

Law, Theology and Pluralism in Earliest Rabbinic Judaism

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I

According to E.D. Hirsch, "All understanding of verbal meaning is necessarily genre bound."¹ We would not interpret and evaluate a legal code, for example, using the same criteria as we would a philosophical treatise. By this logic, a truly *sui generis* text would defy interpretation. Readers would be unable to identify its rules of composition or the predecessor texts to which it might be usefully compared. The question of genre takes on particular urgency for readers of the Mishnah, rabbinic Judaism's earliest literary expression, redacted and promulgated around the year 200 c.e. One's decision as to the Mishnah's genre must say a great deal about what kind of questions one can bring to this pivotal text.

After briefly reviewing the history of the interpretation of the Mishnah, I will go on to suggest that the Mishnah is not best understood as a law code, even though it is permeated with the language of law. Using illustrations drawn from tractate Eduyyot, I will argue that legal discourse in the Mishnah is not prescriptive but is a code for social and philosophical principles. Among the many principles the Mishnah takes up, Eduyyot's particular concern is the issue of maintaining peace in a rabbinic community unified by basic principles but threatened by disunity over the application of those principles.²

II

Martin Jaffee writes of the problem faced by the Mishnah's first audience:

Those who might have chanced to see a copy of the Mishnah or, as is more likely, would have heard portions of it recited by disciples of rabbinic masters, would confront a text offering few conventionally recognizable signals that might guide the audience in its efforts at interpretation.³

As Jaffee highlights, the Mishnah crosses the classic division between "open" and "closed" texts.⁴ It speaks in the language of biblical legal categories, but does so in a way that reveals its origins in the schoolhouses or disciple circles of the early rabbinic movement. It talks of matters of concern to all Israelites, but in a language accessible only to rabbinic specialists. The Mishnah is self-referential with no logical beginning or end, and it assumes an active role for its reader who must understand the document whole in order to follow it in its parts.⁵

The history of Mishnah exegesis, however, views the text otherwise. Later rabbinic authorities, including the Babylonian Talmud, would read the Mishnah as a law code and set the tone for 1,500 years of Mishnah scholarship. Ignoring the Mishnah's rich mosaic of unresolved

competing opinions, its sustained attention to grey area cases and conundrums, these readers found in rabbinism's foundation document a source book for legal questions that were moot in the world of late antique and medieval Judaism.

Recently, however, an alternative hermeneutic has been proposed, bypassing the Talmud's interests and attempting to recapture the original intention of the Mishnah's framers.⁶ What emerges is a document that focuses on legal topics but purposefully fails to relate that law to the lives of contemporary Jews. The legal system envisioned by the Mishnah ignores the world of early third-century Palestine in favor of an imagined world combining elements of a dimly remembered past (the world of the Second Temple and its Priesthood) and a hoped for messianic future. In order to understand the role of law and legal discourse in the Mishnah, we therefore need to challenge later rabbinic readings. We must also challenge the accepted definition of the Mishnah in the tradition of Western scholarship, which viewed it as an historically accurate reflection of first century Pharisaic legalism.

My focus here will be on a single portion of the Mishnah, tractate Eduyyot, ("On Testimonies"). Like the well-known and equally distinctive tractate Abot ("The Ethics of the Fathers"), and unlike the majority of the Mishnah's tractates, Eduyyot deals with no single legal topic. Rather, it is organized around the names of individual sages, making frequent use of mnemonic devices.

For example, the first three pericopae (*mishnayot*) each contain three-part disputes between Shammai, Hillel, and the anonymous Sages. This is followed by four disputes between the houses (or schools) of Shammai and Hillel and then a listing of instances in which the School of Hillel changed its views to accord with that of the School of Shammai. Large sections of the tractate which follow are organized around listings of three or four opinions held by individual rabbinic sages on diverse topics, each section of which begins: "Rabbi X testified concerning the following three matters..."

For this reason, scholars have assigned Eduyyot to either the most primitive period of the Mishnah's development or to the period after the promulgation of the rest of the document. That is, to the period of 70 c.e. or post-220 c.e. Evidence for the earlier dating comes from the Tosefta to Eduyyot. The Tosefta, the Mishnah's companion text redacted sometime after 300 c.e., begins its commentary to Eduyyot with the following story:

When sages came together in the vineyard at Yabneh, they said, "The time is coming at which a person will go

looking for a teaching of Torah and will not find it, a teaching of scribes and will not find it . . ." They said, "Let us begin from Hillel and from Shammai."⁷

The Tosefta accounts for Eduyyot's anomalous structure by assigning it to the first generation of Rabbis who begin their post-70 attempt to reconstruct Judaism by gathering the sayings of earlier sages, starting with Hillel and Shammai. According to this view, it was only later rabbis who decided to reorder Mishnah pericopae under topical headings.

