely concerned with practical matters (like the Sabbath interpretations discussed in Chapter One), it is likely that some interpretation resulted from Torah-study and halakhic debates.

The fact that much interpretation was based on theoretical reflection does not, however, mean that interpretation such as CD's Sabbath law does not reflect a binding

attitude toward law. The fact that the CD scribe sought to correct the vagueness of the Torah's Sabbath law reveals his expectation of what he thinks law should look like and how it should function.

VI. CONCLUSION

In this chapter I have examined the tension between authority and interpretation. While this issue is typically discussed by legal theorists, it is highly relevant for understanding the nature of interpretation in early Judaism. Once a text holds an authoritative status, such that it provides preemptive reasons for actions and/or belief, then its interpretation becomes a particularly contentious issue. Since the text must meet the needs of an ever-evolving community (settling matters of belief and action or faith and practice), it required definitive interpretation. Because of the nature of interpretation, however—the fact that it always innovates—the authority of the text is challenged. While the manner in which scribes in early Judaism deal with this tension is very different from modern legal systems, the problem itself is fundamentally the same.

This discussion is necessary because in the next chapters I discuss interpretive sources that manage this tension. Although my goal is to identify the legal thought that underlies their interpretive efforts, these interpreters all faced this problem; this fact lurks behind much of my discussion in the following chapters.

PART II: TEXTUAL ANALYSIS

CHAPTER FOUR: LEGAL INTERPRETATION IN THE TEMPLE SCROLL'S *YOM KIPPUR* LAW

In this chapter I examine the interpretive changes that the author of the Temple Scroll made to the Torah's prescriptions for a festival on the tenth day of the seventh month. In keeping with other laws in TS, the author gathers and systematizes all the relevant pieces of the Torah that deal with this festival and creates a more legally coherent set of prescriptions. In the end, I conclude that when the many interpretive changes made by the author are examined, it becomes apparent that he, much like Lon Fuller's fictitious King Rex (Chapter One sec. II.B), had an intuitive awareness of the requirements of the rule of law, particularly the requirement of consistency and clarity; he attempted to create a version of the Torah that better meets these requirements. This interpretive agenda reveals that the author of TS thought the Torah's laws possessed preemptive force. That is, its laws had to be air-tight, practically speaking, in order to preempt its subject's background reasoning and deliberations. In other words, the author of TS treated the Torah as a source of binding obligation.

This chapter is divided into three main sections. First, I provide an overview of the Temple Scroll. Second, I provide a reconstruction of the text of TS 25:10–27:10. This is necessary since there are a number of critical issues to be discussed with my reconstruction. Third, the bulk of this chapter will be spent identifying eight legal innovations in TS's interpretive reworking of the Torah's *Yom kippur* laws that pay significant attention to the threats to the rule of law.

I. AN OVERVIEW OF THE TEMPLE SCROLL

A. *Manuscript Evidence, Provenance, and Date*

Although most scholars refer to the Temple Scroll as a single object of study, it is apparent that this text, much like most other texts, existed in multiple forms and underwent development. By far the most important manuscript is 11Q19 (11QT^a), the largest of all the scrolls discovered and the basis of almost every discussion of TS.¹ This scroll, copied by two scribal hands in the early first century C.E. consists of 67 columns,² the first of which is entirely lost and the last of which is mostly (if not entirely) blank.³ In addition, two other manuscripts have survived from cave 11, 11Q20 (11QT^b) and 11Q21 (11QT^c). Although very fragmentary, these scrolls preserve portions of TS that largely agree with 11QT^a, with some notable exceptions.⁴ I rely primarily on 11Q19.

When it comes to the provenance of TS, there has been a change in scholarly opinion. Prior to the 1990s, it was largely assumed that TS was composed by the Qumran sectarian community, since it was found among the scrolls that were thought to have been written

¹ This scroll can be viewed digitally at: <http://dss.collections.imj.org.il/temple>.

² Crawford, *Temple Scroll*, 11–12.

³ Yadin claimed that col. 67 contains the final column of the text since its bottom half (the only preserved portion) is blank. See Yigael Yadin, *The Temple Scroll* (3 vols.; Jerusalem: Israel Exploration Society, 1983), 2:300–01. Schiffman, however has recently challenged this and argued that 11Q19 represents an unfinished scroll; while 11Q19 stops at col. 66, its *Vorlage* had more material that was not copied on to (the blank) col. 67. See Lawrence H. Schiffman, “The Unfinished Scroll: A Reconsideration of the End of the Temple Scroll,” *DSD* 15 (2008):67–87.

⁴ Some have argued that 11QT^b and 11QT^c are different editions of the text preserved in 11QT^a. For the most recent edition of these and an account of their inter-relationship see James H. Charlesworth et al., “Temple Scroll Edition Close to 11Q19 (11Q20 [11QT^b]),” in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 7: Temple Scroll and Related Documents* (ed. Lawrence H. Schiffman et al.; Louisville: Westminster John Knox, 2011), 175–225; and James H. Charlesworth and Andrew D. Gross, “Temple Scroll-Like Document (11Q21 [11QT^c?]),” in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 7: Temple Scroll and Related Documents* (ed. Lawrence H. Schiffman et al.; Louisville: Westminster John Knox, 2011), 227–33.

there.⁵ Although there were some dissenters,⁶ that consensus persisted until the 1990s.

Thanks particularly to the work of Michael Wise and Lawrence Schiffman this consensus has changed. Wise argues that TS belonged to the community that produced the Damascus Document,⁷ which for him is distinguishable from the distinctly sectarian *Yahad* community of IQS. Although this theory is not widely accepted, his erudite monograph on the scroll forced scholars to critically evaluate Yadin's Qumran theory.⁸ Schiffman's prolific work on the scroll also helped erode Yadin's influential theory. He, however, argues that TS was not a sectarian product because TS differs too greatly from the *halakhic* methodology found in CD and the Community Rule, and lacks the polemically charged language that characterizes all known sectarian literature.⁹ Schiffman's arguments seem the most persuasive.

⁵ This position was assumed and defended by Yigael Yadin, "Is the Temple Scroll a Sectarian Document?," in *Humanizing America's Iconic Book: Society of Biblical Literature Centennial Addresses 1980* (ed. Gene M. Tucker and Douglas A. Knight; SBLBSNA 6; Chico: Scholars Press, 1982), 153–69; Yigael Yadin, *The Temple Scroll: The Hidden Law of the Dead Sea Sect* (New York: Random House, 1985). It is also important to note that the whole concept of a single sectarian "Qumran community" has recently undergone a paradigm shift. Most scholars now agree that the sectarians were a widespread collection of inter-related communities that were part of a wider Essene movement, though there is little agreement on the nature, structure and disbursement of that community. See Eric M. Meyers, "Khirbet Qumran and Its Environs," in *The Oxford Handbook of the Dead Sea Scrolls* (ed. John J. Collins; Oxford: Oxford University Press, 2010), 151–72.

⁶ See, for example, Lawrence H. Schiffman, *Sectarian Law in the Dead Sea Scrolls: Courts, Testimony, and the Penal Code* (BJS 33; Chico: Scholars Press, 1983), 13–14. For an outline of the various opinions on the date and provenance of TS prior to his monograph see Michael Owen Wise, *A Critical Study of the Temple Scroll from Qumran Cave 11* (SAOC 49; Chicago: Oriental Institute of the University of Chicago, 1990), 23–31.

⁷ Wise, *Critical Study of the Temple Scroll*, 129–54.

⁸ See Wise, *Critical Study of the Temple Scroll*, 201–03. For an example of the impact of Yadin's Qumran theory see Barbara Thiering, "The Date of Composition of the Temple Scroll," in *Temple Scroll Studies: Papers Presented at the International Symposium on the Temple Scroll, Manchester, December 1987* (ed. George J. Brooke; JSPSup 7; Sheffield: JSOT Press, 1989), 99–120; and Ernest-Marie Laperrousaz, "Does the Temple Scroll Date from the First or Second Century B.C.E.?", in *Temple Scroll Studies: Papers Presented at the International Symposium on the Temple Scroll, Manchester, December 1987* (ed. George J. Brooke; JSPSup 7; Sheffield: JSOT Press, 1989), 91–97. These two essays on dating the scroll, which came out the year before Wise's monograph, do not even consider that it was of non-Qumran origin, even though that theory did exist (see note 6 above) and was even proffered in the same volume; see Hartmut Stegemann, "The Literary Composition of the Temple Scroll and its Status at Qumran," in *Temple Scroll Studies: Papers Presented at the International Symposium on the Temple Scroll, Manchester, December 1987* (ed. George J. Brooke; JSPSup 7; Sheffield: JSOT Press, 1989), 123–48.

⁹ See Lawrence H. Schiffman, "The Law of the Temple Scroll and its Provenance," in *The Courtyards of the House of the Lord: Studies on the Temple Scroll* (ed. Lawrence H. Schiffman and Florentino García Martínez; STDJ 75; Leiden: Brill, 2008), 3–18; and Schiffman, *Sectarian Law*, 13–17.

The change in consensus that Wise and Schiffman helped produce has not, however, resulted in a clear alternative position on TS's provenance; the majority of scholars only agree that it was not produced by the Qumran community. Schiffman goes so far as to assert, "To this day, we still do not know who wrote the scroll or why. Neither do we know how it made its way to the Qumran caves."¹⁰ Nonetheless, some conclusions are possible. First, there are features in TS that fit well with sectarian ideology that must be taken into account, particularly its polemic against Jerusalem governance, temple, and cult.¹¹ Although it may not be as patently sectarian a text as 1QS, it was likely favourable to that community's ideology; it may even have undergone editing within the sect.¹² Second, given the author's extensive knowledge of the cult, temple, and Torah, it likely originated in priestly or Levitical circles.¹³

When it comes to dating this text, many scholars provide a *terminus ante quem* of 150 B.C.E., which is the paleographic date given to its earliest edition (4QRT).¹⁴ If this is the case,

¹⁰ Schiffman, "Introduction: The Enigma of the Temple Scroll," xx.

¹¹ Schiffman describes this polemic as follows, "We see the author as waging a subtle polemic against the existing order, regarding the Temple, government, and ritual life of the Jewish community. As opposed to the sectarians . . . this author does not decry the practice of his opponents. He does not preach hatred for them, or even separation from them. . . . He simply sets out an alternative way of attaining sanctity and holiness, as he sees it." See Schiffman, "The Law of the Temple Scroll and its Provenance," 8.

¹² Van Kirk and Charlesworth argue that 4QRT was a source for TS (not an early edition) and conclude that although TS did not originate with the sectarian community, they are responsible for its final redaction. See James H. Charlesworth and Andrew de la Ronde Van Kirk, "Temple Scroll Source or Earlier Edition (4Q524 [4QT^b; 4QRT])," in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 7: Temple Scroll and Related Documents* (ed. Lawrence H. Schiffman et al.; Louisville: Westminster John Knox, 2011), 251–52.

¹³ See Florentino García Martínez "The Temple Scrolls," *Near Eastern Archaeology* 63 (2000):173; and Crawford, *Temple Scroll*, 26. For the attitude to Levites in TS see Jeffrey Stackert, "The Cultic Status of the Levites in the Temple Scroll: Between History and Hermeneutics," in *Levites and Priests in Biblical History and Tradition* (ed. Mark Leuchter and Jeremy Hutton; AIL 9; Atlanta: Society of Biblical Literature, 2011), 199–214.

¹⁴ Émile Puech, "Fragments du plus ancien exemplaire du Rouleau du Temple (4Q524)," in *Legal Texts and Legal Issues. Proceedings of the Second Meeting of the International Organization for Qumran Studies, Cambridge 1995. Published in Honour of Joseph M. Baumgarten* (ed. Moshe J. Bernstein et al.; Boston: Brill, 1997), 19–64.

then it would predate the sect (at least the members of the sect who settled at Qumran).¹⁵ However, if 4QRT is a source for the scroll (as opposed to an early edition), then it may be dated later, perhaps early in the first century.¹⁶ As for its *terminus a quo*, many scholars relate its polemics (particularly its polemic against kingship found in col. 56–59) as directed at the Hasmonean dynasty, though there can be no certainty as to which ruler is targeted. Given these factors, it seems reasonable to situate the earliest edition of TS to the last half of the second century, or early in the first century within some sort of priestly (or Levitical) milieu that was akin to the sectarian communities.¹⁷ Although some have made more specific claims, this general conclusion will suffice for the present study.¹⁸

B. The Temple Scroll's Interpretive Tendenz and the Rule of Law's Clarity and Consistency Requirements

Before closely examining TS's interpretation of the Torah's *Yom kippur* laws, it is worth noting that its treatment of these laws is reflective of a general trend throughout TS to attempt to make a more legally coherent version of the Torah. This was immediately

¹⁵ See Crawford, *Temple Scroll*, 25; and Lawrence H. Schiffman et al., "Temple Scroll 11Q19 (11QT^a)," in *The Dead Sea Scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 7: Temple Scroll and Related Documents* (ed. Lawrence H. Schiffman et al.; Louisville: Westminster John Knox, 2011), 4–5. The sect was formed in 135 B.C.E. according to Jodi Magness, *The Archaeology of Qumran and the Dead Sea Scrolls* (Studies in the Dead Sea Scrolls and Related Literature; Grand Rapids: William B. Eerdmans, 2002), 66–69.

¹⁶ See the discussion in, Charlesworth and Van Kirk, "Source or Earlier Edition," 249–51 and the recent suggestion by Molly M. Zahn, "Identifying Reuse of Scripture in the Temple Scroll: Some Methodological Reflections," in *A Teacher for all Generations: Essays in Honor of James C. VanderKam* (ed. James C. VanderKam and Eric Farrel Mason; JSJSup 153; Leiden: Brill, 2012), 133–58.

¹⁷ Zahn, *Rethinking Rewritten Scripture*, 179–80 (and the footnotes therein); Schiffman et al., "Temple Scroll 11Q19 (11QT^a)," 4–5; Crawford, "The Use of the Pentateuch," 307 (and footnotes); and García Martínez "The Temple Scrolls," 173.

¹⁸ For example, Schiffman, based on parallels with Rabbinic records of the Pharisee-Sadducee debate and 4QMMT, argues that the scroll was produced by a community that was a pre-cursor to the Sadducees. See Schiffman et al., "Temple Scroll 11Q19 (11QT^a)," 11; Schiffman, "The Temple Scroll and the Nature of its Law: The Status of the Question," 42–43; Schiffman, "Pharisaic and Sadducean *Halakhah* in Light of the Dead Sea Scrolls: The Case of *tevul yom*," 425–39.

recognized by Yadin as a feature of the whole scroll. In fact, when describing TS's reworking of the Day of Atonement laws he wrote:

As he does with the other festivals, here, too, the author of the scroll fashions the main prescriptions scattered throughout the Pentateuch into a unified whole, adding or deleting to clarify the basic laws whose apparent lack of clarity in extant versions led to conflicting interpretations.¹⁹

Yadin identified five editing techniques that make up this trend in TS: 1) formulation of the text in the first person; 2) merging commands on the same subject; 3) unifying duplicate commands; 4) modifications and additions designed to clarify *halakhic* meaning; 5) appending whole new sections. His second, third, and fourth techniques are very distinct among other scriptural rewritings from the Second Temple period; most other texts are not concerned with the legal incoherence of the Torah.²⁰ Although many have refined and developed Yadin's categories,²¹ the most common term used to describe the compositional

¹⁹ Yadin, *The Temple Scroll*, 2:131–32.

²⁰ Scholars have compared the legal harmonizations of TS with the harmonizations of the Samaritan Pentateuch. For example, Kartveit writes: "One of the conspicuous traits about [SP's harmonizations] is that they have not affected the legal material in the Pentateuch." See Magnar Kartveit, *The Origin of the Samaritans* (VTSup 128; Leiden: Brill, 2009), 274. Tov also notes that harmonization occurs "mainly in the non-legal segments . . . [T]he substance of the law is only rarely harmonized." See Emanuel Tov, "Textual Harmonization in the Stories of the Patriarchs," in *Rewriting and Interpreting the Hebrew Bible: The Biblical Patriarchs in the Light of the Dead Sea Scrolls* (ed. Reinhard Gregor Kratz and Devorah Dimant; BZAW 439; Berlin: De Gruyter, 2013), 21. The same observation has been made for the so-called 4QRP manuscripts. See Moshe J. Bernstein, "What Has Happened to the Laws? The Treatment of Legal Material in 4QReworked Pentateuch," *DSD* 15 (2008):24–49.

²¹ For example, Kaufman suggested a continuum of editorial techniques for which he made six categories: 1) original composition; 2) periphrastic conflation; 3) fine conflation; 4) gross conflation; 5) modified Torah quotation; 6) extended Torah quotation. See Stephen A. Kaufman, "The Temple Scroll and Higher Criticism," *HUCA* 53 (1982):34–43. Alternatively, Milgrom argued that Yadin's second and third categories are better described as: 1) unification, which is the fusion of various related laws; 2) harmonization, where conflicting laws are brought together; 3) homogenization, where overly specific laws are generalized. See Jacob Milgrom, "The Qumran Cult: Its Exegetical Principles," in *Temple Scroll Studies: Papers Presented at the International Symposium on the Temple Scroll, Manchester, December 1987* (ed. George J. Brooke; JSPSup 7; Sheffield: JSOT Press, 1989), 170–75; and Jacob Milgrom, "The Scriptural Foundations and Deviations in the Laws of Purity of the Temple Scroll," in *Archaeology and History in the Dead Sea Scrolls* (ed. Lawrence H. Schiffman; Sheffield: JSOT Press, 1990), 83–99. Michael Wise also created seven categories to describe TS's relation to the Torah, for his much-used appendix, which identifies the biblical sources for each line of 11QT^a (they need not be repeated here). See Wise, *Critical Study of the Temple Scroll*, 208. Callaway provided an alternative term for Yadin's fourth category, which corresponds to Milgrom's "homogenization." He argues that the addition of new laws in biblical language in TS was made by "analogy" from the existing commands. This is what he calls a "micro-compositional" strategy for extending scripture. See Phillip R. Callaway, "Extending

approach to Pentateuchal law that is found in TS is *harmonization*; this is typically understood as the alteration of one text, to bring it into “harmony” with a parallel text that exhibits some differences. Although its use for TS has been criticized, since it does not quite describe all of TS’s legal tampering,²² it persists as a popular descriptor and will suffice for this study.²³

There is good reason to suggest that the Temple Scroll’s tendency toward legal harmonization reflects an attitude of binding obligation toward the Torah. Its harmonizations, which seek to create a more legally coherent version of the Torah, directly address the clarity and consistency requirements of the rule of law. When a legal text is composed of scattered, disparate material and conflicting laws, it becomes very difficult for its subjects to follow the law, and for adjudicators to consult and apply the law; in such cases the clarity and consistency elements are threatened. Therefore, the very act of collecting and merging topically related laws reflects the author’s sensitivity to this challenge; it reveals that he treated the Torah as a source of binding obligation.

Divine Revelation: Micro-Compositional Strategies in the Temple Scroll,” in *Temple Scroll Studies: Papers Presented at the International Symposium on the Temple Scroll, Manchester, December 1987* (ed. George J. Brooke; JSPSup 7; Sheffield: JSOT Press, 1989), 149–62. Bernstein has also provided similar categories: 1) collocation/integration; 2) harmonization and reconciliation. See Moshe J. Bernstein and Shlomo A. Koyfman, “The Interpretation of Biblical Law in the Dead Sea Scrolls: Forms and Methods,” in *Biblical Interpretation at Qumran* (ed. Matthias Henze; Grand Rapids: Eerdmans, 2005), 66–70. Schiffman’s main contribution to this discussion is his claim that the author always used the first occurrence of a law in the Torah, and “merged” it with subsequent topically related laws. See Lawrence H. Schiffman, *The Halakhah at Qumran* (Leiden: Brill, 1975); Lawrence H. Schiffman, “The Temple Scroll in Literary and Philological Perspective,” in *Approaches to Ancient Judaism: Theory and Practice* (ed. William Scott Green; BJS 9; Missoula: Scholars Press, 1978), 150. Dwight Swanson, on the other hand, showed that TS’s method was to establish a base text (whether or not it was the first instance) for each law and then supplement it with other biblical material on the same subject. See Dwight D. Swanson, *The Temple Scroll and the Bible: The Methodology of 11QT* (STDJ 14; Leiden: E.J. Brill, 1995), 228.

²² For TS see Milgrom, “Exegetical Principles,” 170–71. For critique of its use in the pre-SP texts see Michael Segal, “The Text of the Hebrew Bible in Light of the Dead Sea Scrolls,” *Materia Giudaica* 12 (2007):12–16.

²³ For example, see Sarah Pearce, *The Words of Moses: Studies in the Reception of Deuteronomy in the Second Temple Period* (TSAJ 152; Tübingen: Mohr Siebeck, 2013), 143–44;

While it may seem intuitive that this type of interpretive engagement with the Torah's laws reflects this new attitude toward written law, intuition is not enough. It is necessary to closely examine TS's legal innovations to determine whether or not the threats to the rule of law are indeed a significant underlying motivation for its interpretation of the Torah; I examine its interpretation of the Torah's *Yom kippur* laws as a test case.

C. Literary Sources in the Temple Scroll and its Legal Tendenz

Aside from the obvious fact that TS uses the (or a) Torah as a source, many scholars believe that the final product was woven together of independent sources, each of which drew from the Torah. This view began with Wilson and Wills,²⁴ who argued, based on formal and linguistic evidence, that TS is composed of five sources that circulated independently prior to being combined into the final form found in 11QT^a: 1) temple and courts, roughly col. 2–13, 30–46; 2) the festival calendar, col. 13–30; 3) purity laws, col 48–51; 4) laws of polity, col. 51–56, 60–67; 5) the Torah of the King, col. 56–59.²⁵ Although there is variation in the precise boundaries of these sources, many scholars have accepted Wilson and Wills' basic division, with the caveat that the laws of polity are now typically referred to as the "Deuteronomic paraphrase."²⁶

There are, however, a few important scholars who maintain that TS is a unified composition, most notably Molly Zahn.²⁷ She argues that TS reworked a different version of

²⁴ For the state of the question prior to their investigation see Andrew M. Wilson and Lawrence Wills, "Literary Sources of the Temple Scroll," *HTR* 75 (1982):275n2.

²⁵ See Wilson and Wills, "Literary Sources of the Temple Scroll," 275–88. They argue that TS was formed in two stages (284). First, the temple source and laws of polity (Deuteronomic paraphrase) were combined. Second, another scribe incorporated two other independent sources (the festival calendar and purity laws) to produce the final product.

²⁶ The major scholars of TS who have adopted a form of Wilson and Wills' source division are: Wise, *Critical Study of the Temple Scroll*, 197–98; Swanson, *The Methodology of 11QT*, 14, 235–37; Crawford, *Temple Scroll*, 22–23; Lawrence H. Schiffman, "The Theology of the Temple Scroll," *JQR* 85 (1994):109; and Schiffman, "The Deuteronomic Paraphrase of the Temple Scroll," 443–68.

²⁷ See Zahn, "Reuse of Scripture," 133–58; and Molly M. Zahn, "Schneiderei oder Weberei: Zum Verständnis der Diachronie der Tempelrolle," *RevQ* 20 (2001):255–86. See also Paganini, *Rezeption des*

the Torah, that is attested in 4Q365^c (4QRT), which implies it is a unified composition.²⁸ The strongest evidence for this position is the fact that TS seems to exhibit a consistent interpretive method, which appears to be somewhat unique in comparison with other contemporary texts. This consistency among sources was recognized by Swanson, who nevertheless maintains the basic source divisions. He writes:

[T]he Temple Scroll is a composite document incorporating previously independent documents. Apart from this evidence it is possible to discern a pattern of composition common to every section.²⁹

This point is significant for the present study because I claim that many of the legal innovations that are found in each of TS's supposed sources share a common *Tendenz* that is distinct from other rewritten Bible compositions. Since I am primarily focused on legal innovations in one pericope, I cannot definitively prove that TS is a unified composition. However, if it is true that TS's tendency to systematize scattered laws actually reflects a new attitude toward law, and if it is true that such an attitude toward law is unique to TS among contemporary literature, then this provides strong evidence that TS is, in fact, a unified composition.

II. THE TEXT OF TEMPLE SCROLL 25:10–27:10

The Temple Scroll's *Yom kippur* law is found in TS 25:10–27:10, which is part of the festival calendar section of the scroll. Unfortunately, the upper sections of columns 26 and 27 are badly damaged, and early photographs of cols. 26–28 show conflicting arrangements of their fragments.³⁰ However, there are a number of anaphors in the preserved portions that can

Deuteronomiums, 23–27; and C. D. Elledge, *The Statutes of the King: The Temple Scroll's Legislation on Kingship*, 11Q19 LVI 12-LIX 21 (CahRB 56; Paris: Gabalda, 2004), 32–37.

²⁸ Zahn, "Reuse of Scripture," 133–58.

²⁹ Swanson, *The Methodology of 11QT*, 227.

³⁰ The photographs available at <http://dss.collections.imj.org.il/temple> do not match the transcriptions of Elisha Qimron, *The Temple Scroll: A Critical Edition with Extensive Reconstructions* (Israel Exploration Society, 1996); and Schiffman et al., "Temple Scroll 11Q19 (11QT^a)," 70–75. It appears that the fragments on

help to reconstruct some of the legal elements of the text, particularly the elements lost from the top of column 26. My reconstruction is as follows:

. . . ובעשרה בחודש הזה	25:10
יום כפורים הוא ותענו בו את נפשותיכמה כי כול הנפש אשר לוא תתענה בעצם היום הזה ונכרתה מעמיה והקרבתמה בו עולה ליהוה פר אחד איל אחד כבשים בני שנה שבעה ³¹ שעיר עזים אחד לחטאת לבד מחטאת הכפורים ומנחתמה ונסכמה כמשפטמה לפר לאיל ולכבשים ולשעיר ולחטאת הכפורים תקריבו אלים שנים לעולה אחד יקריב הכהן הגדול עליו ועל בית אביו [וקריב אחד על העם ³² ויקריב פר לחטאת ושחטו אתו לפניו] [ועלה את דמו ³³ למזבח במזרק זהב ונתן מדמו באצבעו על קרנות] [מזבח ³⁴ ולקח שעירים שנים מעם לחטא ³⁵ ונתן הכן] הן הגדול [על שני השעירים גורלות] גורל אח[ד ליהוה וגורל אחד לעזזאל] [ושחטו את השעיר אשר על]ה עליו הגורל ליהוה וקבל הכהן] את דמו במזרק הזהב אשר בי[דו וע]שה לד[מו כאשר עש]ה לדם הפר אשר לו וכפר בו על כול עם הקהל ואת חלבו ואת מנחת נסכו יקטיר על מזבח העולה ואת בשרו ואת עורו ואת פרשו ישרופו אצל פרו חטאת הקהל הוא ויכפר בו על כול עם הקהל ונסלח להמה ורחץ את ידיו ואת רגליו מדם החטאת ובא אל השעיר החי והתודה על רואשו את כול עוונות בני ישראל עם כול אשמתמה לכול חטאתמה ונתנמה על רואש השעיר ושלחו לעזזאל המדבר ביד איש עתי ונשא השעיר את כול עוונות	15 26:1 5 10

the top of cols. 26–28 were arranged differently in the old photographs. For example, the fragment that contains the ה הן of 26:3 (הכין]הן הגדול) of the reconstruction appears in 26:5 of the photos on <http://dss.collections.imj.org.il/temple>. Similarly, in one old photo (6352), the fragment that contains the גורל אח of the reconstruction (26:4), which is crucial to every reconstruction of this text, does not appear at all in column 26; rather, the fragment that contains the להמה from 27:2 of the reconstruction appears in its place. It appears that there was no agreement on the arrangement of the fragments that appear on the upper areas of columns 26–28. For heuristic reasons, I will work with Schiffman's recent reconstruction, since it agrees basically with every earlier reconstruction. It is still surprising that there is not even a footnote noting this problem in the critical editions.

³¹ There was an erasure in the scroll at this point. Most scholars assume that תמימים was erased since this word occurs in Num 29:8, which the preceding text follows closely up to this point. See Qimron, *The Hebrew Writings*, 1:164.

³² For the ram-*ôlâ* of the people see Lev 16:5, 24. There is another fragment that contains אשי ריח ייה. Yadin places this fragment at the top of column 28, while Qimron places it at the top of 27. However, if it is correct that the top of col. 26 contained a reference to the *ôlâ* of the people (corresponding to the עלת העם of Lev 16:24), it is possible that this fragment belongs in this section, since it speaks of a sweet-smelling aroma, likely from a burnt offering. Furthermore, this fragment appears at the top of col. 26 in <http://dss.collections.imj.org.il/temple> and in a number of old photos (5026 for example). However, since this line is not legally significant, and since my reconstruction is already heavily conjectural, there is no need to add any additional complexity to the matter.

³³ There is a fragment containing] את דם [that may appear here.

³⁴ There is almost certainly a blood rite for the priest's bull at the top of col. 26 that has been lost. I modeled this blood rite after TS 23:11–14, rather than the biblical rite from Lev 16:14 because TS's altar was different from P's altar. See Innocent Himbaza, "The Rite Of The Blood On The Altar and the Hierarchy of Sacrifices: Qumran Texts, Septuagint and Mishnah as Witnesses to a Law in Evolution," in *The Qumran Legal Texts between the Hebrew Bible and its Interpretation* (ed. Kristin De Troyer and Armin Lange; CBET 61; Leuven: Peeters, 2011), 19–22.

³⁵ Qimron reconstructs]ט'מ[at this point. After combing through numerous old photographs, however, I was unable to find a matching fragment. In any case, if this fragment exists, it is sufficiently close to the לחטא in my reconstruction that one would suppose that this fragment may support my reading as well.

	[בני ישראל אל ארץ גזרה ושלח את השעיר במדבר. . .]	27:001
	[. . . ואחר עשה את עולתו ואת עולת העם עולה היא]	012
	אשי ריח ניהו[ח הוא] לפני יה[וה] . . . ³⁶	002
	[--] ם ביום ה[--] ל ה[--]	27:1
	על כול ³⁷ בני ישראל ונסלח להמה[--] .	
	אחר יעשה את הפר ואת ה[אי] ל ואת ה[כבשים כמש]פטמה	
	על מזבח העולה ונרצתה ה[ע]ולה לבני ישראל חוקות עולם	
5	לדורות ³⁸ . פעם אחת בשנה והיה היום הזה להמה לזכרון.	
	ולוא יעשו בו כול מלאכה כי שבת שבתון יהיה להמה כול האיש	
	אשר יעשה בו מלאכה או אשר לוא יתענו בו ונכרתו מתוך	
	עממה . שבת שבתון מקרא קודש יהיה לכמה היום הזה	
	וקדשתמה אותו לזכרון בכול מושבותיכ ³⁹ . ולוא תעשו כול	
	מלאכה . . .	10

25:10 . . . And on the tenth of this month is *Yom kippur*. And you shall afflict yourselves on it. For any person who does not afflict himself on this very day shall be cut off from his people. And you shall offer on it as an *ôlâ* to *YHWH* one bull, one ram, seven one-year-old lambs [] one male goat as a *ḥattâ'î* besides the *ḥattâ'î* of atonement and their grain and drink offerings

15 according to the rule for the bull, ram, lambs, goat³⁸ and the *ḥattâ'î* of atonement. You shall offer two rams as *ôlâ*.³⁹ One, the high priest shall offer for himself and for the house of his father

26:1 [and the other for the people.⁴⁰ And he shall offer a bull as a *ḥattâ'î*.⁴¹ And they shall kill it before him.]

[And he shall lift its blood to the altar in a golden bowl and put some with his finger upon the horns of] [the altar. And he shall take the two goats from the people as a *ḥattâ'î* and the hig]h pr[iest shall cast] upon the two goats lo]ts. O[ne lot for *YHWH* and the other lot for Azazel.

5 and they shall slaughter the goat upon which *Yhwh*'s lot was cast, and the priest shall lift up its blood in the golden bowl which is in his hand, and he shall do with its blood as he did to the blood of his bull and he shall atone with it for all the people of the congregation. And its fat and grain and drink offerings he shall offer up in smoke upon the altar of the *ôlâ*. And its flesh, skin, and dung he shall burn with his bull. It is the *ḥattâ'î* of the congregation. And he shall make atonement with it for all the congregation

³⁶ There is almost certainly up to five additional lines here that were lost, and are impossible to reconstruct with the available fragments. Since the *Yom kippur* passage in TS seems to be chiasmically structured (see below), it seems likely that the top of col. 27 returned to the two *ôlâ* offerings of Lev 16:3, 5, 25, which begin this section on the Leviticus 16 offerings in TS 25:15ff. This same suggestion is made by David Volgger, "The Day of Atonement according to the Temple Scroll," *Biblica* 87 (2006):253. However, just as in the reconstruction at the top of col. 26, this is only a plausible provisional reading. It is based on: 1) the chiasmatic structure of the passage; 2) the fragment with the pleasing aroma clause, which Qimron places at the top of this col. (it is at the top of col. 26 on most old photographs). It must refer to some sort of burnt offering. The reconstructed phrasing is a combination of Lev 16:24 and TS 15:13.

³⁷ Text in superscript reflects interlinear text.

³⁸ Vermes (*The Dead Sea scrolls in English*, Sheffield: Sheffield Academic Press, 159–60) interprets a pause at this point, which divides the list of offerings' grain and drink offerings from the *ḥattâ'î* of atonement. Thus they interpret ' . . . the drink and grain offerings according to the rule for the bull, lambs, and goat. But for the *ḥattâ'î* of atonement you shall offer . . . ' I disagree with this interpretation. If the author wanted to separate the *ḥattâ'î* of atonement from the other members of the preceding list, then he would have somehow marked the *ḥattâ'î* of atonement. As it stands, the *ḥattâ'î* of atonement is preceded by a ך and a ל preposition, just as the bull, lambs, and goat. It therefore seems most likely that there was a prescribed grain and drink offering for the *ḥattâ'î* of atonement, just as the *ôlâ* members.

³⁹ Schiffman *et. al.* interprets a pause here: "You shall present two rams for one burnt offering." This seems odd and awkward. I follow Vermes.

⁴⁰ For the ram-*ôlâ* of the people see Lev 16:5, 24.

⁴¹ For the bull-*ḥattâ'î* of the priest see Lev 16:3.

10 and it shall be forgiven for them. And he shall wash his hands and feet from the blood of the *ḥattā'î*.
 And he shall come to the living goat and he shall confess upon its head all the sins of the people of
 Israel with
 all their guilt for all their sin. He shall put them upon the head of the goat. And he shall send it out
 to Azazel, the desert, by the hand of the appointed man and the goat shall bear all the sins
 27:001 [of the people of Israel to a remote area and he shall send the goat to the desert...]
 011 [. . . . And afterwards, he shall offer his *ôlâ* and the *ôlâ* of the people. It is an *ôlâ*,]
 012 an offering by fire. [It is] a pleasing aroma before *Yhwh* [. . . .
 27:1 . . .] in the day [. . . .
 . . . for all the people of Israel and it shall be forgiven for them. . . .
 Afterwards, he shall offer the bull and the ram and the lambs according to the rule
 upon the altar of the *ôlâ* and the *ôlâ* will be accepted for the people of Israel. It is an eternal statute
 5 for their generations. Once per year this day shall be a remembrance for them
 And they shall not do any work for it is a sacred rest for them. Any man
 who does work on it or who does not afflict himself in it shall be cut off from the midst of
 their people. This day shall be a sacred rest, a holy convocation for you.
 And you shall sanctify it as a remembrance in all your dwellings. And you shall not do any
 work. . . .

Two points can be made about this reconstruction. First, The *Yom kippur* section of
 TS is comprised of elements from the three Pentateuchal sources that speak of a festival on
 the tenth day of the seventh month: Lev 16:1–34;⁴² 23:26–32; and Num 29:7–11. The
 passage follows a chiasmic format:⁴³

A. Introduction	25:10–12
B. Offerings of Num 29:8–11	25:12–15
C. Offerings of Lev 16:3–28	25:15–27:2
a. <i>ôlâ</i>	25:15–26:1
b. <i>ḥattā'î</i>	26:1–27:01
a'. <i>ôlâ</i>	27:001–012??

⁴² Scholars have long noted that vv. 1–28 come from an earlier Priestly source, while vv. 29–34 are part of the Holiness tradition. For the division between these sections of Leviticus 16 see Jacob Milgrom, “The Case for the Pre-Exilic and Exilic Provenance of the Books of Exodus, Leviticus and Numbers,” in *Reading the Law* (ed. J. Gordon McConville and Karl Möller; New York: T & T Clark, 2007), 50–51; and Israel Knohl, *Sanctuary of Silence*, 27–28; and Christophe Nihan, *From Priestly Torah to Pentateuch: A Study in the Composition of the Book of Leviticus* (FAT 25; Tübingen: Mohr Siebeck, 2007), 346–50.

⁴³ For an alternative chiasmic account see Volgger, “Day of Atonement,” 251–53. Similarly, Brooke notes an inclusio in this pericope. See George J. Brooke, “The Temple Scroll: A Law unto Itself?,” in *Law and Religion: Essays on the Place of the Law in Israel and Early Christianity* (ed. Barnabas Lindars; Cambridge: J. Clarke, 1988), 41.

B ¹ . Offerings of Num 29:8–11	27:3–4
A ¹ . Conclusion	27:4–10

The obvious focal point of the passage is the *ḥattā'î* offerings of Lev 16:3–28, which climaxes with the Azazel goat ritual. While part B/B¹ and C derive solely from Num 29:8–11 and Lev 16:3–28 respectively, A/A¹ is comprised, somewhat randomly, of a host of elements from Lev 16:29–34, 23:27–32, and Num 29:7. Below is a chart that outlines how all the non-sacrificial elements from the three Torah passages are arranged in A/A¹ of TS:

Non-sacrificial elements	Num 29:7	Lev 16:29–34	Lev 23:26–32	Temple Scroll
Date '10 th day of 7 th month'	v. 7	v. 29	v. 27	25:10-11
Holy convocation	v. 7		v. 27	
Title 'Day of Atonement'	—	—	vv. 27, 28	25:11
Fasting command	v. 7	vv. 29, 31	vv. 27, 32	25:11
Work prohibition	v. 7	v. 29	vv. 28, 31	27:6
Sanctions for noncompliance	—	—	vv. 29, 30	25:11–12 27:6–8
Enduring statute clause	—	vv. 29, 34	v. 31	27:4
Pleasing offering clause	v. 8	—	—	27:4
Remembrance clause	—	—	—	27:5, 9
Sabbath of solemn rest		v. 31	v. 32	27:6, 8

The second point about this passage concerns the reconstruction at the top of line 26. It must be emphasized that this is not meant to be precise. It is only provisional; I only claim that something like this was likely to have existed at the top of this column; it does not matter for present purposes whether there was more than two additional lines above the well-preserved fifth line (there was likely four or five), or whether they were arranged or worded differently. My claim in this reconstruction is that the top of col. 26 contained two elements from the offerings discussed in Lev 16:3–28: 1) an *ôlâ* offering for the people of one ram; 2) a *ḥattā'î* sacrifice for the priest of one bull, along with some sort of blood rite.

The *ôlâ* of one ram for the people seems very probable given the mention of two rams at the end of col. 25:15–16: “You shall offer two rams as *ôlâ*. One, the high priest shall offer for himself and for the house of his father. . .” Since the lines preceding the preserved portions of col. 26 clearly deal with the *ḥattâ’î* offerings of Lev 16:3–28, it seems quite possible that the mention of two rams at the end of col. 25 also come from the offerings of Leviticus 16; there must have been a transition from Num 29:8–11, which TS clearly follows in 25:12–15, to the offerings of Leviticus 16, which are clearly followed above 26:5. Furthermore, Leviticus 16 prescribes two ram *ôlâ* offerings: one for the priest (vv. 3, 24) and one for the people (vv. 5, 24). It is therefore only natural to assume that col. 26 began with the second of the two rams mentioned at the end of col. 25; if the first was for the priest and his family, for whom else would the second be?

There are even more compelling arguments for the presence of a *ḥattâ’î* bull offering for the priest in the unpreserved portion of col. 26. To begin, since the preserved line in 26:5 starts in the middle of the lot-casting ritual of Lev 16:8–9, one can assume that this was preceded by other elements from the Leviticus *ḥattâ’î*-offering context. Furthermore, there are three anaphors in the preserved text that do not make sense without an antecedent, which indicates that the top of col. 26 must also have contained prescriptions for the priest’s *ḥattâ’î* bull, along with a blood rite, which correspond to the *ḥattâ’î*-bull and blood rite of Lev 16:3, 6, 11, 14, 18–19, and perhaps a disposal rite.⁴⁴ The well-preserved portion of col. (26:5–9) states:

⁴⁴ For the anaphoric use of the article see Paul Joüon and T. Muraoka, *A Grammar of Biblical Hebrew* (Subsidia Biblica 27; trans. T. Muraoka; Rome: Editrice Pontificio Istituto Biblico, 2006), 137f3; and Bruce K. Waltke and Michael Patrick O’Connor, *An Introduction to Biblical Hebrew Syntax* (Winona Lake: Eisenbrauns, 1990), 13.5.2c. For a similar conclusion see David Instone-Brewer, *Traditions of the Rabbis from the Era of the New Testament* (Grand Rapids: Eerdmans, 2004), 39.

. . . and they shall slaughter the goat upon which *YHWH*'s lot was cast, and the priest shall lift up its blood in the golden bowl which is in his hand, and he shall do with its blood as he did to the blood of his bull. . . .And its [the goat's] flesh, skin, and dung he shall burn with his bull.

The most obvious anaphoric phrase is “as he did to the blood of his bull.” This phrase is lifted straight from Lev 16:15: “Then he [the priest] shall kill the goat . . . that is for the people and . . . do with its blood as he did with the blood of the bull.” The antecedent to the article on הַפָּר in this verse is obviously the priest's *ḥaṭṭā' t̄*-bull mentioned in 16:11, 14, and the clause ‘as he did with its blood’ refers to the blood rite for the priest's *ḥaṭṭā' t̄* bull described in v. 14. What is more, while the bull in Lev 16:15 is only identified as the bull of v. 14 with the anaphoric article (הַפָּר), in TS the author leaves no doubt that it refers to the priest's bull: הַפָּר אֲשֶׁר לוֹ. This added certainty was likely needed to distinguish the priest's *ḥaṭṭā' t̄* bull from the *ôlâ* bull in 25:13, 15, that comes from the offerings of Num 29:8–11. Similarly, the possessive suffix on the bull (פָּרוֹ) in 26:9 also indicates that the top of col. 26 contained a discussion of the priest's *ḥaṭṭā' t̄* bull, likely even a disposal rite that is close to TS 16:10–12.⁴⁵

Finally, the article on ‘the golden bowl’ (בַּמְזֶרֶק הַזֶּהָב) along with the relative clause “which is in his hand” indicates that this item must have already been introduced; the phrase simply does not make sense without an antecedent, which must have been introduced in the unpreserved portion with a description of a blood rite for the priest's *ḥaṭṭā' t̄*-bull. Thus, regardless of the degree of precision of my provisional reconstruction, the top of col. 26 must have contained a reference to a ram *ôlâ* for the people, and a bull *ḥaṭṭā' t̄* for the priest, along

⁴⁵ One could easily argue that the top of col. 26 contained a discussion of the priest's *ḥaṭṭā' t̄*-bull's disposal. Why would the author say that the people's *ḥaṭṭā' t̄*-goat should be burned ‘with his bull,’ unless he had earlier mentioned his bull was? If so, another line at the top of col. 26 would likely mention its disposal “in a place outside the city reserved for sin offerings” similar to TS 16:10–12.

with a blood rite; it is the only way to make sense of the otherwise meaningless anaphors in the preserved text.

III. THREATS TO THE RULE OF LAW ADDRESSED IN TEMPLE SCROLL'S INTERPRETIVE REWRITING

The author of TS created a version of the Torah's *Yom kippur* law that addresses seven threats to the rule of law. While he does not eliminate all such threats, which is expected given the constraints of implicit interpretation (see Chapter Three sec. IV.C), it is nonetheless clear that he sees these threats as problematic. No other Second Temple scribe who creatively rewrote the Torah seems to have considered them a problem, at least to the same extent.⁴⁶ I will identify each below:

A. *Eliminating Conflicts: The Relation between the Offering Rituals of Numbers*

29:7–11 and Leviticus 16:3–28

Both Lev 16:3–28 and Num 29:7–11 prescribe *ôlâ* offerings and *ḥaṭṭā'î* offerings for the tenth day of the seventh month. The two sets of laws, however, have different requirements for each offering as is demonstrated in the chart below:

	Leviticus 16:3–28	Numbers 29:7–11
<i>ôlâ</i>	One ram for the priest (v. 3, 24) One ram for the people (v. 5, 24)	One ram (v. 8) One bull (v. 8) Seven lambs (v. 8)
<i>ḥaṭṭā'î</i>	One bull for the priest (v. 3, 6, 11, 14, 18, 27) Two goats for the people (v. 5, 7) <ul style="list-style-type: none"> • One for Yahweh (v. 8, 9, 15, 18, 27) • One for Azazel (v. 8, 10, 21–22) 	One goat in addition to the <i>ḥaṭṭā'î</i> of atonement (v. 11)

⁴⁶ Zahn notes that 4Q366 similarly groups topically related laws just as TS. See Zahn, *Rethinking Rewritten Scripture*, 221–23, 235.

While the Lev 16:3–28 text prescribes two rams for *ôlâ*, one for the priest and one for the people, Num 29:8–11 prescribes one bull, one ram, and seven lambs for *ôlâ*, without distinguishing between offerings for the priest and offerings for the people. For the *ḥaṭṭā'î*, Num 29:11 prescribes one male goat in addition to an undefined “sin offering of atonement,” while Lev 16:3–28 prescribes one bull for the priest, and two male goats for the people. These two sets of laws are so different that they appear to be totally unaware of each other. The reason for this is that even though they are both P texts, the offerings of Lev 16:3–28 were, in all probability, not originally associated with a festival on the tenth day of the seventh month. Rather, Lev 16:1–28 originally detailed the requirements for an *ad hoc* purification ritual, which was to be performed on an as-needed basis, as was the case after the deaths of Nadab and Abihu (Leviticus 10, 16:1).⁴⁷ Once the H scribes added Lev 16:29–34, the purification rite was added to the Israelite festival calendar as an annual event to be performed on the tenth day of the seventh month.

The result of this transformation, however, is that the previous offering requirements for the tenth day of the seventh month from Num 29:7–11 are entirely unrelated to those of Lev 16:3–28. Thus the Torah ended up prescribing two conflicting rituals to be performed on the same day. While this is not a problem if the Torah is treated as an epistemic authority, as was argued in Chapter One, contradictions are problematic if the Torah is treated as a preemptive reason for action; it forces its subjects to rely on their own reasoning to decide which prescription to follow: those of Num 29:7–11 or those of Lev 16:3–28? The fact that

⁴⁷ For a full account of this argument see Nihan, *From Priestly Torah to Pentateuch*, 345–54; and Jacob Milgrom, *Leviticus 1–16: A New Translation with Introduction and Commentary. Vol 1* (AB 3; New York: Doubleday, 1991), 1061–63.

the compilers of the Torah made no attempt (nor did later Torah rewriters) to harmonize these conflicts indicates that they did not view its legal collections as legally binding.

The author of TS, however, sought to harmonize these conflicting norms, which reveals his attitude toward the law. The most obvious conflict between these two laws is the question of how many rams they prescribe for *ôlâ*.⁴⁸ The Leviticus text prescribes two rams, one for the people and one for the priest, while the Numbers text prescribes just one. Any reader of this text who is seeking to comply with its requirements must decide whether to offer only one, in keeping with Numbers, or to offer two, in keeping with Leviticus 16, or to offer three, which harmonizes the requirements of the two laws; in fact, Josephus, Philo and the tannaitic sages also reckoned with this problem.⁴⁹ The author of TS chose the latter of these options, requiring one ram as part of a separate offering procedure from that of Leviticus 16 (TS 25:13, 27:3), both to be performed on the same day.⁵⁰ The fact that the author saw these conflicting norms as an interpretive problem reveals his attitude toward the Torah.

The TS's harmonization of these two offering requirements may be likened to other interpretations of the Torah's conflicting prescriptions. For example, as was famously pointed out by Fishbane, the Chronicler's depictions of the performance Josiah's *paschal* offering blends the boiling (בשל) requirement of Deut 16:7 with the roasting by fire (צלי אש)

⁴⁸ Another obvious question concerns the number of goats to be used for the *hattâ 't*; Num 29:11 prescribes one goat in addition to the *hattâ 't* of atonement, while Lev 16 prescribes two goats, one for Yahweh and one for Azazel. It seems likely that this was included at the top of col. 27. The *ôlâ* and *hattâ 't* offerings of Num 29:8–11, which mention the goat, are included at the beginning of TS's Day of Atonement law, but only the *ôlâ* is mentioned in the well-preserved portion of col. 27. It therefore seems very likely that the *hattâ 't* goat mentioned in 25:13–14 was discussed prior to the *ôlâ* procedure of 27:3–4.

⁴⁹ Josephus prescribed three rams (*Ant.* 3.240), while Philo prescribed two rams (*Spec. Laws* 1.188). For an overview of the debate in Rabbinic sources, see Yadin, *The Temple Scroll*, 2:132–33.

⁵⁰ William K. Gilders, "The Day of Atonement in the Dead Sea Scrolls," in *The Day of Atonement: Its Interpretations in Early Jewish and Christian Traditions* (ed. Thomas Hieke and Tobias Nicklas; Themes in Biblical Narrative: Jewish and Christian Traditions 15; Leiden: Brill, 2012), 67.

of Exod 12:9.⁵¹ In 2 Chr 35:13 it states: “And they boiled the *pesach* in fire according to the rule” (ויבשלו הפסח באש כמשפט). While Deut 16:7 prescribes the offering to be boiled, this is expressly forbidden in Exod 12:9 (אל תאכלו ממנו נא ובשל מבשל במים), where the offering is to be roasted in fire. On the surface, it appears that the Chronicler’s depiction of the offering is meant to harmonize the conflicting laws, similar to TS’s resolution to the conflicting offerings of Num 29:8–11 and Lev 16:3–28 (and similar to sec. B below). However, the Chronicler only swaps a legal conflict for a legal absurdity; the act of boiling in fire is practically absurd and therefore challenges the possibility requirement of the rule of law.⁵²

In other words, not all conflict-harmonizing interpretive traditions are driven by the threats to the rule of law. The Chronicler only sought to blend two authoritative traditions (though not legally/practically authoritative), even if it left, in Fishbane’s words, a “desperate illogicality.”⁵³ If the Chronicler’s interpretive efforts were truly motivated by the consistency requirement of the rule of law, he would not have left a text that threatens the possibility requirement. What distinguishes TS’s interpretive conflict-harmonizing is that, unlike 2 Chr 35:13 (as well as other rewritten scripture texts such as 4QP and the pre-SP texts), it is driven by the threats to the rule of law.

⁵¹ Fishbane, *Biblical Interpretation*, 134–37.

⁵² For an excellent analysis of the problem and past explanations see Ehud Ben Zvi, “Revisiting “Boiling in Fire” in 2 Chronicles 35:13 and Related Passover Questions: Text, Exegetical Needs and Concerns, and General Implications,” in *Biblical Interpretation in Judaism and Christianity* (ed. Isaac Kalimi and Peter J. Haas; LHB/OTS 439; New York: T&T Clark, 2006), 243–45. In the end, Ben Zvi argues that the term *בשל* practically meant “roast” but was conceptually understood as boiling. He concludes this, however, because Chronicles does not advance “impractical *halachot*” (244). However, this explanation assumes that the Chronicler’s audience would have understood this practical-conceptual distinction, which seems unlikely. I would argue that, in Ben Zvi’s words, “the world of the text aims at presenting an ideologically correct past, even if it reports a culinary absurd behavior” (243). It may very well have been the case if the Chronicler was not bothered by the requirements of the rule of law, such as consistency or possibility, such that he could blend the two Pentateuchal traditions to create a practically absurd offering.

⁵³ Fishbane, *Biblical Interpretation*, 251.

B. *Eliminating Conflicts in the Torah's Grain and Drink Offerings*

Another innovation in TS is its addition of grain and drink offerings to accompany the *ḥaṭṭā'ṭ* offerings in its festival calendar. As noted by Yadin and others, all of the prescriptions for the grain offerings and drink offerings in the Torah's festival calendars exclusively accompany *ôlâ* offerings; they never accompany *ḥaṭṭā'ṭ* offerings.⁵⁴ Yet in TS the *ḥaṭṭā'ṭ* offering is always set alongside the *ôlâ* offerings, so that *both* are accompanied by grain and drink offerings (e.g., TS 17:13–15; 18:4–6; 23:4–5, 11–17; 25:12–15; 28:6–9). This is evident when Num 29:8–11 is compared to TS 25:12–15:

Num 29:8–11

⁸ והקרבתם עלה ליהוה ריח ניחח פר בן־בקר אחד איל
אחד כבשים בני שנה שבעה תמימים יהיו לכם
ומנחתם סלת בלולה בשמן שלשה עשרנים לפר שני⁹
עשרנים לאיל האחד
¹⁰עשרון עשרון לכבש האחד לשבעת הכבשים
¹¹שעיר עזים אחד חטאת מלבד חטאת הכפרים ועלת
התמיד ומנחתה ונסכיהם

⁸But you shall offer a burnt offering to the LORD, a pleasing aroma: one bull from the herd, one ram, seven male lambs a year old: see that they are without blemish.
⁹And their grain offering shall be of fine flour mixed with oil, three tenths of an ephah for the bull, two tenths for the one ram,
¹⁰a tenth for each of the seven lambs: ¹¹also one male goat for a sin offering, besides the sin offering of atonement, and the regular

TS 25:12–15

. . . והקרבתמה בו עולה¹³ ליהוה פר אחד
איל אחד כבשים בני שנה שבעה שעיר
¹⁴עזים אחד לחטאת לבד מחטאת הכפורים
ומנחתמה ונסכמה
¹⁵כמשפטמה לפר לאיל ולכבשים ולשעיר
ולחטאת הכפורים

¹²But you shall offer on it [the day] a burnt offering
¹³to the Lord: one bull, one ram, seven male lambs a year old, one male
¹⁴goat for a sin offering besides the sin offering of atonement and the grain and drink offerings

⁵⁴ See Yadin, *The Temple Scroll*, 2:143–46; Milgrom, “Exegetical Principles,” 173; Swanson, *The Methodology of 11QT*, 30; Bilhah Nitzan, “Approaches to Biblical Exegesis in Qumran Literature,” in *Emanuel: Studies in Hebrew Bible, Septuagint, and Dead Sea Scrolls in Honor of Emanuel Tov* (ed. Emanuel Tov et al.; VTSup 94; Boston: Brill, 2003), 357–39; Magen Broshi, *Bread, Wine, Walls and Scrolls* (JSPSup 36; Sheffield: Sheffield Academic Press, 2001), 217; Paul Heger, *Cult as the Catalyst for Division: Cult Disputes as the Motive for Schism in the pre-70 Pluralistic Environment* (STDJ 65; Leiden: Brill, 2007), 278–80; Zahn, *Rethinking Rewritten Scripture*, 211–12; and especially Gary A. Anderson, “The Interpretation of the Purification Offering (חטאת) in the Temple Scroll (11QTemple) and Rabbinic Literature,” *JBL* 111 (1992):17–35.

burnt offering and its grain offering, and their drink offerings.

¹⁵ according to the rule for the bull, the ram, the lambs, the goat and the sin offering of atonement.

This is one of numerous examples in which the author of TS changed the Torah's law to ensure that, contrary to the Torah's requirement, the *ḥaṭṭā' t* offering would also be accompanied by a grain and drink offering.

Jacob Milgrom calls this innovation a *homogenization*, which he explains as cases when “a law which applies to specific objects, animals, or persons is extended to other members of the same species.”⁵⁵ According to this explanation, the author of TS looked to one example of a guilt offering that was accompanied by grain and drink offerings—the case of the leper in Lev 14:10–13—and extended the details of that law to all the *ḥaṭṭā' t* offerings of the TS festival calendar. This explanation, however, is not without problems. First, the offering for the leper is called a guilt offering (זשח), not a *ḥaṭṭā' t* (though it is compared to a *ḥaṭṭā' t* in v. 13).⁵⁶ It cannot, therefore, explain why the author of TS took the details of the grain and drink offerings that accompanied the guilt offering and applied them to the *ḥaṭṭā' t* offerings. Second, this innovation in TS is concentrated in its festival calendar; the ritual for purification of a healed leper of Lev 14:10 is not obviously applicable to festival calendar offerings. Third, as noted by Anderson, Lev 14:10 makes no mention of a drink offering (only a grain offering).⁵⁷ Thus, Milgrom's explanation cannot account for this innovation in TS.

Anderson provides a more likely explanation. He argues that TS creates the requirement that grain and drink offerings must accompany the *ḥaṭṭā' t* in order to address a

⁵⁵ Milgrom, “Exegetical Principles,” 171.

⁵⁶ See m. *Menah* 9:6.

⁵⁷ Anderson, “Purification Offering,” 30n21.

contradiction in the Torah. First, he argues that the author of TS understood Num 15:1–12 as a general list of grain and drink offerings that must accompany various sacrifices and offerings. Indeed, vv. 4–10 gives precise quantities of grain, oil, and wine offerings that must accompany bulls, rams, and lambs, while vv. 11–12 gives the summary statement “Thus it shall be done for each bull or ram, or for each lamb or young goat. As many as you offer, so shall you do with each one, as many as there are.” Second, he argues that the author interpreted Num 15:24 to be included in this general law on grain and cereal offerings, and furthermore, that, by shifting the accents, this verse actually prescribes a grain and drink offering for the *ḥattā'î*.⁵⁸ Finally, when TS uses the term כמשפטמה (according to the rule) to summarize the grain and drink offerings that are to accompany the *ôlâ* and *ḥattā'î*, it is modeling the language of Num 15:24. Most references to the grain and drink offerings of the festival calendar in Numbers 28–29 actually detail the specific quantities of the flour and wine (three tenths of an ephah of flour and a third of a hin of wine and so forth). This, however, is not the case with the festival calendar of TS; it repeatedly refers back to a general rule: “and you shall perform the grain and drink offerings according to the rule for bulls, rams, and lambs.” This is what we find in TS 25:14–15. Since Num 15:24 does not detail the amounts of flour and wine, but uses the touchstone “according to the rule,” it seems highly likely that this is the same general rule that TS consistently refers back to.

Anderson’s explanation, therefore, seems much more plausible than Milgrom’s, and, it is further bolstered by the enigmatic reference to the young goat (“Thus it shall be done for each bull or ram, or for each lamb or young goat”). In the festival calendar of Numbers 28–

⁵⁸ He argues that TS understood this verse to mean “All the community shall perform the sacrificial rites with respect to the bull, the burnt offering, so as to be a pleasing odor for the Lord. And its cereal offering and drink offering according to the law and one he-goat for the purification offering.” See Anderson, “Purification Offering,” 28.

29, the only time a goat is offered is with the *ḥattā' t* (28:15, 22, 30; 29:5, 11, 16, 19, 22, 25, 28, 31, 34, 38). The fact that a goat appears in the summary list of animals that are to have grain and drink offerings (Num 15:11) could easily have led an interpreter to assume that the goat in the festival calendar of Numbers 28–29 also required a grain and drink offering.

If this explanation is sound, then this innovation in TS would correct a perceived contradiction in the Torah. If Num 15:1–12, 24 prescribes a grain and drink offering for the *ḥattā' t* offerings—particularly the goat *ḥattā' t*—then why would there be no grain and drink offerings for the multiple goat *ḥattā' t* offerings in Numbers 28–29? One set of laws prescribes a grain and drink offering for the *ḥattā' t*, and the other set of laws does not. Such a contradiction would threaten the Torah's ability to provide a preemptive reason for action; it would leave its subjects to rely on their own reason to decide which law to follow. The fact that this seemed like a problem to the author of TS indicates that he saw the Torah as a source of binding obligation. He consistently changed the requirements of the festival calendar of Numbers 28–29 to make sure that the goat *ḥattā' t* received a grain and drink offering just as the *ôlâ* offerings did.

C. Systematizing Scattered Laws I: The Grain and Drink Offerings of Numbers

29:9–10

The Temple Scroll's innovation to the grain and drink offerings of Numbers 28–29 addresses another threat to the rule of law, in addition to its contradiction with Numbers 15:1–12. Its use of the term *כמשפטם* (according to their rule) also systematizes the scattered and disjointed grain and drink offerings listed in the festival calendar of Numbers 28–29. As noted above, while Numbers 28–29 lists the quantities of flour and wine required for the grain and drink offerings for each festival occasion (Sabbath, Passover, Firstfruits, etc.), the

festival calendar of TS simply refers back to the general rule outlined in Numbers 15. The effect of this change is that it cleans up the scattered laws in the Torah, thus addressing the clarity requirement of the rule of law; the law cannot preempt one's reasons for action if it is difficult to identify what, exactly, it requires of them.

This is particularly evident from the lack of consistency with the quantities of each grain and drink offering for the various festivals of Numbers 28–29. For example, while the quantities of each offering are specified for the daily lamb offerings (28:3–8), only the quantity for the grain offering is specified for the Sabbath (vv. 9–10).⁵⁹ Similarly, while the amount of flour required for the grain offering is specified for Passover (28:20–21) and the Festival of Weeks (28:27–29), this is not so with the drink offerings (v. 31). This is also the case with the festival on the tenth day of the seventh month (29:7–11), which is of present concern: the amount of flour is specified for the grain offering (three tenths of an ephah for the bull, two tenths for the one ram, a tenth for each of the seven lambs; v. 9–10), but is left unspecified for the drink offerings, which are referred to simply as “their drink offerings” (v. 11).

By contrast, the general list of grain and drink offerings appears quite systematic in Num 15:1–12. In vv. 4–10 it lists each quantity: a lamb requires a tenth of an ephah of flour and a quarter hin of wine (vv. 4–5), a ram requires two tenths of an ephah of flour and one third of a hin of wine (vv. 6–7), and a bull requires three tenths of an ephah of flour and one half hin of wine (vv. 8–10). Then, in vv. 11–12 a concluding statement is provided on the grain and drink offerings. The fact that the author of TS opted to fix the scattered and inconsistent

⁵⁹ The daily lamb offerings specifies that one tenth of an ephah of flour is required for each lamb, which is to be mixed with a quarter of a hin of oil (v. 5), and that a quarter of a hin of wine is required for the lamb's drink offering. By contrast, the lambs of the Sabbath offering do not mention the quantity of the oil needed for the grain offering, or the quantity of the wine for the drink offering.

requirements of the grain and drink offerings of Numbers 28–29 indicates that he felt constrained by the clarity requirement of the rule of law. He swapped the inconsistent measurements of P’s festival calendar for the systematic, precise, and consistent list of laws from Numbers 15:1–12, which he referred back to with the term כמשפטמה

D. Systematizing Scattered Laws II: The Order of Leviticus 16:3–28

Not only did the author of TS see the scattered laws on the grain and drink offerings of Numbers 28–29 as a problem, he also saw the disjointed order of the offerings of Leviticus 16 as a problem. This was noted by Yadin (and others); the order of offerings in Leviticus 16 is so convoluted that its precise requirements are very difficult to follow.⁶⁰ In fact, the non-sequential order of the offerings led numerous early Pentateuchal critics to suspect that Leviticus 16 was composite.⁶¹ The most obvious evidence for this conclusion is the resumptive repetition of vv. 6 and 11: “Aaron shall present/offer the bull as a sin offering for himself, and shall make atonement for himself and for his house.” The first reference to the priest’s bull offering in v. 6 is interrupted with an apparent digression on the lot-casting rite for the people’s *ḥattā’î* goats (vv. 7–10) before returning to the subject of the priest’s bull in v. 11. This disjointed back-and-forth between offerings in Leviticus 16 does not stop there, however. After the digression of the people’s *ḥattā’î* goats in vv. 7–10, they are not discussed again for another four verses (v. 15). Similarly, while the ram-*ôlâ* offerings of the priest and the people are first introduced in vv. 3 and 5, they are not discussed again (and then only very briefly)⁶² until v. 24. Furthermore, while the instructions for the Azazel goat begin in v. 10,

⁶⁰ Yadin, *The Temple Scroll*, 2:134; Instone-Brewer, *Traditions of the Rabbis*, 308–09; Brooke, “A Law unto Itself,” 41; Milgrom, *Leviticus 1–16*, 1063–64.

⁶¹ For an overview of the history of research see Nihan, *From Priestly Torah to Pentateuch*, 340–45.

⁶² The later reference to the *ôlâ* offerings are so brief that Schiffman, apparently, did not notice them. He writes “Both of these rams are mentioned in Lev 16:3 and 5 although, curiously, they do not appear in the remainder of the description of the Day of Atonement ritual in Lev 16.” See Schiffman, “The Case of the Day of Atonement Ritual,” 337.

they are not completed until vv. 20–22. Thus the offering procedure in Lev 16:3–28 is not presented in a sequential manner; after the instructions for one offering are given, the text turns to another ritual procedure, and then returns to the first before, discussing the second and so forth.

Such non-sequential arrangement of the atonement procedure would make it extremely difficult to follow. That is, such unsystematic laws threaten the clarity requirement of the rule of law. The law cannot preempt one's reason for action if its subjects cannot identify its precise requirements due to its lack of clarity. While the back-and-forth sequence of laws in Leviticus 16 may serve a literary or rhetorical purpose,⁶³ they cannot, as they are, serve a legal purpose. In other words, Leviticus 16:3–28 was, in all likelihood, not meant to function as a rulebook for atonement procedures.