Evidence for a later date centers on the presence of numerous post-Yavnean masters in this text.⁸ A synoptic comparison of legal pericopae cited in Eduyyot with parallel passages in their topical contexts elsewhere in the Mishnah indicates that most are demonstrably primary in their topical contexts and are later repeated in Eduyyot.⁹

In his topical outline of the Mishnah's contents, Jacob Neusner fails to find a place for Eduyyot.¹⁰ Neusner's decision sharpens the question before us: If Eduyyot was an early form of Mishnah, why was it preserved and included in the final redaction? If Eduyyot was composed as a later appendix to the Mishnah, what purpose did such a miscellany serve? I propose that Eduyyot was intended as an appendix to the Mishnah, expressing one of the central concerns agitating the young rabbinic movement as it sought to consolidate its power in the first years of the third century. Without a Temple to unify the people the rabbis were concerned about the possibility of schism and were horrified by their memories of the religious, political and social divisions which characterized the late second commonwealth. They therefore sought to illustrate, throughout this exemplary tractate, the position that compromise rather than principled dissent must become the norm in inter-rabbinic disputes over law. This point can be illustrated from a section early on in the tractate, a rare passage in which the Mishnah reflects on its own contents.

III

Mishnah Eduyyot 1:3-6¹¹

1:3 Hillel says, "one full *hin* of drawn water renders a ritual bath unfit."

[Hillel uses the archaic expression "full *hin*," instead of "*kab*"] only because a person must quote the exact language of his teacher.

And Shammai says, "Nine *kabin*."

And the Sages say, "[The law] does not follow either of these opinions. Rather [the law follows the following precedent]: when two weavers came from the Dung Gate in Jerusalem and testified in the name of Shemaiah and Abtalion that three *login* of drawn water render the ritual bath unfit, the Sages accepted their words."

1:4 And why do they record the opinions of Shammai and Hillel for no practical purpose?

To teach the generations that come afterwards that no one should persist in their own opinion, for "the fathers of the world" did not persist in their opinion.

1:5 And why do they record the opinion of an individual against that of the majority, since the established law always follows the opinion of the majority?

So that if a [nother/a later] court should favor the view presented by the individual, it may depend on it.

For a court must not annul the opinion of another court unless it exceeds it in wisdom and in the number of its members...

1:6 Rabbi Judah said, "If that is so, then why do they record the opinion of the individual against that of the majority for no practical purpose?"

So that if a person should say, "I hold such a tradition," [another Sage] can reply to him [based on the latter's knowledge of the Mishnah] "You heard it as the view of so and so."

In the first units the pre-70 sages Shammai, known for his stringent rulings, and Hillel, known for his lenient positions, dispute an issue also taken up as the first pericope in tractate Niddah, which deals entirely with menstrual impurity. Here and in the next ruling the anonymous Sages stake out a middle ground between the positions of these early masters. The third dispute signals the end of this unit by a change in formal pattern, the positions of the authorities are reversed. Now Hillel's name comes first and his position is more stringent than that of Shammai (12 versus 36 *login*). Furthermore, Hillel's position is glossed with a strikingly self-reflective comment, which is rare in the Mishnah. We are told that Hillel's use of language illustrates the principle that the disciples of Sages must repeat their master's positions verbatim, not even adapting terminology.

This statement gains additional importance in the section that follows. In a statement unparalleled in the Mishnah, we are told that the Sages could not formulate their own position until they received the testimony of two weavers, weavers who came from the lowest social stratum of Jerusalem, the inhabitants of the Dung Gate. Sages accept their position because the weavers, rather than Hillel or Shammai, faithfully transmit the position of Shemaiah and Abtalion, men who tradition accounts to have been the teachers of Hillel and Shammai. We have then a double irony. Not only are these laypeople shown to be preserving an authentic tradition but we are told this after having just been specially directed to Hillel's dedication to preserving the exact language of his teachers.