When the author of TS interpreted this passage, however, he was troubled by its lack of clarity, and this indicates that he viewed the Torah as a source of binding obligation. If the Torah was meant to provide a preemptive reason for action, then the sacrificial procedure of Lev 16:3–28 would have to meet the clarity requirement of the rule of law. In order to do this, the TS author reordered all of its requirements. After introducing the two *ôlâ* rams from Lev 16:3 and 5 (TS 25:15–26:1?), he then introduced the priest's bull *ḥaṭṭā'î* at the top of col. 26. Instead of moving on to the people's *ḥaṭṭā'î* goats, as is the case in Lev 16:7–10, he completes instructions for the priest's bull, along with its accompanying blood rite (and possibly its disposal). He then turns to the two goats and deals with them in sequence (26:3). He first gives the instructions for the lot-casting rite to distinguish which goat is to be slaughtered for *Yhwh* and which goes to *Azazel*. He then deals with all the instructions for

⁶³ For an explanation of Leviticus 16's sequence and compositional unity see Nihan, *From Priestly Torah to Pentateuch*, 58–62.

Yhwh's goat, including the blood rite and the disposal of entrails (26:5–10), which are not discussed in Leviticus 16 until v. 27. He then, logically and sequentially, provides the instructions for the Azazel goat (26:10–27:1?). In this way, the author of TS brought coherence and clarity to a set of laws that is otherwise so disorganized as to be virtually impossible to follow. This legal innovation strongly suggests that the author of TS saw the Torah as the source of binding obligation.

E. Filling a Practical Gap I: Determining the Order of the Two Offering Rituals

Once the author of TS chose to treat the offerings of Num 29:8–11 as a separate offering ritual from that of Leviticus 16, both performed on the same day, he created a new problem: which ritual comes first? Do the *ôlâ* and *ḥaṭṭā'î* offerings of Num 29:8–11 come first, or do the *ôlâ* and *ḥaṭṭā'î* offerings of Leviticus 16 come first, along with the Azazel ritual? Once these are seen as two separate rituals to be performed on the same day, then anyone who wants to follow this law must decide which comes first. But this is problematic for anyone who treats this law as a preemptive reason for action. If the rule-follower must decide for himself which ritual to perform first, then he is relying on his balance of reason, and not on the words of the law. Thus the separation of these two rituals created a practical gap that needed filling: which ritual comes first?

It appears that the author of TS regarded this as a problem and filled this practical gap. Although the TS author introduced the offerings of Num 29:8–11 first (25:12–13), this was likely to serve his literary (as opposed to legal) agenda: the chiasm. In 27:3 the author specifies that 'afterwards' (אחר) the priest is to offer the *ôlâ* of Num 29:8. Unfortunately the top of col. 27 is not preserved, but it seems quite possible that its provision for the *ôlâ* of Num 29:8 would have been preceded by the *ôlâ* of Leviticus 16 and the goat *ḥaṭṭā'î* of Num

29:11. In fact, Yadin noted that the author of TS consistently ensured that all *ḥattā'ūt* offerings were to be preceded by the *ōlā* offerings.⁶⁴ This would provide a clear order of sacrificial operations: 1) *ḥattā'ūt* from Leviticus 16; 2) *ḥattā'ūt* from Num 29:11; 3) *ōlā* from Leviticus 16; 4) *ōlā* from Num 29:8. Of course, this reconstruction remains speculative. What is clear though is that the order of operations proceeds from the offerings of Leviticus 16 to the offerings of Num 29:9–11. The fact that the author of TS filled this practical gap indicates that he did not want those subject to the law to decide for themselves which offering should come first. In other words, the author of TS treated the Torah as a preemptive reason for action, which required that the words of the law have no practical gaps.

F. Filling a Practical Gap II: Identifying the Offerer of Numbers 29:8–11

Another practical gap in the Pentateuchal law that the author of TS sought to fill is the identity of the offerer for the ritual of Num 29:8–11. While it is clear that the priest performs the offering ritual in Leviticus 16,⁶⁵ the laws of Num 29:8–11 simply use the masculine plural imperative verb והקרבתם (you shall offer). There is no specification as to the agent of these offerings; in fact, the entire festival calendar of Numbers 28–29 lacks reference to the specific offerer. This is a practical gap because it leaves the community to decide for themselves—based on their balance of reason—who is to perform the sacrifices. This gap is especially noticeable when the ritual of Num 29:8–11 is compared with that of Leviticus 16, which would have been obvious to the author of TS.

⁶⁴ Yadin, *The Temple Scroll*, 2:146–48.

⁶⁵ While it is clear that the priest performs the blood and Azazel rites in TS, it is unclear who actually does the sacrificing, since the author uses an indefinite plural “they shall slaughter” in 26:5 (the ן on שחטו was noted by Qimron on the verso of the scroll. See Qimron, *Critical Edition*, 40.

To address this problem, he specified that it is the priest who performs the offering. In 25:15–16, the scribe transitions from the masculine plural imperative from Num 29:8, to the third masculine singular form from Leviticus 16, in which the high priest is the subject:⁶⁶

תקריבו אליהם שנים לעולה אחד יקריב הכוהן הגדול TS 25:15–16

You shall offer two rams as *ôlâ*, one the high priest shall offer . . .

Then in 27:3, when the author moves from the offerings of Leviticus 16 back to the offerings of Num 29:8–11, he continues with the third masculine singular verbs of Leviticus 16 with the same high priest subject (יעשה). In this way, the author of TS filled a practical gap from his source text, to ensure that its subjects would follow the laws as written, without relying on their balance of reason.

G. Filling a Practical Gap III: Adding a Blood Bowl

One obvious detail that the author of TS added to the ritual of Leviticus 16 is a receptacle for the blood rite. This has been noted by other scholars, and was already part of the discussion among the tannaitic sages.⁶⁷ The blood rite prescribed in Leviticus 16 simply requires that Aaron use his finger to “sprinkle” (קצק) the blood of the two *hattā'î* offerings (the priest’s bull and the people’s goat) on the *kapporet* (vv. 14–15) and the horns of the altar (vv. 18–19). Again, this requirement leaves a practical gap: how is the priest supposed to gather the blood in the first place? Without any mention of a blood receptacle, the priest must rely on his practical reasoning as to how to fulfill the law’s requirements: he must deduce

⁶⁶ This is also noted by Swanson, *The Methodology of 11QT*, 26n31.

⁶⁷ See Cana Werman, “The Wood-Offering: The Convolved Evolution of a Halakhah in Qumran and Rabbinic Law,” in *New Perspectives on Old Texts: Proceedings of the Tenth International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature, 9-11 January, 2005* (ed. Betsy Halpern Amaru et al.; STDJ 88; Leiden: Brill, 2010), 160–61; Daniel Stökl Ben Ezra, *The Impact of Yom kippur on Early Christianity: The Day of Atonement from Second Temple Judaism to the Fifth Century* (WUNT 163; Tübingen: Mohr Siebeck, 2003), 19–20; and Schiffman, “The Case of the Day of Atonement Ritual,” 340. For tannaitic discussion see *m. Yoma* 4:3, 5:4.

that a bowl is the best means of completing this ritual. Once this happens, however, he is no longer adhering to the rule; he is adding to it. Thus, in order to ensure that the Torah fully preempts the priest's reason for action, the TS author added a blood receptacle to the law, thus revealing his attitude toward the law.

As noted by Schiffman, this may have been a common practice at the time;⁶⁸ that is, the use of a blood-bowl for the atonement ritual may have become part of the standard practice of the time. If this was the case, then the TS author added it to the law to ensure that the priest would actually be doing what the law stipulated, and not what a secondary unwritten law dictated. In other words, if the Torah is to provide a preemptive reason for action—one in which its subjects must do what it says simply *because* it says so—then that law must include all the legally significant practical details that are necessary to meet its requirements;⁶⁹ otherwise they are doing something more than or other than what the law requires. It does not matter whether the blood-bowl was already in use at the time, or whether it was a purely literary addition conjured in the mind of the TS author or a contemporary interpretive tradition;⁷⁰ either way, it was added, like many other of these legal innovations, because the author of the Temple Scroll was not comfortable with practical gaps in a text that served as a practical authority.

⁶⁸ Schiffman, "The Case of the Day of Atonement Ritual," 340.

⁶⁹ I say *legally significant* details must be added to the law because there is no end to the practical details that are involved in rule-following. For example, the *Yom kippur* law does not specify which finger the priest is to use for the blood rite, or which hand to use. Such practical details are not included because they are not legally significant. The blood-bowl, however, would have been considered legally significant since it is an additional object used in the performance of the blood rite.

⁷⁰ Aramaic Levi also prescribes a bowl for the blood rite. See Jonas C. Greenfield et al., *The Aramaic Levi Document: Edition, Translation, Commentary* (SVTP 19; Leiden: Brill, 2004), 82. The fact that the blood bowl may have been a contemporary interpretive tradition in circulation does not negate the legal thought that this addition reflects in TS. The author of TS could have left the Torah's prescription intact, omitting the bowl, like all other versions of the Torah and Torah rewritings of the time. The fact that the author included this indicates that he wanted to create a Torah free from practical gaps.

H. Filling a Practical Gap IV: Moving the Ablution Rite

The final legal innovation that TS makes to the Torah's *Yom kippur* law is moving the position of the ablution rite within the sequence of the offerings. According to Leviticus 16, the priest must wash himself twice: once, in 16:4 before he adorns himself with the 'holy tunic' (כַּתְנֶת בַּד קֹדֶשׁ); and once again in vv. 23–24, when he changes back to his regular clothes after the *ḥaṭṭā'ūt* blood rites. As Christophe Nihan notes, these new garments and ablution rites that frame the atonement ritual in Leviticus 16 were included for theological reasons; they mark a separation between the regular cult activities of the priest, and the special nature of the atonement ceremony.⁷¹ While such washing may serve a theological purpose, there is a much more *practical* need for a washing rite in the midst of the blood rites. In Leviticus 16 the priest is told to “sprinkle some of the blood” of the *ḥaṭṭā'ūt* offerings on the horns of the altar “with his finger” (v. 19). Immediately after this, the priest is told to come to the Azazel-goat and “lay both his hands on the head of the live goat.” Practically speaking, this sequence makes no sense; the priest's hands are covered in blood; why would he lay his bloody hands on the Azazel goat?

To respond to this practical oddity, the TS author eliminated the ablutions that frame the atonement offering, and instead set an ablution at this more appropriate juncture in the ritual. After all the prescriptions for the atonement offerings are complete, along with the carcass disposal, TS prescribes an ablution rite: “Then he shall wash his hands and feet from

⁷¹ He writes: “Aaron, as the community's representative, must endorse a new, distinct status during the ritual's celebration, which is symbolized by the fact that he must leave his usual clothes and wear specific ones. The change of clothes and the ritual bath (v. 4, 24) frame the ceremony and define a period of marginality, during which the transition occurs. . . . The return to Aaron's usual clothes and the presentation of the burnt offerings (v. 23ff.) signal the end of Aaron's marginal status and thus the resumption of the official cult.” See Nihan, *From Priestly Torah to Pentateuch*, 336–70, esp. 370. See also Frank H. Gorman, *The Ideology of Ritual: Space, Time and Status in the Priestly Theology* (JSOTSup 91; Sheffield: JSOT Press, 1990), 90; and Roy Gane, *Cult and Character: Purification Offerings, Day of Atonement, and Theodicy* (Winona Lake: Eisenbrauns, 2005), 189–90.

the blood of the *ḥattā' t*." (26:10). Immediately after this, the priest is instructed to "come to the living goat" to "confess upon its head" (26:10–11). It is likely the TS author saw the hand-washing rite at this point as a practical necessity.⁷²

Yadin suggests that this innovation in TS brings it in line with the requirements of Exod 30:18–21, which prescribes priests to wash their hands and feet before entering the Tabernacle or perform an *ôlâ*.⁷³ Although the phrasing may have derived from these verses, this explanation seems unlikely because TS makes no mention of washing before the *ôlâ* or *ḥattā' t* offerings; the ablution explicitly appears before the priest is instructed to put his hands upon the Azazel-goat, hands which would otherwise be bloodied from the goat-*ḥattā' t*. Alternatively, Milgrom argues that the TS author added a handwashing rite at this point because of his theology: the *ḥattā' t* blood causes defilement of persons and not inanimate objects.⁷⁴ However, this explanation seems conjectural.

I would suggest that the best explanation for the addition of the ablution rite after the blood manipulation ritual of the people's *ḥattā' t*-goat is a purely practical issue that arose from his binding attitude toward law. Without an explicit requirement for an ablution, the priest would have to decide for himself whether or not to clean his bloody hands before placing them on the Azazel goat. Since the author considered the Torah to provide preemptive reasons for action, the law must explicitly state the ablution requirement; otherwise such a decision is the result of the priest's balance of reason.

⁷² This is also the conclusion of Instone-Brewer, *Traditions of the Rabbis*, 309; and William K. Gilders, "Blood Manipulation Ritual in the Temple Scroll," *RevQ* 22 (2006):539.

⁷³ Yigael Yadin, *The Temple Scroll*, 2:117. See also *Jub* 21:15–16.

⁷⁴ See Milgrom, *Leviticus 1–16*, 1064.

IV. CONCLUSION

In this chapter I have argued that one of the primary interpretive agendas of TS was to create a version of the Torah's laws that would better meet the requirements of the rule of law, thus revealing the author's attitude of binding obligation toward the Torah. It must be noted, however, that not all of TS's innovations are the result of the author's new attitude toward law. For example, other scholars have noted that the atonement ritual of TS's *Yom kippur* law results in the forgiveness of the congregation, while the ritual of Leviticus 16 focuses on the issue of purification; thus TS 'corrects' this by transferring the concept of forgiveness from the *ḥattā't* offerings of Leviticus 4:20 to its atonement ritual in TS 25:10–27:10.⁷⁵ Such an interpretation is the result of purely theological considerations, rather than practical considerations like gaps, conflicting norms, or disorganized laws.

Nevertheless, one of the main features of the Temple Scroll is that it shows significant concern for threats to the rule of law. Its elimination of conflicts, systemizing of scattered laws, and filling of practical gaps all indicate that the author viewed the Torah as a binding obligation. Furthermore, if it can be demonstrated that this was a significant concern for all major sections of the scroll (the temple source, festival calendar, purity source, and Deuteronomic paraphrase), then it may be concluded that TS is a unified composition, and that one of its primary interpretive agendas was to present a version of the Torah's laws that could more readily be used as a source of binding obligation upon its subjects. Such a widespread and unique legal *Tendenz* amidst so many contemporary examples of interpretive

⁷⁵ See Mila Ginsburskaya, "Leviticus in the Light of the Dead Sea Scrolls: Atonement and the Purification from Sin," in *The Dead Sea Scrolls in Context: Integrating the Dead Sea Scrolls in the Study of Ancient Texts, Languages, and Cultures* (ed. Armin Lange et al.; VTSup 140; Leiden: Brill, 2011), 268–29.

rewriting make the Temple Scroll a unique and important text in the development of legal thought in early Judaism.

CHAPTER FIVE: LEGAL INNOVATION IN THE SAMARITAN PENTATEUCH'S COVENANT CODE

While the previous chapter examined a series of obvious and radical legal innovations made by the author of the Temple Scroll, this chapter will look at a much subtler series of changes that are found in a number of laws from the Samaritan Pentateuch's version of the Covenant Code as well as its changes to Deut 22:1–4. The most obvious of these changes comes in the laws of Exod 21:28–36: while the MT and all other witnesses to these verses spell out the consequences for damages inflicted by one's goring ox, the SP broadened the law to address “any animal.” While numerous scholars have already noted this broadening tendency in SP,¹ I want to point out the *legal* significance of these seemingly minor changes. Specifically, I argue that they reflect an attitude of binding obligation toward written law.

Together chapters four and five identify legal innovations that were motivated by this development in legal thought, which lie on both ends of the spectrum of rewritten scripture,² spanning from the radical reworking of the Torah in the Temple Scroll to the much subtler and more restrained changes within the Samaritan Pentateuch. Although the changes in SP do *not* attempt to present a more legally coherent version of the Torah (as TS does), they are important because they demonstrate a rare case in which a scribe sought to address some threats to the rule of law in his *Vorlage* by making some very minor (by comparison to TS) non-invasive changes to the text. Thus, very different approaches to interpretive rewriting were motivated by the same change in legal thought—the change that sees written law as a practical authority rather than as a non-binding epistemic authority.

¹ See sec. II below, and the notes therein.

² For the concept of a spectrum of rewriting see Crawford, *Rewriting Scripture*, 13–15.

This chapter is divided into three main sections. First, I establish the provenance of SP's legal innovations. Here I suggest that the legal changes that I examine were made by Samaritan scribes, and are to be distinguished from the so-called pre-Samaritan text-type from the Dead Sea scrolls.³ Second, I identify the threats to the rule of law that the SP scribes made. They were concerned particularly with the problem of under-inclusiveness, which threatens the generality requirement of the rule of law. There is also one instance in which they added precision to a vague law, which shows a concern for the clarity requirement of the rule of law. Third, I note some further considerations when the legal innovations of SP are compared with those of TS that help to situate the identification of the new attitude toward law within the broader phenomenon of legal interpretation and law-writing in early Judaism.

I. THE PROVENANCE OF THE SAMARITAN PENTATEUCH'S LEGAL INNOVATIONS

The Samaritan Pentateuch is the version of the Torah that was created by the Samaritan community to establish their temple on Mount Gerizim as the true place of worship. The Samaritan and Judean Yahwists likely co-existed and collaborated with many shared traditions throughout the Persian and early Hellenistic periods, though there were some strains on their relationship.⁴ One of the major breaks in their relationship came in the latter half of the second century B.C.E., when John Hyrcanus destroyed their temple.⁵ It was likely after this point that they edited their Torah to suit their religious agenda, which was

³ The following manuscripts are commonly considered as belonging to the "pre-Samaritan" group: 4QExod-Lev^f (4Q17); 4QpaleoExod^m (4Q22); 4QLev^d (4Q26); 4QNum^b (4Q27); 4QP^a (4Q158); 4QP^b (4Q364); 4QP^c (4Q365). Sometimes 4QP^d (4Q366) and 4QP^e (4Q367) are included as well. 4QDeutⁿ, too, contains changes similar to those of the pre-SP group, but appears to be a liturgical collection of excerpts from Deuteronomy, rather than a copy of it. For editions, see DJD XII, XIII, and XIV."

⁴ Knoppers highlights shared contact and traditions in the late Hellenistic and early Roman period, despite strained relations. For a summary see Gary N. Knoppers, *Jews and Samaritans: The Origins and History of their Early Relations* (Oxford: Oxford University Press, 2013), 217–40.

⁵ Knoppers, *Jews and Samaritans*, 173.

polemically charged against the Jerusalem cult.⁶ Their Pentateuch was probably composed sometime in the late second or early first century B.C.E., which makes it roughly contemporary with TS, though versions of TS likely existed earlier than SP. The most famous and obvious change they made to the Torah was an addition to the Decalogue that highlights the importance of Mount Gerizim as a sacred location, which stands in opposition to the Jerusalem temple,⁷ a change that was motivated by theological/polemical reasons, rather than by a binding attitude toward law.

These polemical Samaritan changes of the SP, however, are based on a distinct text-type that can be identified among the Dead Sea scrolls—a non-sectarian group of texts that were popular throughout Palestine.⁸ These are often termed the pre-Samaritan scrolls.⁹ They are characterized by their tendency toward harmonization.¹⁰ The scribes responsible for these texts took great pains to create a version of the Torah that harmonizes conflicting narratives, particularly those surrounding Moses and the Patriarchs.¹¹ For example, the scribe

⁶ See Knoppers, *Jews and Samaritans*, 188; Reinhard Pummer, *Early Christian Authors on Samaritans and Samaritanism: Texts, Translations and Commentary* (TSAJ 92; Tübingen: Mohr Siebeck, 2002), 1–2; Reinhard Pummer, “The Samaritans and their Pentateuch,” in *Pentateuch as Torah: New Models for Understanding Its Promulgation and Acceptance* (ed. Bernard M. Levinson and Gary N. Knoppers; Winona Lake: Eisenbrauns, 2007), 246–49. For an earlier dating of the Samaritan schism see Kartveit, *The Origin of the Samaritans*, 351–69.

⁷ One other possible sectarian layer to the SP is the change in verbal aspect to the verb בָּהָר throughout Deuteronomy, from ‘the place God will choose,’ to denote Jerusalem, to ‘the place God has chosen,’ which indicates Shechem, a site already chosen as sacred by the time of Moses’s speech. See Crawford, *Rewriting Scripture*, 22–23.

⁸ See Jan Dušek, *Aramaic and Hebrew Inscriptions from Mt. Gerizim and Samaria between Antiochus III and Antiochus IV Epiphanes* (CHANE 54; Leiden: Brill, 2012), 85–86.

⁹ See Emanuel Tov, *Textual Criticism of the Hebrew Bible* (Minneapolis: Fortress Press, 2001), 80–100; and note 3 above.

¹⁰ Tov does not use the term harmonization to describe these texts. He distinguished between harmonization, which is small-scale changes that are made to align similar texts, and the larger phenomenon of “content-editing” that is found in the large-scale changes in the pre-SP texts. See Emanuel Tov, “Rewritten Bible Compositions and Biblical Manuscripts, with Special Attention Paid to the Samaritan Pentateuch,” in *Hebrew Bible, Greek Bible and Qumran: Collected Essays* (ed. Emanuel Tov; TSAJ 121; Tübingen: Mohr Siebeck, 2008), 60.

¹¹ For an examination of these texts see Judith E. Sanderson, “The Contributions of 4QPaleoExod^m to Textual Criticism,” *RevQ* 13 (1988):547–60; Sidnie White Crawford, “The Pentateuch as Found in the Pre-Samaritan Texts and 4QReworked Pentateuch,” in *Changes in Scripture: Rewriting and Interpreting Authoritative Traditions in the Second Temple Period* (ed. Hanne von Weissenberg et al.; BZAW 419; Berlin:

responsible for 4QPaleoExod^m added sections of Deuteronomy's Decalogue account that were not present in the version found in Exodus 20.¹² This was done to ensure that Moses' account of the Decalogue did not contain any details that are not present in the earlier version.¹³ Tov, for example, states that these texts "reflect a tendency not to leave in the Pentateuchal text any internal contradiction or irregularity which could be taken as harmful to the sanctity of the text."¹⁴ It was this harmonizing text-type that the Samaritans used as a *Vorlage* when they made their sectarian changes; thus texts like 4QPaleoExod^m and 4QNum^b were non-Samaritan harmonized texts that were in use throughout Palestine, including Samaria to the north.¹⁵ It was texts like these that the Samaritans used to create the sectarian layer of their Pentateuch.

What is important to note is that the Samaritan changes to the Pentateuch that are the focus of this chapter—the changes to a selection of laws in the Covenant Code and one in Deuteronomy—are not present in any other version of the Torah. Although they are not part

De Gruyter, 2011), 123–36; Crawford, *Rewriting Scripture*, 23–34; and Jeffrey H. Tigay, "Conflation as a Redactional Technique," in *Empirical Models for Biblical Criticism* (ed. Jeffrey H. Tigay; Philadelphia: University of Pennsylvania Press, 1985), 54–96.

¹² He injected most of Deut 5:24–27 into Exod 20:19, and vv. 28–31 after Exod 20:21. For a full account of this scroll and its harmonizations see Judith E. Sanderson, *An Exodus Scroll from Qumran: 4QPaleoExod^m and the Samaritan Tradition* (HSS 30; Atlanta: Scholars Press, 1986).

¹³ Crawford writes: "The motivating force behind the act of harmonization is the notion that the text of Scripture is perfect and perfectly harmonious. Thus, all perceived differences should be altered or removed, to achieve the ideal perfection." See Crawford, *Rewriting Scripture*, 23. Alternatively, Kartveit argues that these additions represent a 'Moses layer' that emphasizes Moses as the only true prophet in the face of the increasingly authoritative prophetic corpus at the time. This Moses layer, according to Kartveit, was a Samaritan addition that reflects a polemic against the prophetic corpus of the Judean cult. See Magnar Kartveit, "The Major Expansions in the Samaritan Pentateuch – the Evidence from the 4Q Texts," in *Proceedings of the Fifth International Congress of the Société d'études Samaritaines: Helsinki, August 1-4, 2000: Studies in Memory of Ferdinand Dexinger* (ed.; Paris: Geuthner, 2006), 117–24.

¹⁴ Tov, *Textual Criticism of the Hebrew Bible*, 85–86. See also Emanuel Tov, "The Nature and Background of Harmonizations in Biblical Manuscripts," *JSOT* 31 (1985):3–29; and Emanuel Tov, "The Textual Development of the Torah," in *Textual Criticism of the Hebrew Bible, Qumran, Septuagint: Collected Essays* (ed. Emanuel Tov; VTSup 167; Leiden: Brill, 2015), 248, where he writes: "These harmonizations appear. . . because the scribes of the Torah scrolls endeavored to create what they considered to be near-perfect copies of the most sacred book of all." See also Knoppers, *Jews and Samaritans*, 183. He writes "It seems clear that the scribes responsible for such additions conceived of the Pentateuch as a single literary whole. The result of their interventions is a slightly expanded Pentateuch that exhibits greater internal literary coherence."

¹⁵ For a full list of the pre-SP texts see Dušek, *Gerizim and Samaria*, 86–89.

of the distinctly polemic sectarian layer of SP, they were likely made within their community in the early first century B.C.E. As Tov notes, the Samaritans preserved their Torah with a high degree of accuracy.¹⁶ Other than their obvious addition to the Decalogue, their scribes were quite restrained, not adding any additional major harmonizations.

Even more important, as I argue below, the fact that they made these changes is significant because they stand in contrast to the pre-SP texts' lack of attention to the threats to the rule of law. What is so significant about these harmonizing pre-SP texts is that, amidst so many harmonizations—where details from one narrative episode are inserted into parallel episodes to eliminate conflict—the Torah's conflicting and disparate legal sections are left untouched. The scribes had ample opportunity to address this problem, which is the very same problem that TS addressed, and yet they did not seem bothered by it. This strongly suggests that they did not view written law as a source of binding obligation; their view of law was not constrained by the clarity and consistency requirements of the rule of law. Thus Kartveit notes concerning the pre-SP texts: “One of the conspicuous traits about them is that they have not affected the legal material in the Pentateuch.”¹⁷

This is similar to the so-called 4QRP texts, which harmonize the Torah even further than the pre-SP texts, as noted by Moshe Bernstein. Although the scribes responsible for these manuscripts do tamper with Pentateuchal law to some degree (in contrast to the pre-SP texts, which make no changes to the law), it appears that their primary concern is narrative coherence. For example, concerning the merger of inheritance laws from Numbers 27 and 36, Bernstein writes, “[T]he controlling principle is not the reordering of legal material, but the

¹⁶ Tov, *Textual Criticism of the Hebrew Bible*, 80–82.

¹⁷ Kartveit, *The Origin of the Samaritans*, 274. Tov also notes that harmonization occurs “mainly in the non-legal segments . . . [T]he substance of the law is only rarely harmonized.” See Tov, “Textual Harmonization in the Stories of the Patriarchs,” 21.

smoothing out of the flow of the story.”¹⁸ This stands in stark contrast to TS, which was almost exclusively concerned with the issue of legal coherence. Bernstein concludes, “[I]t seems clear that there is very little exegetical reworking of the 4QRP legal material, either in the way that there is reworking of its narrative material or in the way that there is exegetical re-arrangement and harmonization in the legal material in 11QT.”¹⁹

Therefore, the legal changes that the SP scribes made to their Torah should be situated with the Samaritan community, likely in the early first century. These changes, as I argue below, stand in stark contrast to the harmonizing tendencies that their textual antecedents exhibit. They are much less invasive than the earlier pre-SP texts, and they treat written law as the source of binding obligation. This latter claim, however, has yet to be demonstrated.

II. CORRECTING THREATS TO THE RULE OF LAW IN THE SAMARITAN PENTATEUCH

A. *Previous Observations on SP’s Generalizing Tendency*

Before examining each instance in which the SP scribe showed concern for the threats to the rule of law, it is worth making some general comment on SP’s tendency to broaden law, which has been noticed by scholars in the past. For example, Sanderson notes that the alteration to the goring ox law was “deliberate exegetical work” that “extended the application of the law.”²⁰ Similarly Cornelis Houtman thought SP “generalized the regulation.”²¹ A few commentators have also recognized that the change from *יִנְקֶם יִנְקֶם* to *מִוֹת יִרְמֶת* in Exod 21:20 (see below) reduces ambiguity. Jackson, for example, suggests the

¹⁸ Bernstein, “The Treatment of Legal Material,” 37.

¹⁹ Bernstein, “The Treatment of Legal Material,” 46.

²⁰ Sanderson, *An Exodus Scroll from Qumran*, 80; 308. See also *DJD IX*, 69.

²¹ See Cornelis. Houtman, *Exodus* (vol. 2; Historical Commentary on the Old Testament. Kampen, NL.: Kok Publishing House, 1993), 2:179.

Samaritans harmonized this text with the *יומת מות* laws to provide for consistent language (which represents more advanced literary practices).²² He then later suggests the harmonization indicates “a preference for (what was now seen as) an institutional death penalty rather than the exercise of private vengeance.”²³ William Propp, who notices a *Tendenz* throughout the entire Covenant Code noted that SP “consistently attempts to make its laws as general as possible.”²⁴ Molly Zahn has noted several of these laws as well and suggests that “laws are being interpreted as applying not simply to the specific animals explicitly mentioned, but to any comparable animal; thus the laws’ applicability is extended.”²⁵

Finally, and most recently, Andrew Teeter has correctly noted that the additions, omissions, and lexical exchanges in the goring ox laws, as well as the omissions from the injury laws of Exod 21:18–21, all serve to generalize the laws.²⁶ I will return to his observations below.

B. Generalizing Under-Inclusive Laws I: Adding General Terms to the Law

The first and most obvious change that the SP scribes made was to broaden the scope of the goring ox laws to include “any animal.” This is evident in Exod 21:28:

MT

וכי יגח שור את איש או את אשה
ומת סקול יסקל השור ולא יאכל את
בשרו ובעל השור נקי

SP

וכי יכה שור וא כל בהמה את איש
או את אשה ומת סקל יסקל הבהמה
ולא יאכל את בשרו ובעל הבהמה
נקיא

²² See Jackson, *Semiotics*, 98n17.

²³ Jackson, *Wisdom-Laws*, 246n36.

²⁴ William Henry Propp, *Exodus 19–40: A New Translation with Introduction and Commentary. Vol 2* (AB 2; New York: Doubleday, 1999), 121–22.

²⁵ Zahn, *Rethinking Rewritten Scripture*, 142. See also P. Kyle McCarter Jr, *Textual Criticism: Recovering the Text of the Hebrew Bible* (Philadelphia: Fortress, 1986), 35–36.

²⁶ Teeter, *Scribal Laws*, 162–63.

When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten, but the owner of the ox shall not be liable.

When an ox or any animal strikes a man or a woman to death, the animal shall be stoned, and its flesh shall not be eaten, but the owner of the animal shall not be liable.

Here is it evident that the scribe responsible for these changes was dissatisfied with the under-inclusiveness of the earlier version of the law. While scholars are correct that this broadens the scope of the law, what I want to highlight is the fact that the need for this broadening—at least to this extent—would only have been felt if the scribe believed the law should provide preemptive reasons for action.

SP's addition of general terms to the law is quite extensive. In its version of the Covenant Code, for every casuistic law in this section that begins with כִּי (which signals a new legal unit in the Covenant Code),²⁷ the editor added the phrase “or any animal” (וְאִם לֹא בַהֲמָה) to the word ‘ox’ (21:28, 33, 35; 23:4).²⁸ He also added this phrase to the specific animals listed in the Sabbath prohibition (23:12), and to Deuteronomy's reformulation of the lost animal law from Exod 23:4, which is found in Deut 22:1–4 (vv. 1 and 4). Thus, he added this phrase to the beginning of every possible law in the Covenant Code that dealt with

²⁷ This feature of the *Mišpātīm* is well documented. Each main clause is introduced with כִּי (vv. 28; 33; 35) and subordinate laws are introduced with אִם (vv. 29; 30; 32; 36), or וְאִם (v. 31). See, for example, Christo H. J. Van der Merwe et al., *A Biblical Hebrew Reference Grammar* (Biblical Languages: Hebrew 3; Sheffield: Sheffield Academic Press, 2000), 300; Jackson, *Semiotics*, 104; and Gershon Brin, “The Use of ‘Or’ (וְאִם) in Biblical Legal Texts,” in *Studies in Biblical Law: From the Hebrew Bible to the Dead Sea Scrolls* (ed.; Sheffield: JSOT Press, 1994), 90–103.

²⁸ There are two exceptions. First, in Exod 21:37, where there are separate consequences for each animal, the scribe could not generalize one punishment for “any animal.” However, this is not the case in 22:3, where the thief's punishment is the same for any animal that is found alive. Thus, the SP scribe added the ‘or any animal’ generalizing phrase there. Second, in Exod 23:12, the ‘or any animal’ generalizer is added to the Sabbath law's requirement for rest. The Sabbath prohibition does not begin with כִּי. This phrase is also added to the list of animals in Num 31:28. That addition, however, does not seem connected with SP *Tendenz* in SP's Covenant Code.

specific animals;²⁹ he also added the phrase to the only one of these laws that was reinterpreted in Deuteronomy.³⁰

The scribe also made two additional changes throughout these laws as part of this generalizing agenda. First, after adding the phrase “or any animal” to the legal units that begin with כִּי, the scribe replaced every subsequent mention of the specific animal (such as the ox) with the word ‘animal’ (בהמה), along with the necessary gender changes. Second, in the goring ox laws, the verb ‘gore’ (נגח), which is specific to oxen, is replaced with the term ‘strike’ (נכה), which can apply to all animals. Thus, in Exod 21:29, which deals with the consequences for the owner of an ox that was known to be a gorer, every reference to the ox was replaced with בהמה, and every verb נגח was changed to נכה:

MT

ואם שור נגח הוא מתמל שלשם
והועד בבעליו ולא ישמרנו והמית
איש או אשה השור יסקל וגם בעליו
יומת

But if the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner also shall be put to death.

SP

ואם בהמה מכה היא מתמל שלשום
והועד בבעליו ולא ישמרנו והמית
איש או אשה הבהמה תסקל וגם
בעליו יומת

But if the animal has been accustomed to strike in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the animal shall be stoned, and its owner also shall be put to death.

These changes are consistent throughout the Covenant Code. After the addition of כל בהמה to each legal unit, every שור was changed to בהמה (21:28 [twice], 29 [twice], 32 [twice], 36

²⁹ See the exception in 21:37 noted above. Also, Exod 23:5 gives the scenario of a donkey that has been overloaded with its burden. This was likely not extended because the noun משא is exclusive to donkeys, mules (2 Kgs 5:17), and camels (2 Kgs 8:9). Thus, the phrase כל בהמה ואי could not apply to that law. The only real exception is Exod 22:29, which calls for the offering of the firstborn ox and sheep, but does not mention the requirement to offer other animals.

³⁰ For Deuteronomy as a reinterpretation of the Covenant Code see Levinson, *Legal Innovation*, 1–6.

[thrice]), and every נגה, was changed to נכה (21:28, 29, 31, 32, 36), along with all necessary changes in gender.³¹

It should be noted that such generalizations do occur in biblical and Mesopotamian law collections. For example, Exod 22:9 states: “If a man gives to his neighbor a donkey or an ox or a sheep or any beast (וא כל בהמה)...” Fishbane has also noted this and other similar generalizing phrases that are found in the Pentateuchal legal corpora and argues that they were “[E]mpty phrase[s]—which adds nothing to the law itself, but merely articulates what any lawyer would have invariably inferred.”³² While Fishbane suggests such legal expansions are only part of biblical law, Hector Avalos has pointed out that these phrases also occur in Mesopotamian law.³³ For example, LH 7 states: “If a seignior has ... received for safekeeping either silver or gold or a male slave or a female slave or an ox or a sheep or an ass or any sort of thing (*u lu mimma šumšu*) ...”

What is important to note is that the legal *Tendenz* of SP that I identify is much more systematic than that which is found in the Pentateuchal and Mesopotamian legal collections. It is a natural part of communication to use generalizing terms that encompass all the members of a given category which can be added to a list or can serve in place of a list. For example, a person might say ‘I like pie, cheesecake, and ice cream,’ or she might say ‘I like pie, cheesecake, and ice cream, basically all desserts,’ or she might simply say ‘I like all desserts.’ Each statement may have the same meaning; in the first statement, pie, cheesecake,

³¹ There are two deviations from this consistent pattern. First, in v. 31, the MT repeats the verb נגה (‘If it gores a man’s son or it gores his daughter’), while in SP נכה is only used once (‘If it strikes a man’s son or daughter’), and applied to both scenarios by ellipsis. Second, in v. 35, the MT requires that the owner of an ox that kills another ox shall sell his ‘living ox’ (השור החי) and split its price. In SP, however, the scribe omitted the word השור, rather than change it to הבהמה, so that the adjective החי functions as a noun (much like the adjective המת functions as a noun in MT vv. 34, 35, 36). This also served his purpose.

³² See Fishbane, *Biblical Interpretation*, 170–87 (quote from 171–72). See also Brin, “Legal Texts,” 90–103.

³³ Hector Avalos, “Exodus 22:9 and Akkadian Legal Formulae,” *JBL* 109 (1990):116–17.

and ice cream might simply serve as *examples* that illustrate the entire dessert category; the second statement simply makes this explicit; the third eliminates the specific members altogether. The point is that any of these statements can express the same meaning, because the use of generalizing terms is a normal part of communication. This, I would argue, can explain why there is sporadic use of generalizing terms in the MT and Mesopotamian law; it is simply a natural part of communication in non-legal language.

As I argue below, however (sec. III.A), the use of lists in legal language is not a typical means of communication. Because law must provide preemptive reasons for action, it must be much more careful in deciding whether to employ a generalizing term to list the individual members of a category. While the earlier version of the Covenant Code reflected in the MT reflects the sporadic use of generalizing terms that is common for non-legal communication, SP treats the Covenant Code's language as binding law. First, however, there are two more threats to the rule of law in SP's Covenant Code that must be noted.

C. Generalizing Under-Inclusive Laws II: Removing Restrictive Clauses

The second and third threats to the rule of law that the SP scribe addressed is found in the injury laws of Exod 21:18–21. These laws prescribe the remedy when a man injures another man. There are two separate situations described in the protasis in vv. 18 and 20: two men fighting; and a man beating his slave. For each scenario, the implement of harm is stated: a stone (אבן) or a fist (אגרף) in v. 18, and a stick (שבט) in v. 20. What is notable in SP is that all three instruments of harm are omitted. Verse 18 reads:

MT

וכי יריבון אנשים והכו איש את
רעהו באבן או באגרף ולא ימות
ונפל למשכב . . .

SP

וכי יריבון אנשים והכו איש את
רעהו ולא ימות ונפל למשכב . . .

When men quarrel and one strikes the other with a stone or with his fist and the man does not die but takes to his bed . . .

When men quarrel and one strikes the other and the man does not die but takes to his bed . . .

Similarly, verse 20, involving a slave, reads:

MT

כי יכה איש את עבדו או את אמתו
בשבט ומת תחת ידו

When a man strikes his slave, male or female, with a rod and the slave dies under his hand .

..

SP

כי יכה איש את עבדו או את אמתו
ומת תחת ידו . . .

When a man strikes his slave, male or female, and the slave dies under his hand . . .

The fact that all three implements of harm are omitted in SP cannot be the result of scribal error.³⁴ Given the generalizing tendency noted in the goring ox laws, it seems very likely that the SP scribe understood the listed implements of harm as restrictive clauses, rather than exemplary lists. Thus the SP scribe understood the injury law of vv. 18–19 as only applicable in cases when the injury was caused by a fist or stone; injury caused by a tool or a pot would be exempt since they are not covered by the law. Similarly, he viewed the law of vv. 20–21 as applying only when the harm done to the slave was inflicted with a rod. As I argue below, it seems most likely that these implements of harm were included as exemplary lists, which, to use Jackson’s term,³⁵ facilitate the narrative image the laws evoke. In other words, these laws were originally written as epistemic authorities. The SP scribe, however, changed them according to his new understanding of law, which had to be comprehensive, not merely exemplary.

³⁴ For an account of the constraints on haplography see Jonathan Vroom, “A Cognitive Approach to Copying Errors: Haplography and Textual Transmission of the Hebrew Bible,” *JSOT* 40 (2016):, 259–79.

³⁵ See my discussion in Chapter One sec. I.E, and Jackson, “Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence,” 433–57.

At this point it will be useful to return to my discussion from Chapter Three (sec. V) concerning my focus on interpretive motives, rather than interpretive methods. It is clear that the generalizing tendency in SP involves multiple interpretive methods: adding generalizing phrases; changing the wording of the law (from נגה to נכה); and omitting text (the instruments of harm). This is aptly noted by Teeter: “[O]ne encounters multiple textual strategies more or less ‘systematically’ deployed to achieve a single exegetical end.”³⁶ Thus, in examining this series of textual changes, it is much more productive to focus on the interpretive motives, rather than the methods.

Furthermore, despite the aptness of Teeter’s observation, his later conclusions on the nature of textual changes to biblical law demonstrate the limitations of emphasizing interpretive methods at the expense of motives. After all his extensive examination of the changes to law throughout the transmission of the Pentateuchal legal corpora, he concludes:

[T]he abundant evidence of deliberate intervention examined . . . clearly indicates the operation of the identical processes of interpretive change also found in the transmission of “non-legal” scriptural texts. There are no fundamental differences in overall profile, distribution, or frequency. Taken together, then, analysis of this material supplies no evidence for the special treatment of legal texts, nor do the interpretive changes attested suggest the operation of a distinct interpretive mode or set of interpretive procedures customized to the transmission of law. One finds evidence not of a special legal hermeneutics, but rather of a common textual hermeneutics.³⁷

While Teeter is not wrong in these comments, his focus on interpretive methods overlooks the importance of interpretive motives. In the case of SP’s Covenant Code, it should be no surprise that the scribe changed his *Vorlage* by addition, omission, and lexical exchanges; how else is one to change a text? The real question is *why he did what he did with the law*? And here is found something clearly unique about the goal of the interpretive changes to

³⁶ Teeter, *Scribal Laws*, 162.

³⁷ Teeter, *Scribal Laws*, 207.

these laws that a focus on interpretive methods will completely miss. Why did the SP scribes see the specificity of the Covenant Code laws as a problem that needed fixing, while there is very little evidence of effort throughout earlier transmission of legal literature to address this issue?³⁸ Some sort of development must have taken place that provided the impetus for such changes—a development in legal thinking. Any study that emphasizes interpretive methods at the expense of motives will inevitably miss this important observation.

D. Clarifying Vague Laws: Adding Precision to Injury Laws

Another threat to the rule of law addressed in SP's account of the injury laws of Exod 21:18–21 can be found in the punishment for killing one's slave in the course of a beating. According to the MT, if “the slave dies under his hand, he shall be avenged (נָקַם יִנְקָם).” In SP, however, the punishment is much more specific: “he shall be put to death (מוֹת יוּמָת).” This same change is also made in v. 21. While the MT reads “if the slave survives a day or two, he is not to be avenged (יִקָּם),” the SP reads “he shall not be put to death (יוּמָת).” It is no coincidence that all three of the occurrences of נָקַם were changed to מוֹת in vv. 20–21. The term נָקַם was probably used because at the time the Covenant Code was composed, there was no structure in place to ensure the execution of the slave-owner. The slave referred to was likely a foreigner, who would have had no relative (גֹּאֵל) to avenge his death.³⁹ Thus, since

³⁸ See also Hobson, “Exact Transmission,” 469, who notes that there were almost no changes made to the legal sections of the Laws of Hammurabi in 1000 years of transmission, while the legal sections saw notable substantive changes.

³⁹ Although Exod 21:2–11 deals explicitly with a “Hebrew slave” (עֶבֶד עִבְרִי), there is good reason to suggest that the slave in this text is foreign. See the extensive discussion by Gregory C. Chirichigno, *Debt Slavery in Israel and the Ancient Near East* (JSOTSup 141; Sheffield: Sheffield Academic Press, 1993), 145–85, esp. 182–84; and Frank Crüsemann, *The Torah: Theology and Social History of Old Testament Law* (trans. Allen W. Mahnke; Minneapolis: Fortress, 1996), 153. For another ancient parallel see Michael Gagarin, *Early Greek Law* (Berkeley: University of California Press, 1986), 69. He notes that killers of foreign slaves in ancient Greece were not punished because there was no one to avenge their deaths. Until Solon's reform, the legal structure lacked an official body with which to carry out the law's sanctions. These societies relied on a rule-bound form of clan justice where family members were responsible for redressing wrongs. For Mesopotamian parallels see Pamela Barmash, “Blood Feud and State Control: Differing Legal Institutions for the Remedy of Homicide During the Second and First Millennia B.C.E.,” *JNES* 63 (2004): 183–99.

there was no one who could put the slave-killer to death, the drafter used the vague term דָּקַן , quite possibly as a reference to divine justice. This resulted in a vague law, however. It is not clear what must happen to the man who kills his slave. Given the other obvious changes in the goring ox laws, it seems likely that the SP scribe saw such vagueness as a threat to the law's ability to provide a preemptive reason for action, and replaced the vague term with a more specific punishment.

III. FURTHER CONSIDERATIONS

While it seems clear that the Samaritan scribe responsible for these changes viewed the law as a preemptive reason for action, a number of further considerations are warranted.

A. *Exemplary Lists and Exhaustive Lists in Law*

First, Peter Tiersma makes some observations about the use of lists in law that are very pertinent to SP's legal innovations.⁴⁰ He makes a distinction between *exemplary lists* and exclusionary or *exhaustive lists*.⁴¹ What characterizes exemplary lists is that they are meant to function as a guide that has an illustrative effect; in other words, they possess epistemic rather than practical authority. Because of this, they are very uncommon in any body of laws in modern legal systems. If law is supposed to provide a preemptive reason for action, then it must tell its subjects what is and what is not lawful; it cannot simply provide suggestions to which its subjects are free to add. Exhaustive lists, by contrast, are exclusionary; whatever is written in the list is covered by the law, while anything that is excluded is not covered by the law. Almost all lists in modern law are treated as exhaustive.

⁴⁰ See my discussion in Chapter One sec. II.C.i.

⁴¹ Peter M. Tiersma, "Categorial Lists in the Law," in *Vagueness in Normative Texts* (ed. Vijay K. Bhatia et al.; Linguistic Insights 23; Berlin: Peter Lang, 2005), 109–30.

In fact, after identifying a few examples of exemplary lists in law (such as jury instructions), Tiersma notes that courts generally treat them as exhaustive. He writes,

[M]ost courts have come to the same conclusion . . . a list of certain . . . specific remedies is generally regarded as being exhaustive or complete, rather than consisting of some examples to which a court might be able to add.⁴²

Therefore, when the law is treated as a preemptive reason for action, then anything not covered in its specific wording cannot produce a binding obligation.

When it comes to the Covenant Code (and the Mesopotamian law collections), the fact that the laws deal with very specific situations, like the goring ox (cf. LE 53–55; LH 250–52), or miscarriage that was the result of a blow (SL 1–2; MAL 21; 50–53; HL 17–18; LH 209–214; Exod 21:22–25),⁴³ indicates that they were *not* meant to function as a comprehensive statement of law. By the same token, the laws of Covenant Code that pertain to oxen or donkeys must be taken to function as exemplary lists, as well as the specific instruments of harm in Exod 21:18, 20, and the many other specific lists in Pentateuchal law.⁴⁴

Another way of understanding SP's changes is according to the principle of legality discussed above (Chapter Two sec. A). According to this principle, the law can only be applied to that which is written down. There is no room for interpretive or analogical extension of the law. The systematic nature of SP's changes (when compared to the sporadic expanding clauses in the Pentateuchal and Mesopotamian collections) indicates that their

⁴² See Tiersma, "Categorical Lists in the Law," 117–20, esp. 119.

⁴³ Shalom Paul cites one other text (UM 55–21–71, iii, 2'3') that does this. See Paul, *Cuneiform and Biblical Law*, 71n3.

⁴⁴ There are many such lists in the Torah, beyond what the SP corrected. See the arguments of Bernard S. Jackson, "Two or Three Witnesses," in *Essays in Jewish and Comparative Legal History* (ed. SJLA 10; Leiden: Brill, 1975), 153–71. Although he argues that the "catch-all" phrases that tend to complete specific lists all represent the tendency for completeness (i.e. precision) in legal drafting, I would argue that they are only sporadic and that they, in contrast to SP, reflect typical non-legal communication.

interpretive changes were made according to the principle of legality, such that, without their interpretive intervention, the law would apply only to the specific animals named. In other words, unlike the biblical generalizing clauses, SP's changes were *not*, in Fishbane's words, "empty phrases."⁴⁵ Rather, they reflect an important development in legal thought.

B. *Under-Inclusive Laws and Jackson's Narrative Theory of Ancient Law*

The second consideration concerns the reason as to why the drafters of the Covenant Code may have chosen to focus on specifics—whether animals or instruments of harm—rather than general categories of things. This can be explained with Jackson's narrative theory of ancient law.⁴⁶ He argues that the primary effect that the Pentateuchal and Mesopotamian law collections were meant to have upon their subjects was to evoke narrative images that would help guide their efforts toward dispute resolution. As I argued in Chapter One (sec. I.E.), this is likely the equivalent for ancient law of Arie Rosen's account of epistemic significance, which is the basis of an epistemic directive's authority. If the primary concern of the authors of the Covenant Code was to evoke narrative images, then it makes much more sense to use concrete paradigmatic examples, like a goring ox rather than a dangerous animal. For example, a law on a goring ox, or a law that depicts a man striking another with a stone in the course of a fight (Exod 21:18) evokes a much more vivid and effective narrative image than a general law on injurious animals, or aggravated assault.⁴⁷

⁴⁵ Fishbane, *Biblical Interpretation*, 171.

⁴⁶ See my discussion in Chapter One sec. I.E.

⁴⁷ A recent monograph by Assnat Bartor reinforces Jackson's theory by examining the "poetics of biblical law" (14). She identifies the narrative elements of the casuistic laws of the Pentateuch. For example, she demonstrates that each of the characters in the law of the scorned woman (Deut 22:13–21) refers to the girl differently, which reflects point of view. Such a poetic strategy would certainly heighten the narrative images that the law was meant to evoke. See Assnat Bartor, *Reading Law as Narrative: A Study in the Casuistic Laws of the Pentateuch* (AIL 5; Leiden: Brill, 2010), 14, and 163–83.

Therefore, not only might the specific laws and lists in the Covenant Code serve an illustrative function, they also serve a narrative function; they more effectively evoke narrative images that will influence an audience's thinking—an effective strategy for an epistemic authority. By contrast, such narrative strategies were lost on the SP scribe, who sought to ensure that the law was maximally inclusive, due to his attitude of binding obligation toward the Torah.

C. Reasoning by Analogy versus Precedent with the Goring Ox

The third consideration concerning SP's interpretive changes to the series of laws in Covenant Code concerns LaFont's argument that the Mesopotamian (and biblical) law collections were, in fact, legally binding, according to a model of subsidiarity (see Chapter Two sec. A.i).⁴⁸ She argues that although the law collections are not comprehensive (they are under-inclusive), royal/appellate judges were able to employ analogical reasoning to the law to come up with verdicts. This, according to LaFont, is treating the law as legally binding. For example, a judge may rule that the owner of a dog that bit a person is liable, based on the goring ox law: in each case the owner of an animal is responsible for the harm they cause. Such an account of the function of law appears to undermine my argument concerning SP's legal interpretation of the goring ox law. If the law's subjects could simply apply the law through this type of analogical extension, then there would be no need to generalize the law; it was always applicable to 'any animal.' This is actually what Fishbane argues.⁴⁹ Thus,

⁴⁸ LaFont, "Subsidiarité dans les Droits," 49–64.

⁴⁹ So Fishbane states, concerning the generalizing term in Exod 22:9: "Since this generalizing expansion does not add a new principle to the law, it probably reflects a later scholastic concern to make precise and explicit what any jurist would (or should) have easily inferred by analogy. See Fishbane, *Biblical Interpretation*, 171.

according to this reasoning, SP's generalizing was unnecessary since the law was easily applicable to analogous cases.

Legal theorists, however, are careful to distinguish between precedential obligation on the one hand, which is legally binding, and analogical reasoning on the other, which is a form of epistemic authority. Schauer writes,

Understanding the idea of precedent requires appreciating the difference between learning from the past, on the one hand, and following the past just because of the fact of a past decision, on the other. With respect to the former, which is not really precedential reasoning at all, the . . . court may learn from a previous case, or be persuaded by some decision in the past, but the decision to do what another court has done on an earlier occasion is not based on the previous case's status as a precedent. Instead the decision exemplifies the fundamental human capacity to learn from others and from the past. There are many instances in which . . . [a] court will be persuaded by the reasoning of another court, but if the . . . court is genuinely persuaded, then it is not relying on—obeying—precedent at all.⁵⁰

Thus, analogical reasoning is quite different from precedential obligation. Analogical reasoning might say: "because the owner of a goring ox should be given punishment X, so also should the owner of a rabid dog be given that same punishment." This line of reasoning—*analogical reasoning*—*learns* from past cases; it is not bound by them.

The reason why analogical reasoning must be distinguished from precedent is that otherwise the possibility arises for an infinitely malleable 'application' of the law. Analogical reasoning is based on similarity; if law X applies to situation Y, and situation Y is similar to situation Z, then law X should apply to Z. Thus, if culpability applies to the owner of a goring-prone ox, and a goring-prone ox is similar to a rabid dog, then the owner of a rabid dog is also culpable. While such reasoning may seem a legitimate use of the law—and thus render SP's interpretations as not legally significant—it is not so simple, because similarity

⁵⁰ Schauer, *Legal Reasoning*, 38.

can be found between any two things. Ultimately the question simply relies on persuasion, and is thus not binding. For example, is owning a goring-prone ox similar enough to make a bee-keeper culpable when his bees sting a child who in turn has an anaphylactic reaction? Is it similar enough to make one who owns an overgrown rose bush culpable when its thorns poke the eye of a passer-by? What if the goring ox was not in the care of the owner at the time of the harm? Would analogical reasoning still work there? Ultimately arguments from analogy are only effective to the degree that they can *persuade* their addressees that the similarities between case Y (such as the goring-prone ox) and case Z (such as the bee-keeper's bees) are strong enough to warrant application of conclusion X (culpability). If they rely on persuasion, then that puts analogical argument squarely in the realm of epistemic authority. Thus LaFont's account of the laws' 'bindingness' is not a binding account of the law at all. Laws such as those of the goring ox could not have been considered positive law because, even if royal judges would have extended their application to new cases (for which there is no evidence), such a use of the law does not treat it as a binding obligation.⁵¹

The more important point to make is that the very fact that the SP scribes chose to generalize these laws demonstrates that analogical reasoning was not an option for them; there would have been no need to extend the law's applicability if analogical reasoning was a viable option. The scribe did not think: "of course the goring ox law applies in all cases of animal damage." If this was obvious to him, then there would be no need to interpret in the first place—interpretation always makes its object say something more than, better than, or other than the object says on its own. Ironically, SP's interpretation is based on analogical reasoning—if an ox then other animals too. Yet the goal was to tell the law's future subjects

⁵¹ See also Frederick F. Schauer, "Why Precedent in Law (and Elsewhere) is not Entirely (or even Substantially) about Analogy," *Perspectives on Psychological Science* 3 (2008):454–60.

what, for them, was the proper extent of the law, so they would not have to resort to analogical argument.

D. *The Limited Extent of Legal Changes*

The fourth point to be made concerning SP's significant, yet subtle and non-invasive legal innovations is the question of why they did not go as far as TS did. If the SP scribes were really bothered by threats to the rule of law in their Torah, why would they only make this series of relatively minor changes when there are countless other threats to the rule of law in the Torah that occupied the attention of later tannaitic sages? The author of TS was willing to make major changes to the Torah's legal corpora to address its legal challenges. The pre-Samaritan scribes were willing to make major changes to the Torah's narratives. Are these small and subtle changes enough to conclude that the SP scribe(s) responsible for these textual interventions was part of a major development in legal thought?

With some qualification, I believe the answer to this question is yes. As I have argued above, the legal changes found in SP's Covenant Code are to be kept distinct from the pre-Samaritan narrative harmonizations. The pre-SP scribes were clearly willing to make substantial changes to their Torah in service of their agenda. Yet the fact that they left the law alone, with its glaring contradictions, is enough to conclude that they did not consider the Torah to have been legally binding; one would expect that the law would have been first on the list of changes to be made. Furthermore, it is difficult to think of a reason as to why the SP scribe made these changes apart from a legally binding attitude toward law; there is no point in making such systematic changes to a series of under-inclusive laws apart from an awareness that under-inclusiveness is problematic in law. It therefore stands to reason that, in contrast to the pre-SP scribes, the legal innovations in the Covenant Code were made at a

point when the text of their Torah was fairly stable, such that they could not make extensive renovations to the text. If this was the case, then the SP scribe had to settle for a making a small set of minor tweaks in a series of laws in the Covenant Code. While there are surely other places he could have changed, the fact that he made at least these is enough to conclude that the changes for which the SP scribe was responsible attest to development in legal thought.

IV. CONCLUSION

In this chapter I argue that a small series of changes to law in SP's version of the Covenant Code were all made as a result of a new binding attitude toward law. The fact that the SP scribes were bothered to a significant degree by the law's under-inclusiveness and vagueness indicates that they viewed the Torah as legally binding—as providing preemptive reasons for action. While his creative rewriting was much more constrained than that of TS, being confined to a small series of minor alterations to his *Vorlage*, there is enough evidence to conclude that SP's legal innovations reveal the new binding attitude toward written law.

CHAPTER SIX: LEGAL REWRITING IN THE QUMRAN PENAL CODES

In the two previous chapters I analyze the legal innovations found in two interpretively rewritten versions of the Torah that reflect an attitude of binding obligation toward law, and I conclude that the manner in which the Temple Scroll and the Samaritan Pentateuch treat (at least some of) the laws of the Torah indicates that the scribes viewed it as possessing practical/legal authority. In this chapter I examine some of the legal literature produced by the Qumran sect, focusing particularly on the penal codes found in the two main rule texts—the Damascus Document and 1QS—along with the various texts affiliated with them (D and S texts).¹ Since the full publication of the cave four manuscripts, it is evident that the sectarian rule texts underwent the same type of interpretive rewriting that the biblical and other non-sectarian texts went through; the scribes responsible for transmitting them made many creative additions and changes, and they are preserved in multiple editions.² The fact that we have material evidence for the various versions of the sectarian rule texts provides fruitful ground for inquiry as to whether or not they viewed their rule texts as the source of binding obligation.

The basic premise of this study is that if a legal text is treated as law—as a preemptive reason for action—then the manner in which a scribe interpretively engages that

¹ See sec. I.A below. for an introduction to these texts.

² For comparison of the development of the rule texts with biblical texts see Charlotte Hempel, “Pluralism and Authoritativeness: The Case of the S Tradition,” in *Authoritative Scriptures in Ancient Judaism* (ed. Mladen Popović; JSJSup 141; Leiden: Brill, 2010), 193–208; Molly M. Zahn, “Torah for “The Age of Wickedness”: The Authority of the Damascus and *Serekh* Texts in Light of Biblical and Rewritten Traditions,” *DSD* 20 (2013):410–32; and Annette Steudel, “The Damascus Document (D) as a Rewriting of the Community Rule,” *RevQ* 25 (2012):605–20.

text will look a certain way. Once a directive (or a set of written directives) achieves the status of law, it no longer provides a good reason for action; it provides a self-sufficient reason for action that usurps its subjects' background reasoning, such that they do what it requires simply because it says so, even if they do not want to comply and even if they do not think it is a good idea. As Schauer puts it: "Law makes us do things we do not want to do."³ Once a text is ascribed this kind of authority, the way it is handled by its subjects changes completely. The shift from providing a good reason for action to providing a preemptive reason for action brings about a whole new manner of interpretive engagement with the text, one which is primarily preoccupied with the threats to the rule of law.

When it comes to the manner in which the Qumran rule texts were interpretively rewritten, what is immediately noticeable is that there is no concern whatsoever with the threats to the rule of law. Even though the penal codes are rife with these challenges, and even though the scribes interpretively engaged the penal codes in their creative rewriting, there is not the slightest hint that they were ever bothered by the law's under-inclusiveness, over-inclusiveness, vagueness and so forth. While it is certainly possible that a practical authority can be interpreted for non-legal purposes, it would be odd to entirely ignore any threats to the rule of law that they exhibit. In a sense, this chapter will argue from silence: the rule texts were never viewed as binding law because their interpretive rewritings, which are extensive, are never concerned with the threats to the rule of law. This *ex silentio* argument, however, is reinforced by the claim that practical authority, because of its preemptive reason-giving power, *always* brings the threats to the rule of law to light. When a normative text

³ This is the first line of his book. See Frederick F. Schauer, *The Force of Law* (Cambridge: Harvard University Press, 2015), 1.

achieves the status of binding law, then any interpretive engagement with that text will be primarily concerned with these challenges.

This chapter is divided into three main sections. First, I address two methodological issues that affect my analysis of the penal codes: their literary relationship and their genre. Second, I examine a number of instances of interpretive rewriting in the penal codes, each of which show no concern for the threats to the rule of law. Finally, I return to the issue of the rule texts' genre, and discuss their value for historical reconstruction.

I. THE LITERARY RELATIONSHIP AMONG THE RULE TEXTS AND THE PROBLEM OF THEIR GENRE

A. *Literary Relation between S, D, and 4Q265 and the Problem of Identifying Direction of Dependence*

If my goal in this chapter is to determine whether or not the interpretive rewriting of the penal codes was concerned with the threats to the rule of law, then I must be able to establish which text was doing the interpretive rewriting and which text was being interpreted. This, however, is no simple matter because the literary relationship among the rule texts is complex, and because the historical relationship among their underlying communities is complex.

There are the two main rule traditions from Qumran, each of which contain penal codes.⁴ First, there is the tradition that is reflected in 1QS, a well preserved scroll discovered in Cave One. This tradition is also found in ten fragmentary scrolls from Cave Four and two additional manuscripts from caves five and eleven.⁵ Together the texts from this tradition are

⁴ They are found primarily in 1QS 6:24–7:25; 4QS^e fragment 1 4–15, 2 3–8; 4QS^s fragment 3 2–4, 4a–b 1–7, 5a–c 1–9, 6a–e 1–5; CD 14:18–22; 4QD^a fragment 10 i–ii, 4QD^e fragment 7 i, and 4Q265 fragment 4 i:2–ii:2. Small bits and pieces of penal codes are also found in 4QS^d, 4QD^b, 4QD^d, and 11Q29.

⁵ For an overview of the manuscripts see Metso, *The Serekh Texts*, 1–6.

known as ‘S’ texts, because of the frequent use of the term *serekh* (סרך).⁶ The S community typically referred to themselves as the *Yahad* (יחד),⁷ and it appears that they were a celibate, monastic, and esoteric group,⁸ which was likely composed of numerous branches settled throughout Palestine, including Khirbet Qumran, though they likely were in some manner withdrawn from Judean life.⁹

The second tradition among the rule texts is reflected in the Damascus Document, which is best preserved in two manuscripts from the Cairo Geniza, CD A and CD B. Eight fragmentary editions of this text have been recovered from cave four and two additional manuscripts from caves five and six.¹⁰ This family of texts is typically referred to as ‘D’ texts, because they depict an exiled community that established themselves in Damascus.¹¹ These texts likely reflect an Essene community that was integrated into Judean life and

⁶ While most scholars translate this term as ‘rule,’ Chad Stauber has recently argued persuasively that *serekh* refers more broadly to what he calls ‘disposition,’ which is any type of “arranging and laying out.” See Chad Martin Stauber, “Prophetic Scribalism: A Semantic, Textual and Hypertextual Study of the *Serek* Texts” (Ph.D. Dissertation, University of Toronto, 2013), 14–15.

⁷ For the significance of this term see John J. Collins, *Beyond the Qumran Community: The Sectarian Movement of the Dead Sea Scrolls* (Grand Rapids: Eerdmans, 2010), 54–55.

⁸ The question of whether or not the *Yahad* were celibate has received much attention. On the one hand, the S texts seem to avoid any mention of family life. For example, as I demonstrate below, the penal code in 1QS omits the final two laws from D’s penal code, which prohibit fornication with one’s wife, and speaking against fathers. On the other hand, it is odd that amidst all the laws in S, there is no command to abstain from sexual activity. For a more complete account of the debate see Eyal Regev, *Sectarianism in Qumran: A Cross-Cultural Perspective* (Religion and Society 45; Berlin: Walter de Gruyter, 2007), 252–53; and Joan E. Taylor, “Women, Children, and Celibate Men in the *Serekh* Texts,” *HTR* 104 (2011):171–90.

⁹ There has been a shift in thinking in scrolls scholarship. It was once assumed that the *Yahad* was a small isolated monastic sect that withdrew from Jerusalem to live in the desert settlement at Khirbet Qumran. However, most scholars now believe that the *Yahad* was comprised of numerous groups that were spread out across Palestine. See, for example, the recent monographs by Alison Schofield, *From Qumran to the Yahad: A New Paradigm of Textual Development for The Community Rule* (STDJ 77; Boston: Brill, 2009); and Collins, *Sectarian Movement of the Dead Sea Scrolls*, 52–87. For a critique of the original assumptions about Qumran see Devorah Dimant, *History, Ideology and Bible Interpretation in the Dead Sea Scrolls: Collected Studies* (FAT 90; Tübingen: Mohr Siebeck, 2014), 7–12.

¹⁰ For an overview of the manuscripts see Charlotte Hempel, *The Laws of the Damascus Document: Sources, Tradition, and Redaction* (STDJ 29; Leiden: Brill, 1998), 1–3; and Hempel, *The Damascus Texts*, 19–24.

¹¹ For example, CD 6:4–5 states “The Well is the Law, and those who dug it were the converts of Israel who went out of the land of Judah to sojourn in the land of Damascus” (ישראל שבי הם וחופריה התורה היא הבאר) (דמשק בארץ ויגורו יהודה מארץ היוצאים). For the significance of the term in CD see Hempel, *The Damascus Texts*, 58–60.

spread across Palestine in groups called ‘camps’ (מחנות).¹² Unlike the S community, D depicts a non-celibate family setting, and unlike S, D contains sections of *halakhah* that addresses the nation of Israel, not just a withdrawn sectarian community.¹³ Furthermore, D’s designation for themselves is ‘congregation’ (עדה), rather than *Yahad*.¹⁴

There is extensive debate over the nature, origin, and interrelation of the S and D communities, which cannot be discussed here.¹⁵ The only point necessary for this study is the question of literary dependence between them, since I examine the interpretive rewriting of the penal codes between D and S (and within S). I assume that the D tradition generally precedes the S tradition.¹⁶ Although there are arguments to the contrary,¹⁷ it seems reasonable to conclude that D reflects a branch of Judaism that was fully integrated in Judean life that had not gone so far as to withdraw from society.¹⁸ This cannot be said of S, which deals almost exclusively with matters specific to their group and restricts contact with outsiders.¹⁹ Since there was extensive contact between the S and D communities (as I

¹² For a description of the camps see Regev, *Sectarianism in Qumran*, 166–69.

¹³ See note 9 above.

¹⁴ See Yonder Moynihan Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls: A Comparative Study of the Covenanters’ Sect and Contemporary Voluntary Associations in Political Context* (STDJ 97; Leiden: Brill, 2012), 9n16.

¹⁵ Two important issues in this discussion are the relation of the S and D communities to the Essenes, as depicted in classical sources, and their relation to Khirbet Qumran. For a history of research see the collection of essays in Devorah Dimant and Ingo Kottsieper eds., *The Dead Sea Scrolls in Scholarly Perspective: A History of Research* (STDJ 99; Leiden: Brill, 2012). For another recent collection of essays that discusses Qumran and the Essenes see Joan E. Taylor ed. *The Essenes, the Scrolls, and the Dead Sea* (Oxford: Oxford University Press, 2012).

¹⁶ Hultgren, for example, argues that D’s roots reach as far back as the biblical period. S, in turn, grew out of D through dissatisfaction with the temple. See Stephen Hultgren, *From the Damascus Covenant to the Covenant of the Community: Literary, Historical, and Theological Studies in the Dead Sea Scrolls* (STDJ 66; Leiden: Brill, 2007).

¹⁷ See, for example, Eyal Regev, “The *Yahad* and the Damascus Covenant: Structure, Organization and Relationship,” *RevQ* 21 (2003):233–62.

¹⁸ Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls*, 12–13.

¹⁹ S never mentions Gentiles. Furthermore, 1QS 5:10–20, which describes the men of injustice (אנשי העויל, 5:10), seems to have non-sectarian Jews in mind, from whom they are to separate (להבדיל). See Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls*, 13; and Gudrun Holtz, “Inclusivism at Qumran,” *DSD* 16 (2009):22–54. Although Holtz argues that some Qumran texts attest to inclusivism, he maintains the separatist character of 1QS.

demonstrate with the penal codes below and by the fact that they were found in the same cave), it seems reasonable to conclude that S attests to a community within the broader D tradition that, as Collins states, “aspired to a higher degree of holiness.”²⁰

Finally, one additional rule text that further complicates any attempt to identify the literary relationship between S and D is 4Q265, which also contains a penal code. Unfortunately, due to its poor state of preservation, it is difficult to draw any conclusions about its underlying community, or about its relationship to S and D. On the one hand, it attests to S-like features. For example, as argued by Hultgren, 4Q265 4 ii 3–8 appears to describe the initiation rites for entrance into the *Yahad*.²¹ On the other hand, it contains D-like *halakhic* sections, such as a list of Sabbath prohibitions (4Q265 6 1–7).²² Furthermore, as Hempel argues, 4Q265 cannot simply be considered either S or D since it contains unique features of its own that are neither S nor D. For example, concerning its penal code, she writes: “Although 4Q265 is only fragmentarily preserved, it is clear that it contains a tradition-historically independent version of the penal code from those preserved in S and D.”²³ Therefore, not only is it difficult to determine the literary/social relationship between S and D, this relationship is further complicated by the S and D features of 4Q265.

Given the complex dynamics between these rule traditions, it is much more difficult to distinguish between the text being interpreted and the text doing the interpretive rewriting than, for example, was the case with Temple Scroll and the Samaritan Pentateuch in chapters four and five. I will therefore treat the various versions of the penal codes as textual critics

²⁰ Collins, *Sectarian Movement of the Dead Sea Scrolls*, 6, 52–79.

²¹ Hultgren, *Damascus Covenant*, 241–42.

²² Hempel, *The Damascus Texts*, 96–98. See also Florentino García Martínez, “The History of the Qumran Community in the Light of Recently Available Texts,” in *Qumranica Minora I: Qumran Origins and Apocalypticism* (ed. Eibert J. C. Tigchelaar; STDJ 63; Leiden: Brill, 2007), 86–87.

²³ Hempel, *The Damascus Texts*, 94.

treat textual witnesses: I will evaluate each difference to determine the direction of dependence. While some of my conclusions on the direction of dependence may be debatable, my main argument still stands. If one takes a contrary position on the direction of dependence, in all cases it still illustrates a lack of attention to the threats to the rule of law.

B. *The Genre of the Rule Texts*

One further issue on the rule texts that scholars discuss, which is particularly relevant to this study, is their genre. While many scholars assume that the rule texts functioned as law (see below),²⁴ I argue that they were not written as legally binding texts. Instead I argue that they held epistemic rather than practical authority. Furthermore, Bernard Jackson's narrative account of Mesopotamian and biblical law also provides a helpful perspective in reading them.

On the one hand, many scholars assume, or even explicitly argue, that the rule texts functioned as law, possessing legal authority.²⁵ For example, while noting a difference in punishments between 1QS and 4QS^e (which I discuss further below), Alison Schofield writes: “[W]e must note that the two punishments are incompatible and speak against the possibility that both texts were simultaneously in effect in the same community.” Elsewhere she writes: “[I]t would be hard to argue that both edicts [1QS and 4QS^es) were in effect at

²⁴ For example, VanderKam refers to both S and D as “constitutional” texts for the two communities. See James C. VanderKam, *The Dead Sea Scrolls and the Bible* (Grand Rapids: Eerdmans, 2011), 123. Similarly, von Weissenberg states: “Qumranic legal texts such as the Community Rule would have been authoritative in as much as they were normative laws, constituting legally binding norms for their community. Their authority would have functioned on the level of practical, daily life.” See Weissenberg, “Defining Authority,” 190.

²⁵ See for example, Eyal Regev, “Between Two Sects: Differentiating the *Yahad* and the Damascus Covenant,” in *The Dead Sea Scrolls: Texts and Context* (ed. Charlotte Hempel; STDJ 90; Leiden: Brill, 2010), 439–42; and Schofield, *Textual Development for The Community Rule*, 183–88.

the same time.”²⁶ Similarly, while noting two conflicting laws within 1QS, E. P. Sanders writes:

It is impossible for both rules to apply to the same group at the same time. . . . For both *halakot* to make sense, they must have been taken to refer to different categories of members. Theological disparities can be accommodated, but the *halakah* on a given point cannot be two different things at once. . . . The key to this analysis, it must be emphasized, is the assumption that 1QS must have made sense as a document which governed behaviour and penalties for transgression.²⁷

Schofield’s assertion that two conflicting laws cannot simultaneously be “in effect,” and Sanders’ assertion that they cannot “apply to the same group” reveal these scholars’ rule-of-law assumption about the rule texts. The consistency requirement of the rule of law (along with all of its other requirements) is intuitive because the rule of law is the legal ideal that undergirds virtually all of the modern world’s legal systems.²⁸ Of course a legal text cannot tolerate conflict! It is only natural to conclude that conflicting laws must refer to distinct groups.

As I have argued in the Introduction (sec. III), it is anachronistic to impute this assumption to ancient texts. It implies that the community judges felt obligated to comply with the law based on its mere say-so, and were not free to exercise discretion and stray from the words of the law. I suggest rather that they were free to rely on their balance of reason to render a verdict, and were, in all likelihood, unconstrained by the specific words of the law. While the penal codes certainly were meant to have a normative impact upon the community, they were neither written as nor treated as binding norms that demanded strict compliance based on their mere say-so.

²⁶ See Schofield, *Textual Development for The Community Rule*, 115–18.

²⁷ E. P. Sanders, *Paul and Palestinian Judaism: A Comparison of Patterns of Religion* (Philadelphia: Fortress, 1977), 325.

²⁸ See Chapter one n22.

What is at stake in this debate over the rule texts' genre is their value as a source for historical reconstruction. If it is assumed that they functioned as law, then it is possible to reconstruct multiple communities behind the rule texts. For example, Schofield uses the conflicting laws within the S texts to reconstruct multiple contemporary *Yahad* communities that each had their own version of S, a position followed by Yonder Gillihan.²⁹ Alternatively, Sanders argued that the conflicting laws in 1QS's penal codes reflect two different segments within the community. Earlier scholars argue that the conflicting norms reflect different stages of a single community's development.³⁰ What is common to all these reconstructions is their rule-of-law assumption about the penal codes, particularly the consistency requirement.

The main scholar who questions the assumption that the rule texts functioned as law is Sarianna Metso. While examining judicial meetings recorded in 1QS, she writes, "[W]hat catches my attention in these passages is the total lack of reference to any written text. The

²⁹ Schofield, *Textual Development for The Community Rule*, 188–90. She is followed by Gillihan. He writes: "I will take 1QS as the normative rule for the *Yahad*, even if some of the *Yahad*'s cells were governed by other recensions such as 4QS^{b,d} and 4QS^e." See Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls*, 9. Elsewhere he states: "[T]he Penal Code appears to have been organized carefully so that rules could be consulted, discussed and applied quickly in juridical and scholastic contexts" (387).

³⁰ See, for example, Jerome Murphy-O'Connor, "La genèse littéraire de la règle de la communauté," *RB* 76 (1969): 528–49. He argues that punishments became more lenient as the community progressed. Alternatively see C. H. Hunzinger, "Beobachtungen zur Entwicklung der Disziplinarordnung der Gemeinde von Qumran," in *Qumran-Probleme: Vorträge des Leipziger Symposiums über Qumran-Probleme vom 9. bis 14. Oktober 1961* (ed. Hans Bardtke; Berlin: Akademie-Verlag, 1963), 231–47. He argues that the legal provisions progressed from simple to complex. These evolutionary explanations (severe to lenient or simple to complex) have become difficult to maintain since the publication of the cave 4 manuscripts of the *Serekh* texts, in which lenient and severe punishments occur in both earlier and later copies of the text. Since then, scholars such as Baumgarten and Metso argue that although the differing punishments reflect different times in the community's development, it is impossible to identify the nature of that development on the basis of the punishments. See Joseph M. Baumgarten, "The Cave 4 Versions of the Qumran Penal Code," *JSJ* 43 (1992): 268–76; Sarianna Metso, "The Textual Traditions of the Qumran Community Rule," in *Legal Texts and Legal Issues. Proceedings of the Second Meeting of the International Organization for Qumran Studies, Cambridge 1995* (ed. Moshe J. Bernstein et al.; Leiden: Brill, 1997), 141–47; Sarianna Metso, "In Search of the *Sitz im Leben* of the Community Rule," in *Provo International Conference on the Dead Sea Scrolls* (ed. Donald J. Parry and Eugene Ulrich; Leiden: Brill, 1999), 310; and García Martínez, "Qumran Community in the Light of Recently Available Texts," 87–88.

authority for decision making is granted not to any book but rather to the *rabbîm* . . . members of the camps . . . or to the sons of Aaron.” She goes on to write, “[T]he suggestion is reasonable that in the community’s court proceedings, the leading authorities perhaps did not resort to written regulations, but rather were guided by oral tradition.” Therefore, the Community Rule was likely not a “lawbook in the modern sense.”³¹ Furthermore, Metso has also suggested that IQS should not be considered as law because of its conflicting norms,³² and because its legal sections are set alongside non-legal material. Rather, they were didactic texts used to educate new members.³³ In other words, they possessed epistemic authority, rather than practical authority. The results of my analysis below correspond with Metso’s position.

II. INTERPRETIVE REWRITING IN THE PENAL CODES

A. *Literary Dependence Among the Penal Codes*

Before analyzing the differences among the penal codes, it is helpful to first note their extensive commonalities in order to establish the extent of literary dependence among them. The dependence is most obvious from the offenses. Unfortunately, due to the poor state of

³¹ See Metso, *The Serekh Texts*, 61–70 esp. 66, 68–69; Metso, “Methodological Problems,” 332–33; Metso, “*Sitz im Leben* of the Community Rule,” 306–15.

³² See Metso, “Organizational Chart of the Essenes,” 388–91, esp. 391. See also Philip R. Davies, “Redaction and Sectarianism in the Qumran Scrolls,” in *The Scriptures and the Scrolls: Studies in Honour of A.S. van der Woude on the Occasion of his 65th Birthday* (ed. A. S. van der Woude et al.; Leiden: Brill, 1992), 157–60. He came to the same conclusion as well, without drawing from biblical and cuneiform law. For another approach to the rule texts that sees them not as documents for legal application but for ritual performance see Steven D. Fraade, “Ancient Jewish Law and Narrative in Comparative Perspective: The *Damascus Document* and the Mishnah,” in *Legal Fictions: Studies of Law and Narrative in the Discursive Worlds of Ancient Jewish Sectarians and Sages* (ed. Steven D. Fraade; JSJSup 147; Leiden: Brill, 2011), 227–54.

³³ See Metso, “Organizational Chart of the Essenes,” 388–415, esp. 391. Of course, one could argue that the penal codes were originally independent texts for judicial reference, but the very fact that they could be set alongside non-legal material in a single document suggests there was a fundamental generic difference between binding law and the rule texts. Similar arguments have been made regarding the Laws of Hammurabi, which were encased in royal propaganda (see Finkelstein, “Ammissaduqa’s Edict,” 103–04).

preservation of 4Q265, there are only two clear parallels between all three traditions. I highlight the prohibition against false accusations:³⁴

את רעהו בדעהא . . . והאיש אשר יצחה בלו משפט 1QS 7:4

שלו בעצה . . . [ואש] יצח[ה] את רעהו 4QD^a f10 ii:2

ואיש אשׁר יצח[ה] את רעהו . . . 4Q265 f4 i:8

1QS 7:4 And the man who knowingly insults his peer without judgment . . .

4QD^a f10 ii:2 And whoever [ins]ults his peer . . .

4Q265 f4 i:8 And the man who in[sults his peer . . .

The verbal and lexical parallels in this small sample make it clear that there is, at a minimum, an indirect relation among the penal codes in the three rule traditions, if not a direct literary relationship.

This relationship is most obvious between 1QS and the 4QD manuscripts, both in the lexical parallels, and with the order in which they are listed:³⁸

³⁴ The other parallel law is the prohibition against sleeping in a meeting of the *rabbîm* (1QS 7:10; 4QD^a f10 ii:5; and 4Q265 f4 ii:1).

³⁵ There is no division between the words בלי משפט in the scroll. There is also debate of the *waw/yod* (בלו or בלי). I follow Qimron, *The Hebrew Writings*, 1:222.

³⁶ There is no space between the words אתרעהו. See Joseph M. Baumgarten, et al., "The Damascus Document," in *The Dead Sea scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 3: Damascus Document II, Some Works of the Torah, and Related Documents* (ed. James H. Charlesworth; Tübingen: Mohr Siebeck, 1994), 64n503.

³⁷ Transcriptions of 4Q265 material throughout this chapter follows Joseph M. Baumgarten and L. Novakovic, "Miscellaneous Rules (4Q265)," in *The Dead Sea scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 3: Damascus Document II, Some Works of the Torah, and Related Documents* (ed. James H. Charlesworth; Tübingen: Mohr Siebeck, 1994), 258.

³⁸ I place only the relevant text from each passage to facilitate comparison. The text on the scrolls is not arranged in this way.

1QS 7:9–11³⁹

ואשר ידבר בפיהו דבר נבל . . .
 ולמדבר בתוכ דברי רעהו . . .
 ואשר ישכוב וישן במושב הרבים . . .

וכן לאיש הנפטר במושב הרבים אשר
 לוא בעצה וחנם עד שלוש פעמים על מושב אחד
 . . .

And whoever speaks with his mouth a
 foolish word . . .
 And for the one who interrupts his peer
 . . .
 And whoever lies down and sleeps in
 the meeting of the *rabbîm* . . .
 And likewise for the man who leaves
 the meeting of the *rabbîm* without
 permission or reason up to three times
 in one meeting . . .

4QD^a f10 ii:3–8⁴⁰

ואשר ידבר בפיהו [ו] דבר נבל . . .
 בתוך דב[רי רעהו ו] פרע . . .⁴¹ ואשר י[דבר
]ואשר ישכ[ב] [ו]ישן ב[מו]ש[ב] הרבים . . .⁴²
 וכן לאיש הנפ[טר] [אשר] ל[ו] בעצת
 עד שלוש פע[מים על מושב] ה[ר]ב[ים] [ו]ח[נם]
 . . .⁴⁴

And whoever speaks with [his] mouth a
 foolish word . . .
 And whoever in]terrup[ts his peer and]
 disturbs . . .
 And whoever li]es down [and] sleeps in the
 m[ee]ting of the *ra[bb]îm* . . .
 And likewise for the man who lea]ves
 [with]out the permission of the *ra[bb]îm* or
 reason ^{up to} three ti[mes in] one [meeting] . . .

Aside from a few minor differences, these are almost duplicate copies of the same penal code. What is more, other than two additional laws in 1QS (spitting in a meeting and grumbling against the community),⁴⁵ each penal code proceeds with this same degree of agreement in lexica and order for the next ten offenses; the fragmentary 4QD manuscripts

³⁹ Transcriptions of 1QS throughout this chapter follow Elisha Qimron and James H. Charlesworth, “Rule of the Community,” in *The Dead Sea scrolls: Hebrew, Aramaic, and Greek Texts with English Translations. Vol. 1: The Rule of the Community and Related Documents* (ed. James H. Charlesworth; Tübingen: Mohr Siebeck, 1994), 30.

⁴⁰ Transcriptions of 4QD material in this chapter follows Baumgarten et al., “Damascus Document,” 64–65. In a number of instances I will note differences with Qimron, *The Hebrew Writings*.

⁴¹ For this reconstruction see Baumgarten et al., “Damascus Document II,” 64n508.

⁴² For this reconstruction see Baumgarten et al., “Damascus Document II,” 64n511–12.

⁴³ Although Baumgarten et al. and Qimron (*The Hebrew Writings*, 1:55) have ה here (reconstructed to והנב), given the parallel text in 1QS and the state of the fragment, it seems much more likely to reconstruct a ה (והנב). Hempel appears to support this reconstruction. See Charlotte Hempel, “The Penal Code Reconsidered,” in *Legal Texts and Legal Issues. Proceedings of the Second Meeting of the International Organization for Qumran Studies, Cambridge 1995. Published in Honour of Joseph M. Baumgarten* (ed. Moshe J. Bernstein et al.; Boston: Brill, 1997), 340.

⁴⁴ For this reconstruction see Baumgarten et al., “Damascus Document II,” 514–16.

⁴⁵ 1QS 7:13 and 7:17 respectively.

agree with 12 full lines from 1QS, likely more. It is undeniable that there was some sort of interpretive rewriting going on among the S, D, and 4Q265 penal codes.⁴⁶

B. Interpretive Changes in the Penal Codes

It is beyond the scope of this study to catalogue every difference between the penal codes and speculate on the reasons for the changes. I highlight six changes that have been identified in past studies. What is important to note about these changes is that they pay no attention to the threats to the rule of law.

i. EXCLUSION AND FINES IN D AND S

The first difference between the S and D penal codes that has often been noted concerns the use of their punishment terms. Although they each use the verb ענש in the *niphal* (to be fined) and the verb בדל (to be excluded) as penalties, there are notable differences between them. First, it is difficult to determine what punishment is meant by ענש. Of the 32 offenses listed in 1QS, exclusion is prescribed as a punishment for only six offenses,⁴⁷ and only three of those six offenses actually specify the length of the exclusion;⁴⁸ the other three simply prescribe exclusion and say nothing about their duration.⁴⁹

⁴⁶ Hempel and Metso frequently refer to the penal codes as hard evidence for a relationship between the S and D communities. See Charlotte Hempel, *The Qumran Rule Texts in Context: Collected Studies* (TSAJ 154; Tübingen: Mohr Siebeck, 2013), 44. She writes: “The presence of the penal code material in 4QD that parallels 1QS 6:24–7:25 is of paramount importance for the question of the relationship between both documents.” See also Sarianna Metso, “The Relationship between the Damascus Document and the Community Rule,” in *The Damascus Document: A Centennial of Discovery: Proceedings of the Third International Symposium of the Orion Center for the Study of the Dead Sea Scrolls and Associated Literature* (ed.; Leiden: Brill, 2000), 87–90.

⁴⁷ It is prescribed for 1) lying about property; 2) angry speech to a peer; 3) blasphemy; 4) angry speech to a priest; 5) false accusation; and 6) slandering a peer. It should be noted, however, that four additional laws prescribe permanent expulsion without using the term בדל: 1) slandering the *Yahad*; 2) grumbling against the *Yahad*; 3) backsliding after ten-year membership; 4) assisting a backslider.

⁴⁸ Lying about property prescribes one-year exclusion; blasphemy requires permanent expulsion; slandering a peer one-year exclusion.

⁴⁹ Angry speech against a peer, angry speech against a priest, and false accusation simply prescribe ‘exclusion,’ without any mention of its duration.

In the D penal codes, however, of the nine offenses that correspond with S and have preserved penalties,⁵⁰ only one of them prescribes a single עונש punishment,⁵¹ the other eight have double punishments. An additional four offenses have single penalties, but the nature of the penalty is not preserved (either עונש or בדל), and one offense has preserved בדל,⁵² but it is not certain whether or not there is a second penalty.⁵³ What is most curious is that, of the eight double-penalty offenses and one single penalty offense in D that correspond to S, the duration of six of the exclusions match the duration of 1QS's fine. This is evident in the following chart:

Offence	S Text's Penalty	D Text's Penalties
False accusation	Fine: 1 year	Exclusion: 1 year Fine: 6 months
Foolish talk	Fine: 3 months	Exclusion: 3 months Fine: 20 days
Falling asleep in a meeting	Fine: 30 days	Exclusion: 30 days Punished 10 days
Public nudity	Fine: 6 months	Separated 6 months [Punished ?]
Exposing oneself	Fine: 30 days	Exclusion: 30 days Fine: 10 days
Laughing out loud	Fine: 30 days	Exclusion: 30 days Fine [10] days?

⁵⁰ These are: 1) lying about property; 2) false accusation; 3) foolish talk; 4) sleeping in a meeting; 5) exposing oneself; 6) laughing out loud; 7) gesticulation; 8) slandering a peer; and 9) rebelling against the community.

⁵¹ The only D offense that specifies one penalty that is preserved is gesticulation, which calls for a fine (though the duration is not preserved). In the other eight offenses, although the penalty is not always preserved, they can be reconstructed with a high degree of confidence.

⁵² These are: 1) interrupting a peer; 2) leaving a meeting without permission; 3) leaving a meeting while they are standing; 4) grumbling against a peer. Each of these likely only contain one penalty given the spacing of the fragments.

⁵³ For the offense of public nudity, a penalty of six month's exclusion is prescribed in 4QD^a, but there may be space in the lacuna for a second penalty; it is uncertain.

This shows that in every case in which D's double punishment is preserved, the duration of its exclusion matches the duration of the fine in 1QS.⁵⁴

It is difficult to explain this phenomenon. If S and D both prescribe ענש and בדל as punishments, then why do their durations not align? That is, if S was creatively rewriting D, then why would the scribe not simply copy its ענש penalties? It is tempting to explain this in light of their different social settings. In D, the בדל penalty is always longer in duration than the ענש. If we assume that ענש refers to a reduction in food, then such a penalty would be much harsher for the members of an S community. If the D members had their own homes and families, then they would not depend on communal meals to survive; thus a reduction in food would be a fairly minor punishment for D members, while an exclusion from the pure meal would feel harsher. In S, however (along with the community behind 4Q265), a reduction in food would be harsher than exclusion from the pure meal. According to this reasoning, the S scribe sought to apply the longer duration of בדל from D to what would have been the more severe punishment of ענש in S. By contrast, it is possible to argue that the S scribe may have been dissatisfied with the differing durations of בדל and ענש in D. To address this problem, the S scribe simply chose the longer of the two penalties from D, and he may have further sought to simply avoid ענש as a punishment for most offenses; it only occurs in six of S's 32 laws, with no specified duration in three of its six occurrences.⁵⁵

In the end, whatever the reason for this correspondence between the ענש in S and the בדל in D, what is most important to note is that there was in fact some sort of interpretive rewriting going on, even if it is not possible to fully explain why the scribes did what they

⁵⁴ Metso notes, "[I]n every case the length of the exclusion in 4QD corresponds to the length of the fine in 1QS." See Metso, *The Serekh Texts*, 35.

⁵⁵ Gillihan makes a strong case that the penalty durations for בדל in S always match those of ענש. See Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls*, 384–85.

did, or which text was being interpreted and which was doing the interpreting. What I am most interested in pointing out is that all these complex changes to the penal codes—whatever the direction of dependence—pay no attention to the plethora of threats to the rule of law in the penal codes, such as vagueness or under-inclusiveness. For example, the offense of false accusation is over-inclusive. It prescribes the same punishment for an accusation concerning stolen sandals as an accusation concerning murder. Similarly, the offense of foolish talk is vague, since there are many borderline cases in which it is unclear whether or not a given subject is ‘foolish.’ The interpretive changes made by the scribes pay no attention to these problems. Rather, they focus on the punishment durations, which say nothing about the threats to the rule of law.

The duration of the penalties only speaks to the seriousness of the offense: the harsher the offense the harsher the penalty and *vice versa*. Such a change pays no attention to what does or does not constitute an offense, which is where the threats to the rule of law are most evident.

ii. CHANGING THE FOOD REDUCTION IN 4Q265

A second interpretive change among the penal codes that is evident in 4Q265 is the fact that its וַיִּנְחֵם punishment prescribes a reduction in half of an offender’s food rations. This stands in contrast to 1QS, which prescribes a quarter reduction in food. This again only speaks to the seriousness of the offense and leaves all the threats to the rule of law intact.

iii. THE *RABBĪM* IN D

The third interpretive change in the penal codes that I want to highlight supports the above suggestion that D was updated by the S community. In her 1997 article, Hempel draws

attention to the fact that in one of the laws shared between 1QS and D, the D version contains the term ‘the *rabbîm*,’ while the S version does not.⁵⁶

1QS 7:10–11

וכן לאיש הנפטר במושב הרבים אשר לוא בעצה וחנם

And likewise for the man who leaves the meeting of the *rabbîm* without permission or reason

4QD^a f10 ii:6–8

[וכן לאיש הנפטר [אשר] לֹו בעצת הר[ב]י[ם] ו[ה]נ[ם]

And likewise for the man who lea]ves [with]out the permission of the *ra[bb]i[m]* or reason

According to Hempel, the reference to the *rabbîm* in D was added by an S redactor. The most common self-designation in D is עדה, while the most common term in S is הרבים.⁵⁷ This leads Hempel to argue that 1QS 7:10–11 preserves the earlier form of this law, and 4QD^a reflects a later ideological change in the direction of S.

If this explanation is correct, then it is another example of an interpretive change made within the transmission of the rule text penal codes that is *not* motivated by the threats to the rule of law. For example, if this law were to be treated as a preemptive reason for action, then it would have to specify what “אשר לוא בעצה וחנם” (without counsel or permission) means: is there a means of obtaining permission?; what qualifies as permission?; who gives this permission? Such questions address a practical gap that is necessary for following the rule. Unless that gap is bridged, the rule’s subjects will have to rely on their balance of reason rather than the law itself to decide how to comply with the law. Such a threat to the rule of law does not seem of concern to the scribe responsible for making this change. Rather than addressing a practical/legal issue with the law, the scribe was motivated

⁵⁶ See Hempel, “Penal Code Reconsidered,” 342–43; and Hempel, *Damascus Document*, 146–48.

⁵⁷ According to Hempel, הרבים occurs in 1QS 34 times, while only nine times in D texts. See Hempel, “The Penal Code Reconsidered,” 342–43.

by purely ideological considerations, intending to reinforce the identity of the S community.⁵⁸

iv. OMISSION OF LAWS MENTIONING WOMEN AND FAMILY IN S

A fourth change in the S and D penal codes that has received much attention is S's omission of three laws dealing with women and family that are found at the end of D's penal code: 1) fornication with one's wife; 2) grumbling against the fathers; 3) grumbling against the mothers. All three of these offenses are absent in 1QS, which instead ends with two laws dealing with a man who backslides after ten years of membership. For most scholars, the absence of laws dealing with women and family in S indicates that S reflects an all-male community, while D reflects a community whose members participate in family life. For example, Gillihan writes:

The most obvious difference [between the S and D penal codes] lies in the presence of prohibitions that involve women and family life, i.e., murmuring against the Mothers and fornication with one's wife in D. These may be attributed to the fact that D was written for sectarians who practiced regular family life.⁵⁹

This is the most likely explanation for the change; S sought to create a penal code suited to their form of communal life.

What is more, Hempel has noted that S may still have attempted to preserve D's law which prohibited grumbling against the fathers; there are notable parallels with S's law on murmuring against the foundation of the community:

1QS 7:17–18

והאיש אשר ילון על יסוד היחד ישלחחו ולוא ישוב ואמ על רעהו ילון
אשר לוא במשפט ונענש ששה חודשים

⁵⁸ This is very similar to Metso's explanation for the development of S, in which 1QS represents a later edition of S with a more advanced self-understanding of the community's identity. See Sarianna Metso, *The Textual Development of the Qumran Community Rule* (STDJ 21; New York: Brill, 1997), 143–50.

⁵⁹ Gillihan, *Civic Ideology, Organization, and Law in the Rule Scrolls*, 389.

- 4QD^e 7 i:13–14 [ואשר ילון] על האבות [ישלח] מן העדה ולא ישוב [ואם] על האמות
 ונענש עשר[ת] ימים⁶⁰
- 1QS 7:17–18 And a man who grumbles against the foundation of the community
shall be sent away and shall not return. But if he grumbles against
 his peer which is not by law, he shall be fined six months.
- 4QD^e 7 i:13–15 [And whoever grum]bles against the fathers [shall be sent away]
 from the congregation and shall not return. [But if he grumbles]
against the mothers then he shall be fined ten days.

Here it is evident that the S scribe retained the offense of ‘grumbling’ (לון) that he inherited from his received tradition. However, since laws referring to fathers, mothers, and wives were irrelevant to the celibate community, the S scribe changed the law to refer to the community, rather than its fathers.

The fact that the S scribe made this change clearly reveals that he viewed the D penal code as authoritative; it would have been easier to simply eliminate the laws. However, the fact that the interpretative changes pay no attention to the threats to the rule of law indicates that the penal code was not viewed as a *practical* authority. For example, the verb grumble (לון) is just as vague as the word ‘work’ in the Sabbath prohibition; there are countless borderline cases in which it is unclear whether or not the rule applies. If the scribe viewed this law as a practical authority, then he should have been bothered by such vagueness, just as the CD scribe was bothered by the vagueness of the Sabbath prohibition. In other words, if the law was considered a preemptive reason for action, then one of the first questions the scribe would address is: ‘what does it mean to grumble?’ The fact that the scribe was not

⁶⁰ For this reconstruction see Baumgarten et al., “Damascus Document,” 154n251. For an alternative reconstruction see Qimron, *The Hebrew Writings*, 1:56. He suggests the verb ירשע was used instead of לון. This would make the parallel with 1QS less clear.

bothered by such a practical question indicates that he did not view the law as a practical authority; it was more likely an epistemic authority.

In light of this, the changes made by the S scribe make perfect sense. If we adopt Jackson's narrative approach to biblical and Mesopotamian law, the protasis of each law would conjure up narrative images in the addressees' minds. Given the parallel with the Torah's story of grumbling in the wilderness, it seems likely that the penal code offense in D would evoke memory in its addressees of the Israelites grumbling against Moses (Exod 15:24; 16:2, 7; Num 14:2). Such an image would impact its audience's attitude toward the object of the grumbling; they would think: 'I don't want to be like the grumbling Israelites in the wilderness.'⁶¹ This would have an admonitory impact, such that they would be inclined to treat the community's fathers as the Israelites should have treated Moses. The S scribe, seeking to make this admonitory impact relevant to his community, changed the object of the grumbling from the fathers to the foundation of the community itself. Such an interpretive change would reinforce the authority of the community, rather than simply dictate which actions are or are not lawful. In other words, this interpretive change reveals that the S scribe treated D's penal code as an epistemic authority rather than a practical authority.

v. CHANGING PUNISHMENT DURATIONS AMONG S MANUSCRIPTS

The fifth change in the penal codes that is worth noting is the differing עונש punishment durations that are apparent between 1QS and 4QS^e. There are two such offenses:

⁶¹ This parallel is also noted by Alex P. Jassen, "The Rule of the Community," in *Outside the Bible: Ancient Jewish Writings Related to Scripture. Vol. 1* (ed. Louis H. Feldman, et al.; Philadelphia: JPS, 2013), 2951.

Offense	1QS penalty	4QS ^e penalty
Bearing a grudge	Fined one year (corrected from six months)	Fined six months
Exposing oneself	Fined 30 days	Fined 60 days

As noted above, Alison Schofield reconstructs multiple *Yahad* communities based on these differences. This is plausible only if these laws were meant to impose a preemptive reason for action upon its addressees, since only one punishment could be applied.

As noted above (sec. II.B.i), however, the length of the punishment only speaks to the seriousness of the offense; it is unrelated to the threats to the rule of law. For example, bearing a grudge (נטר) is a vague offense. In fact, it is difficult to think of any action that would constitute such an offense, unless the grudge-bearer's anger manifested itself in some way. This is likely why this law is connected to acts of vengeance (1QS 7:8–9).⁶² If this law was intended to provide a preemptive reason for action, then surely the vagueness of the offense would pose a greater problem than the duration of the penalty. If the scribe thought that the offense warranted a stiffer penalty, then he must have some specific type of offense in mind. Yet the vagueness of the offense renders it difficult to know why anyone would think that this offense should be treated more seriously than it is in the earlier manuscript (4QS^e);⁶³ the offense speaks to the addressees' internal disposition. This vagueness poses a significant challenge to this law's ability to provide a preemptive reason for action. Yet the

⁶² The verb נטר refers to carrying anger, as is explicitly stated in 1QS 10:20. The prohibition against grudge-bearing is immediately connected with acts of vengeance: “ואשר יטור לרעהו אשר לוא במשפט ונענש שנה אחת” (And whoever bears a grudge against his peer without justice shall be fined one year; and likewise for taking vengeance in any matter).

⁶³ I follow Metso's reconstruction of the history of the Community Rule; 4QS^e most likely precedes 1QS. See Metso, *The Textual Development of the Qumran Community Rule*, 105–06.

scribe chose to tamper with the fine duration and not with its ambiguity—it is so vague that it is almost unintelligible as law.⁶⁴

While it is difficult to know what the 1QS scribe had in mind when he opted for a stiffer punishment for grudge-bearing, we are on somewhat firmer ground with the offense of exposing oneself; here it is possible to conjecture why the scribe changed the punishment. This law in 1QS 7:13–14 is framed as follows: “ואשר יוציא ידו מתחת בגדו והוא פה ונראתה” (And a man who brings his hand from under his garment when he is clothed and his nakedness is seen, he shall be fined 30 days). This depicts a man who accidentally exposes himself when raising his hand, perhaps in a communal meeting. Schofield’s argument assumes that this is an either-or act: either one exposes himself or he doesn’t. If he does, then it is a fixed fine: the *Yahad* of 1QS prescribes a 30-day fine while the *Yahad* of 4QS^e prescribes 60 days.

It would be difficult, however, to argue that the communal judges were bound to apply the same punishment for every such act. This is because the law, as it stands, is over-inclusive. For example, one member may expose a tiny portion of his skin, catch his indiscretion, and cover himself immediately. Another member, however, may brazenly expose himself with flagrant disregard for the community’s sanctity. If 1QS and 4QS^e were meant to function as law, providing preemptive reasons for action, then the judges would be bound to apply one consistent penalty to all cases, depending on which manuscript governed their community, despite the law’s over-inclusiveness. It seems unlikely, however, that the law would function that way. Rather, the judges would rely on their balance of reason,

⁶⁴ By contrast, Jassen argues that this grudge-bearing is a legal offense (as opposed to a moral offense in literary parallels). He argues that it is governed by a system of official reproof. See Jassen, “Rule of the Community,” 2944–45.

prescribing a more severe penalty to the flagrant exhibitionist, and a lenient penalty for the member with the minor indiscretion.

Since the 1QS scribe who was responsible for this change paid no attention to the law's over-inclusiveness, but rather changed the penalty, it can be surmised that he was influenced by his experience of the practice of the law. If he viewed the law as a preemptive reason for action, then he would have been bothered by its over-inclusiveness. However, since the innovations to the law were focused on the penalty, it stands to reason that the scribe had an experience of the law in mind, one where he thought a member should receive a stiffer punishment than the law stated. Rather than addressing the law's over-inclusiveness—in which case he would change the offense to distinguish between the exhibitionist's act and the minor indiscretion—he instead merely changed the punishment; the law's over-inclusiveness was left intact.

vi. ADDING LEVELS OF EXCLUSION TO D'S TWO-YEAR PUNISHMENT

A sixth interpretive change is the addition of levels of exclusion in 1QS's rendering of D's two-year exclusion. In 4Q270, there is a law that specifies two years of separation for betraying the community and walking in the stubbornness of one's heart. The 1QS scribe added levels of exclusion to this punishment:

4Q270 7 [והאי] ש אשר תזוע [רוחו מיסוד היחד לבגוד באמת וללכת בשרירות לבו] ו
 i:8–10 [ו] הו [בדל שתי שנ] ים ונענש ששים [יום ובמלאות לו שנתים ימים ישאלו הרבים] ⁶⁵
 על דב [רו ואם יקרב] ויכתו [בוהו בתכוננו ואחר ישאל אל המשפט]

1QS והאי ש אשר תזוע רוחו מיסוד היחד לבגוד באמת וללכת בשרירות לבו אם ישוב
 7:18–21 ⁶⁸ ובשנית לוא יגע משקה ⁶⁷ לוא יגע בטהרת הרבים ⁶⁶ ונענש שתי שנים ברשונה

⁶⁵ My reconstruction here follows Qimron, *The Hebrew Writings*, 1:56.

⁶⁶ There is an erasure at this point in the text.

⁶⁷ At the beginning of the next line רבים has been erased.

⁶⁸ At this point בטהרת was erased and משקה is written above in the interlinear space.

הרבים ואחר כול אנשי היחד ישב ובמלואת לו שנתים ימים ישאלו הרבים על
דבריו ואם יקרבהו ונכתב בתכוננו ואחר ישאל אל המשפט

4Q270 7 [A ma]n whose [spirit] trembles [before the foundation of the
i:8–10 community, betraying the truth and he has walked in the
stubbornness of his heart, then] he shall be se[parated two years and
f]ined 60 [days. And when the two years are completed, the many
shall consider] his ca[se, and if he is admitted] he shall be inscr[ibed
in his rank and may then deliberate concerning the law.]

1QS A man whose spirit trembles before the foundation of the
7:18–21 community, betraying the truth and he has walked in the
stubbornness of his heart, then he shall be fined two years. During
the first year he shall not touch the pure meal of the many, and
during the second year he shall not touch the drink of the many.
And he shall sit below all the men of the Community. And when
the two years are completed, the many shall consider his case, and
if he is admitted he shall be inscribed in his rank and may then
deliberate concerning the law.

When the 1QS scribe interpretively composed his version of D's law, he added levels of exclusion to the two-year punishment. In the first year the offender is excluded from the pure meal of the community, and in the second year the offender is excluded from the pure drink. The laws in 1QS and D are otherwise basically the same.⁶⁹

Whatever his reason for this change, what I want to highlight is that, once again, he ignored the glaring problem of vagueness in the law. What does it mean to walk in the stubbornness of one's heart and betray the truth? What qualifies as a violation of that rule? This exhibits the same type of vagueness as the Sabbath prohibition noted in Chapter One, such that it is unclear whether a great many activities should be considered a violation of the law. The way this law is phrased, it cannot provide a preemptive reason for action; one must rely on his balance of reason to determine what he should or should not do.

⁶⁹ See Jassen, "Rule of the Community," 2952.

If the scribe had been bothered by this problem of vagueness, it stands to reason that he would have somehow addressed it. Instead, he expended his interpretive efforts adding a detail to the law that fails to bring any clarity whatsoever to the question of what it means to follow this law and what does or does not constitute a violation of the law. This again indicates that he did not consider his version of the penal code to be a practical authority for his community. Rather, the penal codes, and the rule texts more generally, served as an epistemic authority.

This change to the punishment in D, like the other interpretive changes, pays no attention to the threats to the rule of law. While more legal innovations among the penal codes could be examined, these examples are enough to demonstrate that the threats to the rule of law were of no significant concern to the scribes who interpretively rewrote the Qumran penal codes.

III. THE GENRE OF THE PENAL CODES AND HISTORICAL RECONSTRUCTION

A. *The Genre Question in the Qumran Rule Texts*

At this point it is worth returning to the genre question for the Qumran rule texts: If they were not law (in the modern sense), then what were they? I would suggest that the penal codes were read in communal gatherings with the goal of inculcating members with the community's values.⁷⁰ In this way they functioned as epistemic authorities, impacting members' decision-making by influencing their beliefs and attitudes. The notion that the penal codes were ritually performed is not new. Schiffman, for example, suggests that a reading of the penal code was connected with "the ceremony of initiation into the sect."⁷¹

⁷⁰ For a similar position for biblical law see Dale Patrick, "Studying Biblical Law as a Humanities," *Semeia* 45 (1989):27–47.

⁷¹ Schiffman, *Sectarian Law*, 156–57.

Similarly, Baumgarten suggests that the penal codes may have been “intended not merely for individual reference, but were to be recited at public gatherings.”⁷² More recently, Steven

Fraade has argued that the Damascus Document was more pedagogical than legal:

[T]he section of Laws [of D should] . . . be viewed in relation to, and not apart from, the larger structure and function of the Damascus Document, and that the Laws themselves functioned not just juridically, but also (if not mainly) pedagogically and liturgically, that is rhetorically and performatively, in a particular social setting. . . [W]hen the Damascus Document was read or studied, . . . it would have functioned as a reminder, even a reenactment, for its audience of their original entry and annual reconfirmation into the covenant.⁷³

This is part of Fraade’s argument that D as a whole functioned performatively, which for him denotes “how texts actively and transformatively engage their audiences in the process of conveying meaning and cultivating identity.”⁷⁴ I would push Fraade’s claim even further, to say that the penal codes (and the rule texts more generally) did not function “juridically” at all, but were entirely performative; if they were juridical, they would have been treated differently by their interpreters.

Furthermore, the manner in which the penal codes are arranged would have conveyed community values. As argued above, the severity of the penalties in the penal codes only speaks to the seriousness of the offense: the more serious the offense, the harsher the punishment, and vice versa. This is a universal and intuitive phenomenon with law that is built on the principle that like cases should be treated alike.⁷⁵ When two or more laws are set in juxtaposition, any differing punishments reveals the seriousness of the offense and the underlying values behind the law.

⁷² Joseph M. Baumgarten, “The Unwritten Law in the Pre-Rabbinic Period,” in *Studies in Qumran Law* (ed. Joseph M. Baumgarten; SJLA 24; Leiden: Brill, 1977), 15.

⁷³ Fraade, “Law and Narrative in Comparative Perspective,” 239–40.

⁷⁴ Fraade, “Law and Narrative in Comparative Perspective,” 230n5.

⁷⁵ Andrei Marmor, “Should Like Cases Be Treated Alike?,” *Legal Theory* 11 (2005):27–38.

This point can be demonstrated with three laws from 1QS 6:25–7:3, which are arranged in such a way as to convey the community’s underlying hierarchical social values:

	Offense	Penalty
1QS 6:25–27	Angry speech against an outranking member	One year fine/exclusion
1QS 6:27–7:2	Blasphemy	Permanent separation
1QS 7:2–3	Angry speech against a priest	One year fine/exclusion

The juxtaposing of these three laws conveys community ideology. Each of these three offenses deals with speech that threatens the hierarchical structure of the community. The middle law against blasphemy serves as the baseline; its violation poses the greatest threat to the community. By surrounding the blasphemy law with prohibitions against back-talk to members of higher rank, the relative seriousness of the offenses is conveyed, and, in turn, the community’s underlying values: while the deity is the ultimate authority, maintaining the community’s hierarchy is still of utmost importance. Similar juxtapositions can be found throughout 1QS’s penal code: neglecting a peer, for which the punishment is a three-month fine (7:5–6), is contrasted with neglecting communal property, which carries a 30 day fine (7:6–8); the one-year penalty for slander against a friend (7:15–16) is contrasted with permanent expulsion for the one who slanders the community (7:16–17); and the permanent expulsion for the one who grumbles against the community (7:17) is contrasted with the six-month fine for the one who grumbles against his peer (7:17–18). The effect of this series of juxtapositions is that they convey and reinforce the community’s values.

In a similar fashion, the series of laws on community gatherings and community living also has this ideology-conveying effect. 1QS 7:9–15 contains ten laws that deal with community etiquette:

- 1) foolish talk: three months
- 2) interrupting speech: ten days

- 3) sleeping in an assembly: three days
- 4) leaving the assembly while in session: ten days
- 5) leaving while the assembly is standing: thirty days
- 6) public nudity: six months
- 7) spitting in an assembly: thirty days
- 8) exposing oneself: thirty days
- 9) laughing out loud: thirty days
- 10) gesticulating: ten days

These laws are not similar enough to be considered a series of juxtapositions. However, such a compilation on community etiquette has the effect of inculcating communal values. Mary Douglas's observations on the laws of Leviticus provide a helpful corollary. She describes Leviticus by contrasting rationale modes of argument with "analogical ordering." She writes, "It [analogical ordering] is not based on dialectical principles, its arguments do not run on a linear, hierarchical model. It is based on analogical association . . . that involves the association of concrete experienceable items."⁷⁶ She goes on to apply this to Leviticus. I will provide an extensive quote:

Leviticus' literary style is correlative, it works through analogies. Instead of explaining why an instruction has been given, or even what it means, it adds another similar instruction, and another and another, thus producing its highly schematized effect. The series of analogies locate a particular instance in a context. They expand the meaning. Sometimes the analogies are hierarchized, one within another making inclusive sets, or sometimes they stand in opposed pairs or contrast sets. They serve in place of causal explanations. . . . Many law books proceed in this concentric, hierarchical way. In Leviticus the patterning of oppositions and inclusions is generally all the explaining that we are going to get. Instead of argument there is analogy.⁷⁷

I suggest that the series of laws on communal etiquette from 1QS 7:9–15 are arranged in this way. Instead of being meant for legislative application, they were composed as series of sets and oppositions framed in a series of "concrete and experienceable" situations, which,

⁷⁶ Mary Douglas, *Leviticus as Literature* (Oxford: Oxford University Press, 1999), 16.

⁷⁷ Douglas, *Leviticus*, 18.

according to Jackson's approach,⁷⁸ evoke narrative images within their addressees. The effect was that they convey the community's ideals in a way that linear discourse could not.

B. *Reconstructing Community History with the Penal Codes*

If the penal codes were not meant to delineate punishable offenses and tell the judges how to punish them, then some brief comment can be made on the value of the penal codes for historical reconstructions of the sect. On the one hand, it is intuitively obvious that the offenses in the penal codes must have reflected community life to some degree. As I argue in the case of the law against exposing oneself, the 1QS scribe may have increased the duration of the penalty based on his experience. Similarly, the laws on family were removed from S because they were irrelevant to the life of the community. Thus Schofield's comment that the penal codes give a "rare glimpse of the basics of daily life and community discipline behind the *Yahad* movement" is not without merit.⁷⁹ The offenses do indeed reveal much about the inner-workings of the community behind the text.⁸⁰ Therefore, the offenses in the penal codes can be used for historical reconstruction.

The penalties of the codes, on the other hand, are much less useful as a historical source; too many factors can affect the prescribed punishments in each code.⁸¹ Thus, the fact that 1QS prescribes one year for bearing a grudge while 4QS^e prescribes six months says

⁷⁸ See Chapter One sec. I.E.

⁷⁹ Schofield, *Development for The Community Rule*, 180.

⁸⁰ For other comments like Schofield's see Baumgarten, "The Cave 4 Versions of the Qumran Penal Code," 268; and Jutta Jokiranta, "Social Identity in the Qumran Movement: The Case of the Penal Code," in *Explaining Christian Origins and Early Judaism: Contributions from Cognitive and Social Science* (ed. Petri Luomanen et al.; BibInt 89; Leiden: Brill, 2007), 282–83.

⁸¹ Schofield suggests otherwise. She argues that the changes to the penalties "reflect a concern with keeping the law updated, thereby indicating that they had normative force." See Schofield, *Textual Development for The Community Rule*, 188. While her monograph has much to commend itself, she relies much too heavily on the differing punishments among the S penal codes, based entirely on the assumption that they were the source of judicial activity. As demonstrated above, such an assumption is entirely unwarranted.

nothing about the chronological development of the community,⁸² nor can it be used to distinguish geographically separated communities.⁸³ The penal codes simply did not reflect standardized practices which had to be adhered to by community adjudicators. Adjudicators in all likelihood maintained complete judicial discretion when rendering verdicts. A drafter of the written code could alter the punishments as he saw fit based on his experience of community practice, but the prescribed punishments were by no means binding upon judicial decision-making. Thus, a single community may not have sensed any incongruence in the co-existence of two penal codes that prescribed different punishments for the same offence.

IV. CONCLUSION

In this chapter I have suggested that, unlike the Temple Scroll and the Samaritan Pentateuch, the manner in which the Qumran penal codes were creatively rewritten pays no interpretive attention to the threats to the rule of law. This provides strong evidence that they were not treated as the source of binding obligation.

⁸² This has been a common explanation for the differences in the penalties. See, for example, Jean Pouilly, "L'évolution de la Législation Pénale dans la Communauté de Qumrân," *RB* 82 (1975):522–51; and Baumgarten, "The Cave 4 Versions of the Qumran Penal Code," 268–76.

⁸³ This explanation is prominent in Schofield, *Textual Development for The Community Rule*, 115–18; and Alison Schofield, "Rereading S: A New Model of Textual Development in Light of the Cave 4 *Serekh* Copies," *DSD* 15 (2008):109–13.

CHAPTER SEVEN: THE AUTHORITY OF THE TORAH IN THE EZRA-NEHEMIAH LEGAL NARRATIVES

The method used in this chapter will be different from the previous chapters. As stated in the Introduction, my textual analysis moves from clear cases in which a legal text is treated as a source of binding obligation to less clear cases. In my textual analyses of Temple Scroll, the Samaritan Pentateuch, and the Qumran penal codes my method was clear: the scribe responsible for an interpretation of a law views it as a source of binding obligation if and only if the interpretation pays significant attention to the threats to the rule of law. In this chapter I examine a series of legal narratives in Ezra-Nehemiah (EN) that depict Torah rule-following, particularly the institution of *Sukkot* in Neh 8:13–18, the intermarriage crisis of Ezra 9–10, and the wood offering of Neh 10:35. Despite the fact that the narratives do demonstrate a binding attitude toward the Torah held by the *Yehud* community, there is no explicit legal interpretation or interpretive rewriting of the Torah; thus my criteria for determining a binding attitude toward law is not applicable for the EN rule-following narratives.

It is possible, however, to draw some conclusions based on the lack of explicit legal interpretation in these texts, and to situate the *Yehud* community's use of the Torah within my overall approach to identifying the emergence of a binding attitude toward law in ancient sources. That is the goal of this chapter. The legal narratives of EN are important for understanding the development of legal thought because they attest to a time when a text (the Torah) was viewed as a legal/practical authority, yet its specific wording was not treated as such. The essence of my argument in this chapter is as follows: On the one hand, I show that the *Yehud* community viewed the Torah as providing preemptive reasons for action. There

should be no doubt on this point; the legal narratives of EN show the Torah to be a legally binding text. On the other hand, there is no evidence that *the text of the law* was treated as the source of binding obligation. As demonstrated in Chapter One, once a directive becomes law (becomes a practical authority) then its specific wording is of utmost importance.¹ When we look at how Ezra treated the Torah in EN, he was not noticeably constrained by its specific wording, at least not to the degree that we would expect for legally binding rules. Ezra seemed to be able to make the Torah say things it simply did not say. He felt no constraint to provide interpretive justification for his Torah declarations; in fact, it almost appears as if the words of the Torah did not constrain him at all when he declared ‘let us do x according to the Torah.’ The main goal of this chapter is to explain this phenomenon, and to situate it within my approach to identifying the emergence of a binding attitude toward law.

This chapter is divided into three sections. First, I deal with one historical-critical issue. Here I argue that Ezra’s Torah was sufficiently similar to the traditional Pentateuch to warrant a comparison between the Torah and the Torah-obedience narratives. In section II I establish that the Torah was viewed as a source of binding obligation in Persian *Yehud*. Finally, in Section III I argue that the practical authority of the Torah was mediated through qualified Torah experts; whatever they declared as Torah was treated as the Torah itself. In this way there was an interplay between epistemic authority and practical authority.

I. PRELIMINARY ISSUE: EZRA’S TORAH AND PENTATEUCHAL LAW

Before analyzing the depiction of the Torah’s authority in EN, it is necessary to first address two historical-critical questions. If my goal is to identify the legal thought that underlies the use of the Torah by the *Yehud* community in EN, then I must assume two

¹ See Chapter One sec. I.D.

things: 1) that the EN legal narrative reflects the legal thought of Achaemenid *Yehud*; 2) that Achaemenid *Yehud* possessed a version of the Pentateuch that contained legal content similar to the versions found among the Dead Sea scrolls and preserved in the Masoretic tradition.²

As for the first of these assumptions, most of my observations concern the Ezra Memoir (EM), which is generally accepted as a distinct source within EN. It is comprised of Ezra 7–10 and Neh 8–10.³ I will also make some comparisons with the Nehemiah Memoir (NM), which is roughly contemporary with EM, comprising Nehemiah 1–7; 11–13. While there is no doubt that these two sources themselves underwent editing,⁴ I will assume that they generally reflect the attitude toward law of the *Yehud* community of the fifth century B.C.E.,⁵ and that this attitude toward law was consistent all the way to the latest strata of EN (Ezra 1–6).⁶ However, if one were to date all the sources of EN (and the legal thought they reflect) into the Hellenistic period, then my analysis, while remaining intact, would apply to a later community; what is important is the legal thought that the sources reflect.

² I recognize that the books of the Torah existed in several different editions in the Second Temple period (4QP, 4QPaleoExod^m, Jubilees, Temple Scroll, Genesis Apocryphon, etc.). However, as noted by Bernstein, the laws have not been significantly changed among all versions other than Temple Scroll. See Bernstein, “The Treatment of Legal Material,” 24–49.

³ For the identification of these two sources and the history of research see Philip Yoo, “Ezra and the Second Wilderness: The Literary Development of Ezra 7–10 and Nehemiah 8–10” (Ph.D. dissertation, University of Oxford, 2014), 5–9.

⁴ For a recent history of research see Yoo, “Ezra and the Second Wilderness,” 4–16.

⁵ For example, although Juha Pakkala argues against any synchronic approach to EN (because it was edited and re-edited too many times), he does argue that the earliest layer of the Ezra Memoir “describes how a Torah scribe called Ezra came from Babylon to Jerusalem to reinstate the written Torah. The text implies that the people in Jerusalem had been living without the Torah. When Ezra read it, the people were shocked about its content but eventually celebrated its reinstatement.” See Juha Pakkala, *Ezra the Scribe: The Development of Ezra 7-10 and Nehemiah 8* (BZAW 347: Walter de Gruyter, 2004), 236–43, 292. Similarly, Yoo argues that the earliest layer of EM identifies Ezra as an expert Torah scribe. See Yoo, “Ezra and the Second Wilderness,” 134–48. Thus, if the earliest layer of the EM source depicts Ezra instituting the Torah, then it reflects a consistent attitude toward law all the way to the youngest source of EN (Ezra 1–6).

⁶ For the late date of Ezra 1–6, which is well accepted, see Joseph Blenkinsopp, *Ezra-Nehemiah: A Commentary* (OLT; Philadelphia: Westminster Press, 1988), 43–44; and H. G. M. Williamson, “The Composition of Ezra i-vi,” *JTS* 34 (1983):1–30.

As for the second assumption, earlier studies have argued that Ezra's Torah was something entirely different from the Pentateuch,⁷ or that it was just Deuteronomy.⁸ More recently, however, a number of scholars have identified references in EM to both Deuteronomic and Priestly texts, including Holiness material,⁹ which is the latest major stratum of the Pentateuch.¹⁰ Philip Yoo has also recently identified references to the earlier J and E Pentateuchal sources.¹¹ It can therefore be surmised that Ezra and his community had a relatively complete version of the Torah. Furthermore, while the Pentateuch material was certainly in flux prior to the first century C.E., there is no evidence that the legal collections were significantly changed (other than Temple Scroll).¹² Thus it can be safely concluded that the Torah laws that were referenced in EM were sufficiently similar to the laws of the traditional Torah to warrant comparison.

II. COMMUNITY RESPONSE AS REFLECTING A BINDING ATTITUDE TOWARD LAW

First of all, it is necessary to establish that the Torah was viewed as a source of binding obligation by the *Yehud* community, or at least by the EM narrator. In Chapter Two (sec.II.A.ii), I show that Fishbane and others argue that the Torah was viewed as legally binding by the Persian *Yehud* community, while LeFebvre and others argue that they did not

⁷ Cornelis Houtman, "Ezra and the Law: Observations on the Supposed Relation between Ezra and the Pentateuch," *OTS* 21 (1981):91–115.

⁸ Ulrich Kellermann, "Erwägungen zum Esragesetz," *ZAW* 80 (1968):373–85; and Klaus Koch, "Ezra and the Origins of Judaism," *JSS* 19 (1974):173–97.

⁹ For example, Mark Boda has identified Deuteronomic and Priestly language in the penitential prayer of Nehemiah 9. See Mark J. Boda, *Praying the Tradition: The Origin and use of Tradition in Nehemiah 9* (BZAW 277; Berlin: Walter de Gruyter, 1999). Similarly see Blenkinsopp, *Ezra-Nehemiah*, 152–57; Joseph Blenkinsopp, "Was the Pentateuch the Civic and Religious Constitution of the Jewish Ethnos in the Persian Period?," in *Persia and Torah: The Theory of Imperial Authorization* (ed. James W. Watts; SBL Symposium Series 17; Atlanta: Snow Lion, 2001), 56–60; and especially Yoo, "Ezra and the Second Wilderness," 60–132, 258–67, 292–302, 326–32.

¹⁰ See Knohl, *Sanctuary of Silence*, 199–224. Although Knohl, who first identified that H was a distinct redactional addition to P, argued that H and Deuteronomy were contemporaries, most scholars see H as the latest strand of the Pentateuch. See my discussion in Vroom, "Recasting *Mišpātīm*," 41–43.

¹¹ See Yoo, "Ezra and the Second Wilderness," 60–132, 258–67, 292–302, 326–32.

¹² See Chapter Four sec. I.B.

treat the Torah as law. According to Fishbane, Ezra was able to employ various interpretive methods (such as analogical extension) to extend the application of law to new situations not foreseen by the original drafter. As discussed, in the case of Ezra and the mixed marriage crisis of Ezra 9–10, although the Torah nowhere commands the expulsion of foreign wives and children, Ezra was able to interpretively extend the Torah’s commands to come up with that verdict. By contrast, LeFebvre argues that Ezra does not treat the Torah as binding law in that narrative because the Torah nowhere gives such a command, and there is no interpretive justification for arriving at such a verdict. Rather, Ezra treated the Torah as a Mosaic precedent that somehow informs, but does not determine, his verdict. The impasse between these two positions is an example of why a legal-theoretical approach is necessary to address this question of when written law came to be viewed as legally binding; how can we tell if we do not have a good concept of what it means for law to be law?

Rather than attempting to reconstruct some sort of interpretive reasoning that is simply not there (Fishbane), and rather than focusing on the discrepancies between what the Torah says and what the community does (LeFebvre), I will instead focus on the community’s reaction to perceived Torah commands as depicted in the narratives. I will focus on two Torah-following episodes: 1) the institution of *Sukkot* in Neh 8:13–18; 2) the mixed marriage crisis of Ezra 9–10. For each of these episodes, regardless of the discrepancies between the content of the Torah and the community’s activities—I discuss that issue in section III—it is apparent that the community treated their Torah-directives as preemptive reasons for action.

A. *The Institution of Sukkot in Nehemiah 8:13–18*

First, this preemptory attitude toward the Torah is evident in the *Sukkot* episode of Neh 8:13–18. In this narrative, the institution of *Sukkot* is depicted as a response to the communal study of the Torah. In v. 13, Ezra, the Levites, priests, and household heads gathered on the second day of the seventh month to study (באספו . . . ולהשכיל) the words of the Torah (דברי התורה). In the course of this study, they found directives purported to be “written in the Torah that *Yhwh* commanded by the hand of Moses” (וימצאו כתוב בתורה אשר צוה יהוה ביד) (משה). The substance of these directives is then stated as object clauses, each introduced by אשר (i.e. “They found written in the Torah that/אשר X and that/אשר Y”).¹³ These object clauses from vv. 14b–15 are as follows:

וימצאו . . . אשר ישבו בני ישראל בסכות בחג בחדש השביעי
וימצאו . . . ואשר ישמיעו ויעבירו קול בכל עריהם ובירושלם לאמר צאו ההר והביאו
עלי זית ועלי עץ שמן ועלי הדס ועלי תמרם ועלי עץ עבת לעשת סכת ככתוב

And they found ... that the children of Israel should dwell in booths during the festival of the seventh month

And they found ... that they should proclaim and publish a notice in all their towns and in Jerusalem saying ‘Go out to the hills and bring leaves of olive, leaves of oil trees, and leaves of myrtle, and leaves of palm, and leaves of branchy trees to make booths as it is written.’

These two statements are presented as the substance of the directives that Ezra and company “found written in the Torah that *Yhwh* commanded by the hand of Moses.”

I return to the question of the relation between these object clauses and the content of the Torah. At this point, it is important to note that the *Yehud* community’s response shows that they treated these directives as preemptive reasons for action because they believed they came directly from the Torah. Immediately following the directives, the community performs

¹³ For the object clause see Joüon and Muraoka, *A Grammar*, 157c.

the prescribed actions, using the same verbs from the directives: “And the people went out (ויצאו) . . . and they brought (ויביאו) . . . and they made (ויעשו) . . . booths.” There is no hint of epistemic/persuasive authority here. The community does what is required simply because (as far as they know) it is what the Torah says.

That the community believed that the directives came directly from the Torah is evident for two reasons. First, as noted, the directives are presented as what Ezra found written in the Torah. This image of discovery is reinforced right in the second directive: do this “as it is written (ככתוב).”¹⁴ This is further emphasized at the end of the pericope. In v. 18, the final gathering of the eighth-day was performed “according to the rule” (כמשפט). Second, after the performance of the directives, it is described in v. 17 as a return to a long-lost ancient festival: “The children of Israel had not done so from the days of Joshua son of Nun until that day” (לא עשו מימי ישוע בן נון כן בני ישראל עד היום ההוא). There is no question that the narrator intended to depict the community as performing precisely what the Torah required, and that they did so simply based on the Torah’s say-so. Within the narrative world of the text, there was no difference between the text of the Torah and the directives presented as Torah. And this is the case both for Ezra and his colleagues, and for the *Yehud* community depicted in the episode, who hears and obeys the commands.

Furthermore, the urgency with which the community acts once they hear the commands shows that they viewed the Torah-directives as a binding obligation—as a preemptive reason for action. LeFebvre argues that the community treated the directives as a “historic ideal” that the community could model as a Mosaic exemplar.¹⁴ In other words, LeFebvre argues that Ezra treated the Torah as an epistemic authority. However, there is no

¹⁴ LeFebvre, *Collections, Codes and Torah*, 111–12.

denying that the narrator depicts a sense of urgency within the community to comply with the law, as if they were on a deadline.¹⁵ The fact that *Sukkot* had to be performed in the seventh month (Neh 8:14) created an urgency for the community, since they stumbled across this law on the second day of the seventh month (Neh 8:2, 13). There was no debating or reasoning about the required date; it had to be performed immediately because it was viewed as a binding obligation—a self-sufficient reason for action. This is a clear example of the Torah being treated as law. Regardless of the tenuous relationship between the purported Torah directives and the content of the Torah, the community’s urgent and immediate response to what they perceived as the Torah’s requirements reflects a binding attitude toward the ancient venerated text.

B. The Mixed Marriage Crisis of Ezra 9–10

This same attitude toward the Torah is also reflected in the mixed marriage crisis of Ezra 9–10, which was briefly discussed in Chapter Two. This narrative plays out as a legal crisis that cannot be resolved without third-party adjudication. It begins when the community’s leaders approach Ezra with a perceived intermarriage problem (Ez 9:1–2): “The people of Israel, the priests, and the Levites have not separated from the people of the land. . . . And they have mixed the holy seed with the peoples of the land” (לא נבדלו העם וכהנים) (והלויים מעמי הארצות. . . . והתערבו זרע הקדש בעמי הארצות). Ezra responds with a penitential prayer, in which he confesses that in this offense “we have forsaken your commands” (עזבנו מצותיך; v. 10) and “broken your commands” (להפר מצותיך; v. 14). In 10:3, Ezra’s verdict is revealed, through a speech by Shecaniah: “Let us make a covenant with our God to put out all wives

¹⁵ Jacob Wright notes that once they discovered this command, they followed it “without hesitation.” See Jacob L. Wright, *Rebuilding Identity: The Nehemiah-Memoir and its Earliest Readers* (BZAW 348; Berlin: Walter de Gruyter, 2004), 317–18.

and children from them” (נכרת ברית לאלהינו להוציא כל נשים והנולד מהם). Although Ezra does not himself voice this verdict, there can be no question that he is depicted as the final authority on the matter; why else would they present the problem to him at the opening of the narrative? The verdict is subsequently carried out throughout Judea; the assembly declared: “thusly we will do according to your words” (כן כדבריך עלינו לעשות). Following this, community judges were appointed who, in turn, examined each case and identified all who had married foreign women (vv. 16–17).

There can be no doubt that Ezra’s decision in this episode provides a preemptive reason for action. All adjudication is necessarily preemptive. If a judge does not render a decision that preempts the litigants’ background reasoning, then that judge fails to act as a judge. This is simply the nature of adjudication. In this scene, Ezra’s decision is clearly meant to preempt all background reasoning and conflicting opinions within the community. On the one hand, the community leaders viewed intermarriage as a contamination of “the holy seed” (זרע הקדש); that is their reason for prohibiting intermarriage—their reason for action. On the other hand, expelling all foreign wives and their children is painful for the families and morally reprehensible; this provides strong reason for action as well—to allow the marriages to stand; no man would want his wife and children to be excommunicated from his community. These protesting reasons are even given voice in 10:15, where two men openly oppose this verdict. The whole point of adjudication is, as Raz puts it, “to set things straight,”¹⁶ which is to say—to preempt the various parties’ background reasoning with one authoritative reason for action. There is no doubt that Ezra’s verdict does this (as all verdicts do) and that the community treats his verdict in this way.

¹⁶ Raz, “Introduction,” 7.

What is important to note is that Ezra's decision is said to be given "according to the Torah" (וכתורה יעשה; 10:3). This indicates that the (practical) authority for Ezra's decision derives from the Torah. In other words, for the *Yehud* community, the Torah held practical authority. Despite the background reasoning and debating over the issue, Ezra's Torah verdict set everything straight and cut off all reasoning. It settled the matter. The foreign wives and children had to be expelled simply because that is what (according to Ezra) the Torah commanded. This is especially obvious from the fact that (at least some members of) the community acted against moral reason; the law made them do something they did not want to do, regardless of what they thought of it.¹⁷ Once again, the community's response to the Torah reveals their attitude toward the law.

III. THE AUTHORITY OF THE TORAH VERSUS TORAH EXPERTS IN *YEHUD*

Although it is clear that the *Yehud* community viewed the Torah's laws as producing a binding obligation, the story does not end there. As argued in Chapter One, when a directive becomes law, then it is treated in a certain way, such that the specific words of the law supersede all other considerations, and such that its subjects will show concern for the threats to the rule of law; they ask questions like: "what does it mean to follow this law?"; and "what does and does not qualify as compliance?" When it comes to the manner in which Ezra and his colleagues treated and interpreted the Torah, there is no evidence that they felt this type of constraint. As Schauer states: "[O]ne of the principal features of rules—and the feature that makes them rules—is that what the rule says really matters."¹⁸ When we look at

¹⁷ One litmus test for determining when a directive is treated as a preemptive reason for action is ascertaining instances in which a party does something they do not want to do—something against reason. This reveals Raz's content-independent thesis, which is another component of his theory of law's authority. For discussion see Schauer, *Legal Reasoning*, 63–66 and Chapter One n9.

¹⁸ Schauer, *Legal Reasoning*, 17.

the manner in which Ezra and the *Yehud* community treated the Torah, what the rule says does *not* seem to really matter. They seemed to be free to make Torah declarations without providing any interpretive explanations or justifications—without being constrained by what the Torah actually says. In other words, the fact that Ezra was able to make the Torah say things it simply does not say indicates that there was something different about their attitude toward the binding nature of law when compared to the Temple Scroll's or tannaitic sages' interpretation of the Torah, which shows an intense concern with the specific wording of the law; this requires explanation.

In the end I argue that, because of the lack of access to it, the Torah's (practical) authority had to be mediated by qualified Torah experts; whatever they declared as Torah was treated as Torah itself. In this way, there was an interplay between the epistemic authority held by the Torah expert—the community had to believe/trust that what Ezra declared as Torah was actually Torah—and the practical authority held by the Torah—if they accept Ezra's Torah declaration as Torah itself, then it will provide preemptive reasons for action. My argument in this section unfolds in three parts. First, I demonstrate the lack of interpretive argumentation in the Torah-obedience narratives. Second, I discuss the accessibility requirement of the rule of law. Third, I discuss the role of Torah-experts depicted in the EM legal narratives.

A. The Absence of Interpretive Argumentation in Ezra's Torah-Declarations

The first point to make is that Ezra's Torah-declarations say something different than what the Torah says, without providing—or showing any need to provide—justification for his declarations.¹⁹ Here I want to establish that, according to Ezra and the *Yehud* community,

¹⁹ Stefan Schorch also notes numerous other instances in which scriptural citations do not match any known version of scriptural texts. He also (as do I) argues that the differences between citation and source are

what the rule says does *not* really matter, at least not in the way that Schauer describes. I focus on three instances of this: 1) the institution of *Sukkot* in Neh 8:13–18; 2) the mixed marriage crisis of Ezra 9–10; and 3) the wood offering of Neh 10:35.

i. DISCREPANCIES IN THE INSTITUTION OF *SUKKOT*

When Ezra and his colleagues stumbled across the *Sukkot* laws in their Torah study session (something textually close to Lev 23:33–43),²⁰ they ordered their community to perform this festival, and the community did so according to their binding obligation toward the Torah. The essence of Ezra’s Torah-directives is four-fold. He declares that they should:

- 1) dwell in booths in the festival of the seventh month (v. 14)
- 2) proclaim this in Jerusalem and all the towns (v. 15)
- 3) go into the hills (v. 15)
- 4) gather a series of branches in order to make booths (v. 15)

In addition to these explicit directives, two more can be reconstructed from the description of the community’s compliance in v. 18: “And they performed the festival seven days and in the eighth day there was an assembly” (ויעשו חג שבועת ימים וביום השמיני עצרת). Thus there are (at least) two additional directives implied by the narrative:²¹

not due to variant versions of scripture. Rather, he argues that scribes cited the “deep structure” of the text, which refers to the text’s meaning. This stands in contrast to a text’s “surface structure,” which refers to a text’s word-for-word articulation. See Stefan Schorch, “Which Kind of Authority?: The Authority of the Torah During the Hellenistic and the Roman Periods,” in *Scriptural Authority in Early Judaism and Ancient Christianity* (ed. Tobias Nicklas, et al.; DCLS 16; Boston: De Gruyter, 2013), 2–5; and Stefan Schorch, “The Libraries in 2 Macc 2:13–15, and the Torah as a Public Document in Second Century BC Judaism,” in *The Books of the Maccabees: History, Theology, Ideology: Papers of the Second International Conference on the Deuteronomical Books, Pápa, Hungary, 9–11 June, 2005* (ed. Géza G. Xeravits and József Zsengellér; JSJSup 118; Leiden: Brill, 2007), 177–80. By contrast, I argue below that Ezra and his colleagues just cited their interpretive conclusions as if they were Torah itself.

²⁰ There are three places in the Torah that speak of a festival on the 15th day of the seventh month: Deuteronomy 16:13–15; Num 29:12–38; and Lev 23:33–43. As noted by Yoo, there are likely cross-references to Deut 16:13–15, and perhaps Num 29:35. See Yoo, “Ezra and the Second Wilderness,” 251–55.

²¹ There may be more directives implied by the narrative events of vv. 16–18. For example, the text states that the people constructed booths on their roofs, courts, the temple courts, and in the Water Gate and Ephriam Gate squares (v. 16). Similarly, it states that they read from the book of the Torah every day of the

5) keep the festival seven days

6) hold an assembly on the eighth day

What is significant about these directives is that, although there are clear correspondences with the Torah, they exhibit significant differences. The first and fifth command are clearly taken from Lev 23:36, 42:

	ישבו בני ישראל בסכות בחג בחודש השביעי	Neh 8:14
	ויעשו חג שבעת ימים וביום השמיני עצרת	Neh 8:18
	ביום השמיני מקרא קדש יהיה לכם והקרבתם אשה ליהוה עצרת הוא	Lev 23:36
	בסכת תשבו שבעת ימים	Lev 23:42
Neh 8:14	The children of Israel shall dwell in booths in the seventh month	
Neh 8:18	And they performed the festival seven days and the eighth was an assembly	
Lev 23:36	The eighth day shall be a holy convocation and you shall offer an offering by fire to <i>Yhwh</i> . It is an assembly	
Lev 23:42	You shall dwell in booths seven days	

The element of the booths, seven days, plus the eighth-day assembly in Ezra's directives clearly come from the Holiness Code's version of *Sukkot*.²²

Aside from these correspondences, however, there are notable discrepancies between what Ezra declares as the Torah and what the Torah actually says. First, although the

festival. The fact that this was done may imply that these actions were part of Ezra's directives: "you shall construct booths on your roofs, courts, etc. and you shall read from the Torah." These possible directives cannot be reconstructed with confidence, however. The eight-day length of the festival and the designation of a final assembly (עצרת), however, can be reconstructed as directives from Ezra because they were clearly taken from Lev 23:26.

²² The assembly (עצרת) is also found in Num 29:35, though P's version does not mention booths.

narrative specifies that *Sukkot* is to be performed in the seventh month—which is why the community felt the urgency to perform it immediately—there is no mention of the day. Yet Lev 23:34 (and Num 29:12) specify that it is to be performed on the 15th day of the month. This absence is particularly noticeable in light of the fact that H’s festival calendar (and P’s) lists two additional festivals for the seventh month: 1) the festival of trumpets, which is to be performed on the first day of the month (Lev 23:24; Num 29:1); 2) *Yom kippur*, which is to be performed on the tenth day (Lev 23:27; Num 29:7). If Ezra and his colleagues were studying the Torah and felt obligated to perform *Sukkot*, why is there no mention of the other two festivals?

There are various explanations for this gap in the narrative. For example, Yoo argues that *Sukkot* required special attention because the Torah contained conflicting *Sukkot* prescriptions. Since the other two festivals were straightforward they did not need to be mentioned.²³ While this explanation is appealing, as we saw in Chapter Four, the three different *Yom kippur* laws in the Torah also contain conflicts that would require the same special attention.²⁴ Alternatively, it is possible to argue that the *Yom kippur*’s atonement rite from Lev 16:1–28 was not fixed to a specific day in Ezra’s time (as Lev 16:1–28 is P and vv. 29–34, which set the day, are H).²⁵ This explanation, however, fails because Ezra would still have had P’s festival calendar, which specifies an atonement festival on the tenth day. Furthermore, Ezra was clearly looking at something fairly close to H’s festival calendar.

²³ Yoo, “Ezra and the Second Wilderness,” 257–67.

²⁴ The most notable conflict is the number of rams to be offered on the day, but also the relation between the atonement offerings of Lev 16:1–28 and Num 29:8–11, and the שָׁשׁ offering of Lev 23:27. See Chapter Four sec. III.A–B.

²⁵ See Wilhelm Rudolph, *Esra und Nehemia, samt 3. Esra* (HAT 20; Tübingen: Mohr Siebeck, 1949), 153.

Aside from the fact that H cannot exist without P,²⁶ H specifies both *Yom kippur* and the festival of trumpets for the seventh month. The narrative's failure to mention these is still a problem. Another possible explanation of the absence of *Yom kippur* is to argue that its atonement rites were of concern only to the priests in the temple. Since the narrative of Nehemiah 8 takes place at the Water Gate and concerns the community, there was no need to mention *Yom kippur*.²⁷ However, P's festival calendar clearly prescribes offerings for the people (Num 29:8–11); it was not just a priestly temple-rite. Furthermore, if the community felt obligated by the text, then, regardless of their location, they should feel obligated to perform all of its requirements. The problem remains.

Of course, it is always possible to argue that Ezra had an early version of the Torah that did not contain *Yom kippur* (or the feast of trumpets).²⁸ However, as argued throughout this study, rule-following is a complex issue where, as Wittgenstein argues, “no course of action could be determined by a rule, because every course of action can be made out to accord with the rule.”²⁹ It should be expected that there will be differences between what the Torah says and what is depicted as compliance. We cannot reconstruct alternate versions of the Torah based on the fact that they did not do everything exactly as commanded. Any and every act of interpretation, when it comes to rule-following, contains an element of creativity—something that makes its interpreted object say something better than, other than, more than, or, in this case, less than it says on its own. This same lack of precision can also

²⁶ It is fairly well established that, contrary to early assumptions, H is not an independent Pentateuchal source. Rather, H is a priestly revision of P that is meant to stand alongside P. See Nihan, *From Priestly Torah to Pentateuch*, 545–62.

²⁷ See Yoo, “Ezra and the Second Wilderness,” 271–72; Milgrom, *Leviticus 1–16*, 1070–71.

²⁸ See Blenkinsopp, *Ezra-Nehemiah*, 291; Pakkala, *Ezra the Scribe*, 162; and Håkan Ulfgard, *The Story of Sukkot: The Setting, Shaping, and Sequel of the Biblical Feast of Tabernacles* (BGBE 34; Tübingen: Mohr Siebeck, 1998), 131.

²⁹ Wittgenstein, *Philosophical Investigations*, 201.

be claimed for the absence of a Sabbath rest in EM's narrative (Lev 23:35–36), as well as its title as a holy convocation (מִקְרָא קֹדֶשׁ; Lev 23:35). Given the nature of rule-following, it should be no surprise that their activity is not carried out exactly as prescribed, especially given the temporal gap between the original command and Ezra's community. What is really missing from this narrative is any interpretive explanation for these differences.

This lack of interpretive reasoning is also apparent with a number of other discrepancies. For example, as noted above, the object clauses (marked by אֲשֶׁר) give the content of the Torah commands that Ezra and his colleagues discovered. The second of these directives, however, states that “they should proclaim and publish a notice in all their towns and in Jerusalem” (v. 15). Yet there is no such command in the Torah, and given the wilderness setting of the original command, there is no way to reconstruct any Torah that explicitly mentions Jerusalem. Grammatically speaking, however, the entire directive is marked as an object clause, which they “found” when studying the Torah; grammatically, the command to proclaim *Sukkot* is presented as something that the Torah commands. Of course, it is easily derivable from the Torah. If *Sukkot* was commanded to the wilderness community, and if all Israelites were expected to keep it in later generations (Lev 23:41), then it makes sense that they would have to proclaim it throughout the land at the appointed time. However, this is only an implication of H's command derivable through interpretation (which is always innovative). There is no proclamation command in any of the Torah's *Sukkot* laws. The point to note is that there is no such interpretive argumentation. Ezra is simply able to make the Torah say things it does not say; he presents new laws as if they are Torah.

This same phenomenon is found in other discrepancies. For example, there are notable differences between the list of foliage in Neh 8:15 from that which is commanded in Lev 23:40:

Neh 8:15	צאו ההר והביאו עלי זית ועלי עץ שמן ועלי הדס ועלי תמרים ועלי עץ עבת לעשת סכת	ולקחתם . . . פרי עץ הדר כפת תמרים וענף עץ עבת וערבי נחל ושמחתם לפני יהוה אלהיכם	Lev 23:40
	Go to the hills and bring leaves of olive, leaves of oil trees, and leaves of myrtle, and leaves of palm, and leaves of branchy trees, in order to build booths	And you shall take fruit of splendid trees, branches of palm, boughs of branchy trees, and poplars of the river, and rejoice before <i>Yhwh</i> your God.	

First, H's list of produce includes fruits, while the Torah-command in EM speaks only of foliage. This is likely because the reason for the collection of the foliage in EM is "in order to build booths," which is not the case in H.³⁰ Second, H contains no command to "go to the hills" for the foliage. Again, this can be explained as an implication of the Torah's command, or simply as filling a practical gap. It is nonetheless imputed to the Torah even though it is not part of the actual command.

Thirdly, the trees themselves are different in EM: H commands branches of palm, boughs of branchy trees, and poplars while EM requires just the leaves from palm, oil trees, myrtle, and branch trees. Fishbane argues that Ezra and his colleagues produced their list of branches from an etymological association with the root סכך, which means "to cover with branches."³¹ While this is possible, it requires imputing interpretive reasoning to the narrative that is simply not there. Clines, more convincingly, argues that Ezra and his fellow study-mates simply replaced H's list of trees with a list of trees more readily available to the *Yehud*

³⁰ H. G. M. Williamson, *Ezra, Nehemiah* (WBC 16; Waco, Tx.: Word, 1985), 295.

³¹ Fishbane, *Biblical Interpretation*, 111. See also Blenkinsopp, *Ezra-Nehemiah*, 291–92.

community.³² Again, what is missing is an interpretive justification for this alteration. Instead, they end up making the Torah say things it does not actually say without offering any explanation.

ii. DISCREPANCIES IN THE MIXED MARRIAGE CRISIS

As noted above, in the episode of the mixed marriage crisis of Ezra 9–10, Ezra’s verdict to expel the foreign wives and children was given “according to the Torah” in 10:3:

נכרת ברית לאלהינו להוציא כל נשים והנולד מהם בעצת אדני והחרדים במצות אלהינו
וכתורה יעשה

Let us make a covenant with our God to put out all wives and their children, by the counsel of my lord, and those who tremble at the command of our God, and let it be done according to the Torah.

The fact that the Torah contains no such command demonstrates another case in which Ezra makes the Torah say things it simply does not say—he makes the Torah say more than it says on its own.

It should be noted that there is evidence of interpretive reasoning in this narrative. In Ezra 9:1, 11–12 there is a line lifted straight from Deut 7:1–4, which speaks of intermarriage, one phrase lifted from Deut 23:3–6 (which speaks of forbidden unions), numerous unique gentilic terms from Deut 7:1–4 and 23:3–6, and language that bears close resemblance to that of Leviticus 18 and 20 (which speaks of God putting out unclean foreign nations from the land).³³ Fishbane and others have used these citations to argue that Ezra’s verdict was the result of interpretive engagement with the Torah.

³² David J. A. Clines, *Ezra, Nehemiah, Esther: Based on the Revised Standard Version* (New Century Bible Commentary; Grand Rapids: Eerdmans, 1984), 187.

³³ The question as to whether or not Priestly literature is referenced in Ezra-Nehemiah is debated due to its significance for understanding the formation of the Pentateuch. See Harrington, “The Use of Leviticus in Ezra-Nehemiah,” 1–20. See also Pakkala, *Ezra the Scribe*, 284–90.

These citations, however, show only that Ezra knew the Torah's stance toward marriage with Canaanite people groups (particularly Deuteronomy's stance), and that he viewed the *Yehud* community's marriages as a violation of the Torah's commands. When it comes to the actual verdict—to expel all foreign wives and children—Ezra provides no interpretive justification whatsoever. In fact, the narrative is shaped in such a way that it is Shecaniah who imbues Ezra's decision with the Torah's (practical) authority: "Let us . . . put out all wives and their children, *according to the counsel of my lord (Ezra)* . . . and let it be done according to the Torah." Thus, once again, Ezra (or perhaps Shecaniah) was able to identify his declaration of the Torah's requirements as the Torah itself. In other words, he was able to make the Torah say things it does not actually say.

iii. DISCREPANCIES IN THE WOOD OFFERING OF NEHEMIAH 10:35

Finally, a third example of this lack of interpretive explanation of the Torah's requirements can be found in the wood offering of Neh 10:35. This verse is part of a scene in which the community makes a covenant. In Neh 10:30 they pledge:

ללכת בתורת האלהים אשר נתנה ביד משה עבד האלהים ולשמור ולעשות את כל מצות
יהוה אדנינו ומשפטיו וחקיו

To walk in the Torah of God, which he gave through Moses the servant of God, and to observe all the commands of *Yhwh* our lord and his judgements and his statutes.

What follows this commitment is a series of pledges that the community vows to perform, one of which is the wood offering in v. 35 (v. 34 Eng.):

והגורלות הפלנו על קרבן העצים הכהנים הלויים והעם להביא לבית אלהינו לבית
אבותינו לעתים מזמנים שנה בשנה לבער על מזבח יהוה אלהינו ככתוב בתורה

We have also cast lots among the priests, the Levites, and the people, for the wood offering, to bring it into the house of our God, by ancestral houses, at appointed times, year by year, to burn on the altar of the LORD our God, as it is written in the Torah.

This is but one of several pledges that the community makes, each of which is presented as an act of “walking in the Torah, observing the commands of *Yhwh* and his judgments and his statutes” (v. 30). Therefore, again the Torah is presented as a practical authority because the people commit to perform these actions simply because the Torah commands them; the Torah provides a self-sufficient reason for action.

While each of these pledges’ relation to the Torah merits attention, I will highlight the wood offering. The problem here is that there is no such wood offering prescribed anywhere in the Torah, though a wood offering is found in 4Q365 and Temple Scroll.³⁴ As a result, just as with the above discrepancies, some scholars have suggested that they were working with a different version of the Pentateuch.³⁵ Alternatively, Yoo suggests that the כְּתוּב prepositional phrase does not refer to the precise words of any law, but just “the existence of an authoritative legal collection.”³⁶ Similarly, LeFebvre argues that the “as it is written in the Torah” reference should not be understood as a precise application of the Torah, but rather as a reference to the Torah as a “precedential example,” which lays the framework for a new law.³⁷

Alternatively, Kevin Spawn has taken a linguistic approach to this legal-citation prepositional phrase (and others) to develop a means of identifying its precise referent. What

³⁴ A wood offering can be found in 4Q365 frag. 23 4, and likely also in the Temple Scroll. While this may lead to the conclusion that the author of Nehemiah 9–10 had a version of the Torah that also contained a wood offering, this is not necessarily the case. It is equally possible that later scribes added a wood offering so as to project a new practice into the ancient Torah, similar to the blood-bowl in TS 26:6 (see Chapter Four sec. III.G). Nevertheless, as noted by Hempel and Hoffman, the commands in these texts are still different than Neh 10:35. See Sidnie White Crawford and Christopher A. Hoffmann, “A Note on “4Q365,”” Frg. 23 and “Nehemiah” 10:33–36,” *RevQ* 23 (2008):429–30. Therefore, it seems overly conjectural to reconstruct a Torah that underlies Neh 10:35 when there is no version of the Torah that contains such an offering. See also Zahn, *Rethinking Rewritten Scripture*, 102–08.

³⁵ Crüsemann, *Old Testament Law*, 340–43; Blenkinsopp, *Ezra-Nehemiah*, 319; and Houtman, “Ezra and the Law,” 106.

³⁶ See Yoo, “Ezra and the Second Wilderness,” 114–15.

³⁷ LeFebvre, *Collections, Codes and Torah*, 122.

was done “according to the law”? Was it the pledge to cast lots among the priests, Levites and people? Was it the pledge to do it annually? Or was it just the pledge to burn wood on the altar? According to Spawn, the “as it is written” prepositional phrases have very specific referents, and the actual citation of law was quite limited.³⁸ Thus the community did not always make the Torah say things it did not say, because their claim to what the Torah says was very limited.

In the case of the wood offering, Spawn argues that the “as it is written” phrase only refers to the burning of the wood, and not the other elements of Neh 8:35.³⁹ From this, he draws from Clines’ argument that the pledge was a commitment to carry out the implications of Torah commands. There is a command in Exod 27:20 to keep the tabernacle’s lamp burning. There is another command to keep the fire of the altar continually burning in Lev 6:9, 11–12 (Lev 6:2, 5–6 Eng). These commands imply that wood must continually supply the fire in the temple too, and thus, in a way, the Torah commands the continual bringing of wood to the altar to feed this fire. Clines has argued that the community simply created a new tradition (the wood offering) that works out the implications of these other commands; it was the “establishment of machinery for carrying out a prescription.”⁴⁰ Spawn accepts this argument for the use of the Torah in this passage, but claims that the “as it is written” phrase only refers to the burning of wood.

While I largely agree with Clines, his explanation does not account for the lack of any interpretive explanation for why the wood offering is commanded by the Torah—which is

³⁸ Kevin L. Spawn, *“As it is Written” and other Citation Formulae in the Old Testament: Their Use, Development, Syntax, and Significance* (BZAW 311; Berlin: Walter de Gruyter, 2002).

³⁹ See Spawn, *As it is Written*, 104–08.

⁴⁰ David J. A. Clines, “Nehemiah 10 as an Example of Early Jewish Biblical Exegesis,” *JSOT* 21 (1981):112.

the real problem with this passage. In fact, there is hardly any allusion whatsoever to Exod 27:20 and Lev 6:9, 11–12, other than the image of burning. As for Spawn’s argument, it is difficult to imagine that the narrator did not intend every element of every pledge of Neh 10:31–40 to be understood as something commanded by the Torah; all the pledges are depicted as their response to the commitment to “walk in the Torah of God . . . and to observe all the commands of *Yhwh* our lord and his judgements and his statutes.” It seems unnatural to argue that the author intended to distinguish between specific commands of the Torah and new law created by the community in response to the Torah. There is no indication of this in the narrative. Just as the narrator in Neh 8:14–15 made the Torah say things it did not say (and could not have said—to proclaim *Sukkot* in Jerusalem and all the towns), so too here, the narrator makes the Torah say things it does not say.

To repeat, it should be fully expected that the community would not do everything the Torah commands precisely as it is written. To adapt, revise, and somehow otherwise change law to meet changing circumstances is a normal and necessary part of any system of laws.⁴¹ It is also normal for a community and its judges to see their activity as being in keeping with the law—as the proper application of the Torah. As noted in Chapter Three, judges in modern legal systems frequently stray from the words of the law, but present their decisions as simply an interpretation of the law.⁴² Similarly, the tannaitic sages had a very flexible approach to interpreting and applying the law, as is evident from their interpretation of Exod 23:19. This was also true for the manner in which Roman jurists treated their legal texts.⁴³ It

⁴¹ See the discussion in Fitzpatrick-McKinley, *The Transformation of Torah*, 54–80; and Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 3–19.

⁴² See the discussion in Chapter Three sec. III.

⁴³ See, for example, Dana McCusker, “Liability for Omission under the *Lex Aquilia*,” *Northern Ireland Legal Quarterly* 50 (1999):380–402. He demonstrates that the jurists applied *aquilian* liability to a doctor’s negligence, where the *lex* does not say anything about liability for omission.

should come as no surprise that Ezra and the *Yehud* community's institution of *Sukkot*, the expulsion of foreign wives, their wood offering, and numerous other activities differed from the Torah's precise wording. And it should not be surprising that they viewed their activities as being legitimate applications of the Torah's requirements.⁴⁴ This is true for every legal system throughout history that has operated according to the principle of the rule of law.

What is peculiar about the use of the Torah in EN is the lack of any interpretive justification that connects the dots between that which is written and that which is done; there is no explanation as to why their institution of *Sukkot* or expulsion of foreign wives should be seen as doing what the Torah says (when their actions are in fact something different from what the Torah says). Eileen Kavanaugh notes that interpretive argumentation is essential to adjudication. She writes,

[J]udges cannot simply present their conclusion about what the provision means as their interpretation of the legislation. Their conclusion is simply the outcome . . . of an interpretation. . . . To constitute an interpretation, judges must provide reasons supporting that outcome which show why they believe it to be correct.⁴⁵

How is it that Ezra and his colleagues were able to make the Torah say things it simply does not say, without giving any hint of needing to justify their Torah declarations?

B. The Accessibility Requirement of the Rule of Law and the Torah in Yehud

The key to answering this question is recognizing another one of Fuller's requirements of the rule of law,⁴⁶ which I have not yet discussed. This is the requirement of *promulgation*. Understanding the promulgation requirement of the rule of law is essential to address the question of how Ezra was able to make the law say things it does not say. In

⁴⁴ For other examples of straying from the Torah see the eight discrepancies in LeFebvre, *Collections, Codes and Torah*, 105–29.

⁴⁵ Kavanaugh, "The Elusive Divide," 262.

⁴⁶ See discussion in Chapter One sec. II.B.

short, if the law is to rule—to provide preemptive reasons for action—then its demands must be accessible to its subjects. Put differently, if the law is inaccessible, then it cannot guide its subjects' behavior. As Andre Marmor states:

[P]romulgation is an essential element of normativity. The law is a system of norms, and norms purport to provide reasons for action, so it must be publicized to those whose action it purports to guide.⁴⁷

This feature of the rule of law is so intuitive that it hardly needs explanation: the rule of law requires the law to be publicly accessible.

When it comes to the *Yehud* community's Torah, however, it appears that they had limited access to the Torah. This was the case for a number of reasons. First, it is likely that the Torah was linguistically inaccessible, since many in the community spoke Aramaic rather than Hebrew.⁴⁸ This is indicated by Nehemiah's complaint in Neh 13:23–24:⁴⁹

In those days also I saw the Jews who had married women of Ashdod, Ammon, and Moab. And half of their children spoke the language of Ashdod, and they could not speak the language of Judah, but only the language of each people.

This is likely also the linguistic background of Neh 8:7–8, where the Torah had to be 'explained':

The Levites, helped the people to understand (מבינים) the Law, while the people remained in their places. They read from the book, from the Law of God, clearly (מפרש), and they gave the sense (ושום שכל), so that the people understood (ויבינו) the reading.

⁴⁷ Marmor, "The Rule of Law and Its Limits," 19.

⁴⁸ See, for example, William M. Schniedewind, "Aramaic, the Death of Written Hebrew, and Language Shift in the Persian Period," in *Margins of Writing, Origins of Cultures* (ed. Seth L. Sanders; University of Chicago Oriental Institute Seminars 2; Chicago: Oriental Institute of the University of Chicago, 2006), 138–43.

⁴⁹ See the discussion in Ingo Kottsieper, "'And they did not Care to Speak Yehudit': On Linguistic Change in Judah during the Late Persian Era," in *Judah and the Judeans in the Fourth Century B.C.E.* (ed. Oded Lipschitz et al.; Winona Lake: Eisenbrauns, 2007), 97–102.

Although the verbs in this passage likely refer to some sort of interpretation/explanation,⁵⁰ this does not rule out the (strong) possibility that they were also giving their interpretive renderings of the Torah in Aramaic;⁵¹ these interpretations would look like the אֲשֶׁר object clauses of Neh 8:14–15: “we found written in the Torah that . . .” or “the Torah says that . . .” Such statements, which are different from what the Torah actually says, were likely given in Aramaic. Although Hebrew was still in use to some degree in Persian *Yehud*, there was a linguistic barrier that limited (at least a significant part of) the community’s access to the Torah. Such inaccessibility affects how its binding authority functioned—how the law ‘ruled.’ They had to rely on Torah-interpreters, rather than the Torah itself.

A second barrier to the Torah’s public accessibility was a lack of literacy and a scarcity of scrolls. Even if many in the community understood Hebrew, very few would have been able to read a Torah scroll,⁵² and among those who could, only a select few would have been able to get their hands on a copy of the Torah (assuming the whole text was even written on a single scroll); the material and scribal expertise required for scroll production was very costly and time-consuming.⁵³ In fact, in Neh 8:1–4, the narrator seems to assume that there is only one scroll available, which is in Ezra’s possession:

⁵⁰ See Williamson, *Ezra, Nehemiah*, 277–79; Blenkinsopp, *Ezra-Nehemiah*, 288; Antonius H. J. Gunneweg et al., *Nehemia* (KAT 19.2; Gütersloh: Gütersloher Verlagshaus Mohn, 1987), 112; Najman, *Seconding Sinai*, 35; and Fishbane, *Biblical Interpretation*, 108–09.

⁵¹ For the translation theory see LeFebvre, *Collections, Codes and Torah*, 134–36; Schniedewind, “Aramaic, the Death of Written Hebrew, and Language Shift in the Persian Period,” 139; Kottsieper, “Linguistic Change in Judah,” 102–03.

⁵² It is impossible to precisely know literacy rates and the extent of scribal education in the ancient world. However, it is possible to assume that the returnees from exile were generally more educated than those who stayed behind. Furthermore, the fact that the Levites were charged with translating/explaining the Torah (Neh 8:7; 2 Chr 17:7; 35:3) and they were the ones depicted as reading the Torah in Neh 8:7 suggests that they were a class of literate Torah experts. Beyond the Levites (and priests) however, general literacy was likely quite low.

⁵³ For an account of the material production of writing materials see Emanuel Tov, *Scribal Practices and Approaches Reflected in the Texts Found in the Judean Desert* (STDJ 54; Leiden: Brill, 2004), 31–56.

And all the people gathered . . . And they told Ezra the scribe to bring the Book of the Law of Moses . . . So Ezra the priest brought the Law . . . And he read from it . . . from early morning until midday.

The fact that the people had to ask Ezra to go and get the Torah indicates that physical copies were not readily available; perhaps there was only one. Thus, the community was bound to a book whose requirements were not accessible without the aid of an expert.

C. The Authority of Torah Experts in Yehud

This lack of public accessibility of a text that was viewed as a source of binding obligation created a very unique situation. On the one hand, it is intuitive that, if a community's laws are to guide the behavior of their subjects, then the community must have access to the law's requirements. On the other hand, the Torah was not readily accessible to a large portion of the community. How could the Torah be binding upon them if its binding contents were not publicly available? How did they negotiate this tension?

The answer to this question is that the community had to rely on trusted Torah experts to declare the Torah's requirements. That these declarations were different from the actual Torah should be no surprise; that is just the nature of rule-following, especially of an ancient sacred text. That the experts' Torah declarations were not backed up with interpretive argumentation should also be unsurprising. There would be no point in saying "the Torah says A, which, for our community, means we should do B." If the community did not have access to the A, then there would be no point in explaining the B; and even if they did give an interpretive explanation of the B, there was no means of verifying the validity of the interpretation. The community's Torah experts, of which Ezra was the paradigmatic example, had the freedom to make the Torah say things it does not actually say. They were free to present their Torah interpretations as if they were the Torah itself.

This situation has modern parallels. Legal language today is often so complex that its meaning is not readily accessible to many citizens.⁵⁴ This is the case with tax laws, for example. As a result, experts are hired—tax lawyers—who tell their clients what the law does and does not require of them, and they communicate these requirements in accessible understandable language. Similarly, in developing countries with lower literacy rates, citizens must rely on legal experts to communicate the law’s requirements. Matthew Kramer, for example, notes that the promulgation requirement of the rule of law is not solved even with the oral recitation of law. He writes that such recitation

to destitute people who have never attained literacy, very slim indeed (in most cases) is the likelihood that those people could absorb and retain much of what is being recited. Such people will have to rely almost entirely on the advice and assistance of more knowledgeable parties.⁵⁵

This “advice and assistance” from legal experts would not be the verbatim citation of law, but interpretive statements of how the law’s requirements apply to citizens’ unique social settings, much like Ezra’s Torah declarations. In such situations, where the accessibility requirement of the rule of law is threatened, the law’s subjects must rely on experts to tell them what the law requires.

This situation therefore involves an interplay between epistemic authority and practical authority. Legal experts (like Ezra or tax lawyers) possess only epistemic authority; they preempt one’s reason for belief as to what the law requires. In other words, one will believe what an expert says simply because she or he says it; we believe that the law says Y because that is what the experts tell us the law says. Thus, when we trust what legal experts say about the law, we let that directive preempt our reason for action. At that point, we do

⁵⁴ For comment see Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge Introductions to Philosophy and Law; New York: Cambridge University Press, 2007), 122–23.

⁵⁵ Kramer, *Objectivity and the Rule of Law*, 117–18.

what they say because we believe it is what the law says. Once an epistemic authority's statements about the law's requirements are accepted as law—once they preempt one's beliefs about what the law says—then those requirements are taken as the law itself. Once that happens, the expert's directives end up being treated as practical authorities, because they are regarded as the law itself.

It is clear throughout EM that Ezra is presented as an expert in the Torah,⁵⁶ though there is much debate over the relation between Ezra's role as a priest and his role as a scribe.⁵⁷ I am persuaded by Yoo's explanation that, because of a general shift from prophecy to interpretation in Second Temple Judaism, the role of a priest was no longer to simply inquire of *Yhwh*, but to “inquire of the Torah of *Yhwh*” (Ez 7:10; לדרוש את תורה יהוה).⁵⁸ This development brought about the need for a new type of priest, one who was an expert scribe of the Torah. Thus, in his first introduction in EM Ezra is thrice described as a Torah expert:

Ezra 7:6

ספר מהיר בתורת משה

an expert scribe in the Torah of Moses

Ez 7:11

הכהן הספר ספר דברי מצות יהוה וחקיו על ישראל

the priest, the scribe who scribes the words of the commands of *Yhwh* and his statutes over Israel

Ez 7:12

כהנא ספר דתא די אלה שמיא

The priest of the book of the law of the God of heaven

⁵⁶ See Sebastian Grätz, ““Wisdom” and “Torah” in the Book of Baruch,” in *Wisdom and Torah: The Reception of “Torah” in the Wisdom Literature of the Second Temple Period* (ed. Bernd Ulrich Schipper and David Andrew Teeter; JSJSup 163; Leiden: Brill, 2013), 192–93.

⁵⁷ See the extensive discussion in Yoo, “Ezra and the Second Wilderness,” 148–56.

⁵⁸ See also Fishbane, *Biblical Interpretation*, 553.

The fact that these three epithets occur at Ezra's first introduction emphasizes Ezra's status as one who is qualified to make Torah declarations; his (epistemic) authority is such that whatever he declares as Torah is treated as the Torah itself, which holds practical authority.

That Ezra and his Torah-expert colleagues functioned as the gatekeepers of the Torah's demands is reinforced by Nehemiah's lack of Torah citations. Although Nehemiah held practical authority as governor of *Yehud* (Neh 5:14–15), his orders and commands were never given 'according to the Torah'; that is, they were never presented as Torah declarations. This is particularly evident in Neh 5:1–13 where Nehemiah accuses the wealthy elite of the community of charging interest from their fellow Judeans (v. 7). There was no appeal to the Torah even though each of the Pentateuch's legal corpora prohibit the taking of interest from kin (Exod 22:24 in the Covenant Code, Deut 23:20, and Lev 25:36–37 in H).⁵⁹ Rather, as Lizbeth Fried argues, the authority for Nehemiah's commands "stems not from any law code but from his status as governor."⁶⁰ This is also true for Nehemiah's bans against intermarriage and business dealings on the Sabbath; they are never presented as applications of the Torah. While Fried (and LeFebvre) argues that the lack of Torah citation with Nehemiah's commands is because the Torah was not considered binding law at the time, I would argue that it is because Nehemiah, unlike Ezra, was not a qualified Torah expert.⁶¹ The Torah was, in fact, viewed as the source of binding obligation in Persian *Yehud*. Its authority, however, was mediated through qualified Torah-experts: whatever they declared as Torah was considered as Torah itself.

⁵⁹ See the discussion in LeFebvre, *Collections, Codes and Torah*, 122–28.

⁶⁰ Fried, "Imperial Authorization," 87.

⁶¹ See note 57 above and Lisbeth S. Fried, *The Priest and the Great King: Temple-Palace Relations in the Persian Empire* (Biblical and Judaic Studies from the University of California 10; Winona Lake, Ind.: Eisenbrauns, 2004), 217–21.

IV. CONCLUSION

In this chapter I have argued that although the Torah was viewed as the source of binding obligation in Persian *Yehud*, the community's use of the Torah did not seem to be constrained by the specific wording of the text. This situation is peculiar since one of the principle features of law is that, as Schauer states, "what the rule says really matters";⁶² when law is treated as a preemptive reason for action, then its specific wording—the manner in which it is formulated—is the primary and sole constraint on those who interpret, apply, and obey the law. The reason that Ezra and his colleagues were able to make the Torah say things it does not say—and were thus not constrained by the specific words of the text—is that the majority of the *Yehud* community did not have access to the Torah. Rather, the practical authority of the Torah was mediated through qualified Torah interpreters, of which Ezra is the paradigmatic example.

This situation is distinct from the treatment of the Torah in the Temple Scroll and the Samaritan Pentateuch. In each of these texts, the specific wording of the Torah is of utmost importance. Their scribes sought to present a Torah for their audiences that was less plagued with the threats to the rule of law; they left their readers with a Torah that is better able to be treated as a preemptive reason for action. Ezra and his colleagues show no such concern, because, unlike later scribes, they were not leaving a Torah for their community to read, consult, and obey. There was no need to tie their Torah interpretations to the specific words of the text. They simply presented a number of Torah-directives as if they were the Torah itself, to a community who had no means of evaluating their interpretive merit, because they had no means of ascertaining for themselves what the Torah demanded of them.

⁶² Schauer, *Legal Reasoning*, 17.

It is true that the scribes of TS and SP also present their versions of the Torah as if they were the Torah itself. But that is in the nature of interpretation—those who interpret make their interpreted objects say something more than, other than, or better than they say on their own. All interpretations, to one degree or another, seek to make their interpreted objects say something different or new, and they seek to have those changes identified with their interpreted objects. As Wittgenstein stated, “[W]e ought to restrict the term ‘interpretation’ to the substitution of one expression of the rule for another.”⁶³ What is different in the cases of TS and SP, however, is that the reasoning underlying their interpretive changes reflects the type of reasoning that is applied to binding norms; they present a Torah that is better able to serve as a preemptive reason for action—that suffers to a much lesser degree from threats to the rule of law. When it comes to Ezra and his Torah-expert colleagues, there is no such reasoning. They were not bothered by any threats to the rule of law; there is no indication that they were constrained by the specific words of the text—a key feature of binding norms.

Therefore, the Torah-obedience narratives of EN attest to a time in the history of jurisprudence in which a legally authoritative text was viewed as a binding obligation, but not treated as a binding obligation. For the *Yehud* community, the written Torah was a mysterious sacred source of demands upon their lives. For the gatekeepers of the Torah—Ezra and his colleagues—the words of the Torah could be adapted and reused as they saw fit, as it suited their community’s needs and as it suited their political agendas.

⁶³ Wittgenstein, *Philosophical Investigations*, 201.

CONCLUSION

The question that I address in this study is the question of when written law came to be treated as a source of binding obligation. It is clear from the Mesopotamian evidence that although the ancient cuneiform legal collections were highly venerated and even possessed authority—particularly the Laws of Hammurabi—they were not legally binding upon judges; they did not tell the judges how to decide cases as legal texts do (or at least are intended to do) in courts today. By contrast, it is also clear that the tannaitic sages viewed the Torah as a source of binding obligation; they felt obligated to do what the Torah demands, and they interpreted the Torah’s laws as such. Therefore, somewhere between Hammurabi and the *Tannaim* there must have been some sort of shift in how written law was treated; this is a question that has plagued scholars since Finkelstein and Kraus’ articles in 1960–61,¹ and it is the question that I address in this study.

Rather than beginning with the question of when, historically, law came to be viewed as legally binding, however, my goal is to identify more precisely what it is that we are looking for in our sources. What does it mean for law to be binding? What does it look like when law is binding? How can we know when a directive is being treated as law or as some other type of normative statement? These questions must be answered before any progress can be made toward identifying the emergence of a binding attitude toward law; the lack of critical attention to these questions is the reason that scholars have not been able to agree on when law became binding. In order to address these questions, and develop a method for

¹ Kraus, “Codex Hammu-rabi,” 283–96; and Finkelstein, “Ammişaduqa’s Edict,” 91–104.

identifying instances in which an interpreter treats a text as a source of binding obligation, I turn to legal theory.

I. SUMMARY OF THEORY AND METHOD

A. The Nature of Law's Authority

The best means of articulating how the authority of law functions is with Joseph Raz's preemption thesis. According to this theory, law provides reasons for action that preempts its subjects' background reasoning, such that they feel obligated to do what the law says, simply because it says so. Thus, when we attempt to identify instances in which an interpreter treats a text as legally binding, we are looking for instances in which an interpreter sees that text as providing reasons for action that preempt their background reasoning. In other words, we are looking for instances in which an interpreter feels obligated to comply with that text's requirements simply because it is what the text requires. This is the essence of how the law's authority functions. It is known as practical authority.

The law's authority must be distinguished from another type of authority: epistemic authority. Epistemic authorities only preempt their subjects' reasons for belief. This is the authority of the expert; we believe what they say based on their say-so, but we do not do what they say simply because they say it. The law's authority, by contrast is a practical authority. It tells its subjects what to do regardless of what they think or believe. This is how the authority of the law operates, and it must be kept distinct from other types of normative statements, which can only possess epistemic authority.

B. Identifying an Attitude of Binding Obligation in Ancient Sources

The essence of my method for identifying an attitude of binding obligation in ancient sources is based on the fact that, once a text is treated as a preemptive reason for action—as a

practical authority rather than an epistemic authority—its subjects treat it in a distinct and identifiable way. There is an intense concern with the words of the text and with the question of what does and does not qualify as compliance. This same approach to a text does not apply to non-binding texts. The interpretive reasoning that is applied to binding norms, therefore, is distinct and identifiable.

The manner in which I identify such instances relies on another concept from legal theory: the rule of law. This legal ideal is the notion that legal decisions are determined by pre-established law, rather than arbitrary discretion. According to this ideal, the law must be written such that it can guide its subjects' behavior and determine judicial decisions. The rule of law applies to any long-term text that possesses practical authority.

This ideal is important for my methodology because the rule of law is comprised of eight essential requirements that govern the manner in which law is interpreted. When a long-duration text is viewed as the source of binding obligation, its subjects will interpret it in such a way that they will show a concern for the requirements of the rule of law. Put differently, an interpreter will show a concern for any deficiency in the law's formulation that threatens the eight requirements of the rule of law. For example, vagueness (such as the word 'work' in the Sabbath prohibition) threatens the clarity requirement of the rule of law, and conflicting norms (such as the conflict between the number of rams to be offered on *Yom kippur* in the various Pentateuchal legal corpora) threaten the consistency requirement of the rule of law. I have identified seven of these threats to the rule of law (see Chapter One sec. III). My basic premise is this: when a text is viewed as a binding obligation, its interpreters will show a significant concern for these threats. Conversely, whenever an interpretive source

shows no concern for these threats, it indicates that its author does not view that text as binding law.

II. SUMMARY OF TEXTUAL ANALYSIS

A. *The Temple Scroll and Samaritan Pentateuch*

In my textual analysis, I conclude that both the Temple Scroll and Samaritan Pentateuch treat the laws of the Torah as a source of binding obligation. The manner in which they interpretively engaged Pentateuchal law pays significant attention to the threats to the rule of law. When it comes to the Temple Scroll, the fact that the author saw the scattered and conflicting laws of the Pentateuch as a problem that needed fixing—while numerous contemporary interpretive rewritings did not—suggests that he understood law in a new way: he saw the laws of the Torah as providing preemptive reasons for action; in other words, they were viewed as binding norms. Because of this, the author of the Temple Scroll sought to create a version of the Torah that better meets the requirements of the rule of law, particularly the law’s need for clarity and consistency. To accomplish this, the author of Temple Scroll extensively rearranged its laws, filled several practical gaps, and eliminated legal conflicts.

By contrast, the interpretive changes found in the Samaritan Pentateuch’s Covenant Code were much more restrained. On the one hand, the scribe responsible for these changes, like the Temple Scroll scribe, saw the threats to the rule of law as problematic, particularly the under-inclusiveness of the goring ox laws of Exod 21:28–32. A law that only specifies the remedies for damage caused by a goring ox was far too under-inclusive for the Samaritan scribe. Because he viewed the Torah as providing preemptive reasons for action, only that which is written can be applied; the principle of legality dictates that the law cannot be

extended to cases beyond that which is written.² In other words, when a law on goring oxen is viewed as a practical authority (as opposed to an epistemic authority), then it cannot apply to damages caused by dog bites and bull kicks. Seeking to correct this under-inclusiveness—which threatens the law’s requirement for generality—the Samaritan Pentateuch scribe extended the law to apply to damages caused by any animal. This, much like the situation of the Temple Scroll scribe, reveals his attitude of binding obligation toward the Torah.

On the other hand, the Samaritan Pentateuch scribe’s legal innovations were also different from those of the Temple Scroll: they were much more restrained. While the author of Temple Scroll sought to create a new/alternate Torah—which is evident from its new voicing and narrative setting³—the Samaritan Pentateuch scribe wanted his text to be viewed as another copy of the (Samaritan) Torah. Because of this, he was much more limited in how he could address the threats to the rule of law: he could make only minor changes to his *Vorlage*. Thus, while the author of the Temple Scroll created a whole new Torah that better meets the rule of law’s clarity and consistency requirements, the Samaritan Pentateuch scribe made only a series of minor corrections to one section of the Torah that was under-inclusive and vague. Despite this difference, both Temple Scroll and Samaritan Pentateuch pay noticeable attention to the threats to the rule of law and thus reflect an attitude of binding obligation toward the Torah.

B. The Sectarian Rule Texts

The Qumran penal codes—and rule texts more generally—occupy a unique position in the history of Jewish law. Based on my analysis, the rule texts were not treated as binding law. Amidst all the interpretive changes made throughout the development of the *Serekh*,

² See my discussion on the principle of legality in Chapter One sec. II.A; and Chapter Two sec. II.A.

³ See Segal, “Between Bible and Rewritten Bible,” 10–28.

Damascus, and 4Q265 penal codes, there is not the slightest inkling of concern for the threats to the rule of law, such as vagueness and over-inclusiveness.⁴ The rule text scribes addressed a number of interpretive issues, but left such threats to the rule of law intact. I conclude, therefore, that the Qumran rule texts were written as epistemic authorities, similar to the Pentateuchal legal corpora (the Covenant Code, Deuteronomy, and the Holiness Code). They were meant to teach and edify their audiences by inculcating the community's values within new members. If the addressees acted in accordance with the rule texts, they did so because the reading and study of the texts instilled values and influenced members' decision-making. The rule texts did not simply dictate what to do and what not to do.

C. The Torah in Persian Yehud

In contrast to the sectarian rule texts, the Torah as depicted in the Ezra Memoir was, in fact, viewed as a source of binding obligation by the *Yehud* community. The institution of *Sukkot* in Neh 8:13–18 clearly shows that the community did what (they thought) the Torah commanded based on its mere say-so. In other words, it was treated as a preemptive reason for action. Even more significant, in the mixed marriage crisis of Ezra 9–10, the community complied with (what they thought were) the Torah's demands, even though they did not want to do so. They actually acted against reason; the Torah made them do what reason would otherwise consider immoral: expelling their foreign wives and children from the community. This is very strong evidence that they viewed the Torah as a preemptive exclusionary reason for action.

⁴ For example, the laws on foolish talk and grumbling against the fathers/community are vague. Similarly, the laws on false accusation and public nudity are over-inclusive. Amidst the interpretive changes made to these laws, no attention was paid to these problems. This indicates that the scribes were not operating with a rule-of-law assumption. See Chapter Six sec. II.B.i and sec. II.B.iv–v.

What is peculiar about the Torah's authority in Ezra-Nehemiah is that, even though the community viewed it as the source of binding obligation, it was not interpreted as such. Ezra and his Torah-interpreting colleagues did not see the threats to the rule of law as a problem and they did not feel the least bit compelled even to offer interpretive justifications for their Torah-declarations; while the *Tannaim* were bothered when their interpretive conclusions were "like mountains hanging by a string" (m.*Hag* 1:8), Ezra and his colleagues had no qualms about making the Torah say things it does not say without any interpretive justification. The reason for this peculiarity is because of the lack of accessibility of the Torah. Because the members of the *Yehud* community could not access the Torah, they were forced to rely on what the legal expert declared as Torah. There was an interplay between the epistemic authority held by Torah-experts (of which Ezra was the paradigmatic example), and the practical authority held by the Torah. Ezra was the living embodiment of the Torah, such that whatever he declared as a Torah-demand, the people followed as a preemptive reason for action. Thus, even though the Torah was not interpreted as a practical authority, it was viewed as a source of binding obligation.

III. BETWEEN AUTHORITY AND INTERPRETATION IN ANCIENT LAW

Before sketching a picture of the development of legal thought in early Judaism, it will be helpful to briefly revisit the relation between authority and interpretation that is discussed at length in Chapter Three. The first point to make is that interpretation is always innovative; there is no need to interpret unless an interpretation makes its interpreted object say something more than, less than, better than, or other than it says on its own. Without innovation there is just repetition. For example, even though the Torah does not command the expulsion of foreign wives, the community depicted in Ezra 9–10 genuinely thought that

that is what the Torah commands.⁵ Similarly, Exod 21:28–32 says nothing about the legal remedy for damages inflicted by one’s dog, bull, or goat—it only specifies damages for injury from a goring ox.⁶ Yet the scribe responsible for the Samaritan Pentateuch’s changes wanted his audience to think that the Torah does make such a command. In the same way, the Torah does not prohibit uncle-neice relations,⁷ nor does it command three-ram offerings on *Yom kippur*, or the use of a bowl for the *Yom kippur* blood rite.⁸ Yet the author of the Temple Scroll wanted these commands to be understood as actual Torah commands. Thus, interpretation always innovates, even though it simultaneously attempts to uphold and maintain continuity with tradition. This is the paradoxical nature of interpretation.

Once the nature of authority is recognized, then the act of interpretation becomes more complex. Because authority preempts reason—whether practical authority or epistemic authority—any text that is ascribed authority holds enormous power and influence: a text that is recognized as a practical authority can tell its subjects what to do based on its mere say-so; and a text that holds epistemic authority can tell its readers what to believe, based on its mere say-so. A text’s authority, therefore, adds a new dimension to the act of interpretation. Because interpretation is always innovative, an interpreter must seek to have the innovative element of the interpretation ascribed with the same authority as the interpreted object. This is the concept of authority-transfer that I introduce in Chapter Three (sec. III). The goal of any interpretation of an authoritative text is to transfer the authority of the interpreted object to the interpretation. The Temple Scroll author sought to transfer the preemptive reason-giving power of the Torah to the innovative element of his interpretations, such as the

⁵ See the discussion in Chapter Seven sec. III.A.ii.

⁶ See my discussion in Chapter Five sec. II.A.

⁷ See Chapter One sec. II.C.i.

⁸ See Chapter Four sec. III.A and G.

prohibition against uncle-niece relations, or the ablution rite in the *Yom kippur* blood ritual. Authority-transfer is essential to any interpretation of an authoritative text.

IV. MAPPING THE EMERGENCE OF LEGAL OBLIGATION IN EARLY JUDAISM

At the outset of this study I state that my goal is to develop a method for identifying a binding attitude toward law and to apply that method to a selection of interpretive sources. As such, the main contribution of this study is methodological. My criteria for identifying a binding attitude toward law acts as a diagnostic tool that can be applied to any interpretive source; I applied it to only four sources. My study is therefore limited; it cannot provide definitive conclusions as to when law came to be seen as legally binding. However some comments are possible.

First, the attitude toward law reflected in Samaritan Pentateuch and Temple Scroll took full shape with the tannaitic interpretations of the Torah found in the Mishnah. While Temple Scroll undertook a major rewriting of the Torah, the method of creative rewriting is limited in the extent to which it can address the threats to the rule of law.⁹ For example, it is not possible to delineate a long list of activities prohibited on the Sabbath, as that found in the Damascus Document. This is why the author of Temple Scroll left the vagueness of the Sabbath prohibition of *Yom kippur* intact. The binding attitude toward law does not become fully evident until more explicit approaches to interpretation became the norm. Once scribes and sages began to separate their interpretations from their interpreted objects, it became possible to expend greater efforts to address the extensive threats to the rule of law found in the Torah; I would go so far as to say that the threats to the rule of law are a driving force

⁹ See Chapter Three sec. III.B.

behind much of the interpretive activity found in tannaitic literature.¹⁰ The Temple Scroll and Samaritan Pentateuch are just two examples of texts that reflect the emergence of a binding attitude toward law in early Judaism. More work is needed to find contemporary (or earlier) examples of texts that apply rule-of-law reasoning to legal literature.

The second point to be made concerns the place of the authority of the Torah reflected in Ezra-Nehemiah. As argued in Chapter Seven, the Torah was viewed as a source of binding obligation for the *Yehud* community. As such, the Torah-obedience narratives of EN—particularly the Ezra Memoir—reflect an important development in the history of legal thought. They attest to a use of the law that did not exist in earlier sources (with the exception of the *mīšarum* edicts found in Mesopotamian sources).¹¹ However, because of the Torah’s lack of accessibility (due to a lack of familiarity with Hebrew, illiteracy, and a dearth of physical manuscripts), it was not interpreted as a practical authority: Ezra and his Torah-interpreting colleagues were not the least bit bothered by the threats to the rule of law. Rather, they were able to make the Torah say things it does not actually say, based on their

¹⁰ I obviously cannot prove this claim here. The degree to which the *Tannaim* were concerned with the threats to the rule of law warrants further attention.

¹¹ There is strong evidence to suggest that Old Babylonian kings would release edicts that were legally applied to specific situations for short durations. The short-term nature of these texts makes them much more like binding verbal commands rather than enduring law (see the opening comments in sec. II of Chapter One). The three main surviving edicts are those of Samsu-iluna (Hammurabi’s successor, of which only three paragraphs have survived), Ammišaduqa (of which 22 paragraphs are preserved), and a third unknown king. See Raymond Westbrook, “Mesopotamia: Old Babylonian Period,” in *A History of Ancient Near Eastern Law* (ed. Raymond Westbrook and Gary M. Beckman; HOS 72; Leiden: Brill, 2003), 1:362. See also Charpin and Todd, *Writing, Law, and Kingship*, 83–96; and Raymond Westbrook, “Cuneiform Law Codes and the Origins of Legislation,” *ZA* 79 (1989):214–16. These edicts were typically established at the outset of a king’s reign, or during times of economic crisis. They would mandate the return of a citizen’s land that had been forfeited on account of financial necessity, as well as the cancellation of debt and debt-induced servitude. There is documentary evidence that attests to the legal application of these texts. LaFont provides an example where a letter explicitly cites one of the *mīšarum* edicts. A resident of Sippar wrote a letter to Samsu-iluna complaining of being treated unjustly. The king responded by creating a commission in the city that would remedy the situation “according to the edict.” See Sophie LaFont, “Les actes législatifs des rois mésopotamiens,” in *Auctoritates Xenia R.C. van Caenegem oblata, Iuris Scripta Historica XIII* (ed. S. Dauchy et al.; Brussels: Paleis der Academiën, 1997), 8–10; and Charpin and Todd, *Writing, Law, and Kingship*, 90.

credentials as Torah-experts. It was, in a sense, an early form of the rule of law: the rule of law without the requirements of the rule of law, or, perhaps, the rule of the expert in the law.

This picture, however, raises a question: How can we know when this early form of the rule of law began to emerge? The only reason we can reconstruct this picture of the Torah's authority in Ezra-Nehemiah is that there are narratives depicting the community treating (what they thought were) the Torah's directives as preemptive self-sufficient reasons for action. Thus, my method for identifying a binding attitude toward law—which I applied to Temple Scroll, Samaritan Pentateuch, and the Qumran penal codes—is of no help in identifying this early form of the rule of law. Without other such narratives, how can we know whether or not the Covenant Code was written as a practical authority whose directives were mediated through legal experts? Could we not say the same about the Laws of Hammurabi? To answer these questions, we must turn to other narratives.

While it merits further investigation, I will briefly mention three such narratives. First, the legal narrative of 2 Sam 14:4–11 (the fictitious legal conundrum presented to King David by the woman of Tekoa) does not depict any authoritative text (see Chapter Two sec. I). While David's decision in that case was certainly binding, it is not presented as an application of a written law. Second, the events depicted in 2 Kings 22–23 do seem to depict the application of (what the characters in the narrative thought was) Deuteronomic law. In this famous narrative, a copy of the book of the law is discovered and, in response, King Josiah confesses the nation's violation of the law and institutes numerous religious reforms. This seems to suggest that the book they had discovered held practical authority; it was the basis of their confession and reforms. However, as LeFebvre demonstrates—and similar to Ezra's use of the Torah—their reforms are not explicitly prescribed in Deuteronomy; in fact,

Josiah's first response to the law-book was to consult a prophetess rather than 'interpret and apply the law.'¹² Third, in Hag 2:10, Haggai is instructed to ask the priests for a 'torah,' which appears to be a legal ruling derived from the written law.

While these narratives help fill out the picture of the law's authority, they are of limited value without additional narratives. For example, there is no narrative material that mentions the Qumran rule texts. As a consequence, it is not possible to know whether or not the rule texts held the same type of authority that Ezra's Torah held. I argue in Chapter Six that the rule texts held epistemic authority (rather than practical authority) because the sectarian scribes never paid attention to the threats to the rule of law. However, if they held an authority similar to that of Ezra's Torah, then it is possible that the community viewed the rule texts as binding, though their directives were mediated through qualified interpreters. This conclusion must be held as a possibility. This possibility may also be suggested for Deuteronomy.

Given these complexities, I propose the following broad development of the authority of law in the ancient world.

1. Epistemic authority (Mesopotamian and Pentateuchal law collections)

The first stage in the development of the law's authority is epistemic authority. There is strong evidence to suggest that both biblical and Mesopotamian law collections were not written as practical authorities (see Chapter Two sec. I). However, these texts did originally possess some type of prestige or authority; this is especially clear with Hammurabi. I suggest that they possessed epistemic authority. They were meant to be studied and internalized, with the goal of influencing their audiences' beliefs and actions.

¹² LeFebvre, *Collections, Codes and Torah*, 55–95.

For example, I suggest the Laws of Hammurabi may have been studied by judges and scribes to convey an authoritative concept of justice emanating from the king: “This is what justice looks like, declares the king!” As such, they were not consulted as practical authorities, dictating what to do and what not to do. Rather they influenced their audiences’ beliefs, which ultimately affected their actions. Although much more work is required, I suggest that the biblical law collections were (each in their own way) similarly meant to inculcate community beliefs and values, rather than dictate what to do and what not to do and serve as the basis of adjudication. This type of authority is epistemic rather than practical.

2. *Practical authority mediated through legal experts (the Torah in Ezra-Nehemiah)*

The second development in the law’s authority can be traced to the Torah-obedience narratives of Ezra-Nehemiah. Here it is evident that the Torah was perceived as a binding authority in concept, but was not interpreted as such in practice. Rather, the binding/practical authority of the Torah was mediated through qualified Torah-interpreters. Whatever they declared as Torah was treated as a binding command. This marks a significant innovation from law’s function in Mesopotamia and ancient Israel, where the law collections were never invoked to authorize legal decisions. While this function for the law’s authority is clear for Ezra and the *Yehud* community, it may also apply to Deuteronomy’s community or to the Deuteronomic Historian’s attitude toward Deuteronomy.¹³ It also may apply to the sectarian attitudes toward the rule texts, though this cannot be proven.

¹³ This claim requires further investigation.

3. *Practical authority (Temple Scroll, Samaritan Pentateuch, Midrash Halakhah)*

Finally, the third stage in the development of law's authority in the ancient world occurs when interpreters start to show a noticeable concern for the threats to the rule of law. It is here that the familiar law-as-binding stance toward legal texts begins to emerge. Here, the law becomes an independent source of practical authority, where its subjects feel compelled to do what it says simply because it says so. This attitude toward law is characterized by an intense concern with the precise wording of the text, and with the question of what does and does not qualify as compliance. As a consequence, subjects and decision-makers show a concern for conflicting norms, vagueness, absurd results and so forth.

It must be emphasized that the above three stages in the development of legal authority is very broad, and there is certainly overlap between them. For example, I argue that the Qumran rule texts possessed epistemic authority similar to that of the Mesopotamian and Pentateuchal law collections. Qumran law, however, was written after the Torah's practical authority began to emerge. Thus, if my suggestion is correct, some law collections continued to be written as epistemic authorities, while others were viewed as practical authorities. This is especially obvious in the Damascus Document where its interpretation of the Torah's incest laws (CD 5:7–11) and Sabbath requirements (CD 10–11) displays a binding attitude toward the Torah. Yet, within the same text, its rewriting of the sectarian penal codes shows no such attitude.

Similarly, as I argue in Chapter Three, the Temple Scroll grounds its authority in its claim to unmediated divine revelation; its readers were meant to accept it as Torah based on its pseudepigraphic fiction. However, such grounds for authority-transfer is based on

epistemic authority similar to that of Ezra in stage two of the development of law's authority—where the law's practical authority is mediated by law-experts. Thus, in the case of Temple Scroll, even though its interpretation reflects significant concern for the threats to the rule of law, which indicates stage three, it still reflects vestiges of the second stage of legal thought; stages two and three are somewhat conflated.

V. LOOKING AHEAD

In the end, much more work is needed to fill in and hone this broad picture of the development of the law's authority. In this study I have focused primarily on identifying the emergence of the third stage in the development of legal thought; my methodology is geared to identifying instances in which a scribe shows sensitivity to the requirements of the rule of law. This, however, is not the definitive end of determining when law came to be viewed as a source of binding obligation; it is only the beginning and must be situated within the broader history of legal thought. It is often thought that Greece was the birthplace of the rule of law.¹⁴ I would suggest that more work is needed to bring to light the contributions that Mesopotamia, ancient Israel, and early Judaism make toward this important development in intellectual history.

By the same token, since my methodology is primarily focused on stage three of the development of law's authority, much more work is also needed to fill in the picture for the earlier stages, where texts held epistemic authority, and where there was an interplay between epistemic authority and practical authority. Nevertheless, this study serves as an important first step in clarifying what it means for a text to possess authority, and in

¹⁴ See Tamanaha, *On the Rule of Law*, 7–10; Christopher May, “The Rule of Law: Athenian Antecedents to Contemporary Debates,” *Hague Journal on the Rule of Law* 4 (2012):235–51.

demonstrating the ways in which the authority of a text was brought to bear upon ancient community life.

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