The larger significance of the foregoing for the redactor of our tractate emerges only in the next unit, Mishnah 1:4-6. Here we take a moment to step out of Eduyyot's strings of sayings and raise a question about the very nature of the Mishnah itself. Why should the Mishnah record the opinions of masters that will be rejected? The text seems to be assuming that the Mishnah is a law code but a rather inefficient example of the genre. The four

answers which follow provide a key to the larger purposes of the tractate. The first answer (1:4) responds in terms of the specific case before us. By presenting the positions of these founding figures we are indirectly informed that even such great authorities as these mythic individuals from Second Temple times were willing to change their positions in the face of authentic traditions, no matter what their source. One might ask, of course, how we know that they changed their views. The answer comes from Mishnah Miqva'ot 3:1 where the position here attributed to the weavers is accepted by all parties, who debate its interpretation. In other words, if the students of students of Hillel accept the position of the weavers, we must assume that Hillel himself had gone along. The fact that no reference is made to the other tractate is typical of the Mishnah, which, as noted before, assumes at all times a familiarity with the work as a whole.

We are here introduced to the tractate's main theme: the necessity for teachers to be willing to change their positions on legal issues. In the case before us, such willingness may be based on new information concerning the views of earlier teachers -- a critical issue for the rabbis who were constantly reconstructing the positions of those earlier Sages who lived in the period between and before the two wars against Rome.

1:5 introduces two new criteria. First, we are told that later courts may choose to follow a minority position as they reconsider previous rulings. This in itself is striking. The Mishnah recognizes the possibility of review and reversal in legal rulings. The second half of the pericope, framed as a continuation of the foregoing, actually contradicts its intent. We are now given a radical limit on the power of courts to change the majority rulings of earlier courts. They may do so only if larger and wiser than their predecessors. These two comparatives are two rather ambiguous qualifications. Given this limitation, Rabbi Judah then returns us to the original question and provides a second conservative position. Rabbi Judah holds that minority opinions are recorded so that no one may err in citing them as majority positions.

Attested to the final generation of Mishnaic authorities by the presence of Rabbi Judah, this unit as a whole leaves us with three messages: even the greatest of masters recognizes the authority of oral traditions in the name of earlier Sages; conflicts are resolved by majority vote; and rulings are only to be challenged under exceptional circumstances. These principles are re-enforced throughout the tractate's remaining lists of testimonies.

To cite some striking examples: 4:8 details disputes between the Schools of Shammai and Hillel over marriage and purity laws, concluding with the observation that despite their disputes, the two houses intermarried and ate in each other's homes. The story of Aqabia ben Mahalalel (in 5:6-7) tells of a Sage excommunicated for refusing to follow the majority ruling in a number of cases, thereby losing an opportunity to become the head of the

rabbinic court. On his deathbed, however, he tells his children to follow the rulings he could never accept.

At 8:3, near the tractate's conclusion, Rabban Simeon ben Gamaliel cites a teaching of the first teacher named rabbi by the Mishnah -- Yochanan ben Zakkai. Remarking on the continuing conflict between priests and rabbis, he places a limit on the jurisdiction of rabbinic courts in matters affecting genealogical purity. Since priests would presumably accept only rulings to expel tainted individuals but not rulings to admit those of unclear genealogy, rabbinic courts are advised to avoid such cases entirely. Whether or not this ruling relates to actual historical courts, it does once again draw our attention to Eduyyot's larger concern to limit conflict between Israel's surviving elites.

Finally, the concluding pericope (8:7) introduces the theme of the messianic future. A number of rabbis answer the question of the role of Elijah. Three quite different views end the unit. Continuing the theme of genealogy, Rabbi Judah grants Elijah the role of bringing into the Israelite fold families who had been expelled. Rabbi Simeon shifts ground entirely. In his view, Elijah will come "to harmonize disputes." Sages respond with the more familiar understanding. Elijah will come to make peace in the world. They quote Malachi 3:23-24: "Behold, I will send you Elijah the prophet . . . And he shall turn the heart of the fathers to the children and the heart of the children to their fathers." Later rabbinic commentators are uncomfortable with this citation and interpret it in keeping with Rabbi Simeon's position. The fathers are the Sages and the children are their disciples. Given the context of the passage this may well be the intended understanding.

IV

If this reading of tractate Eduyyot is correct then we have to conclude by asking why the rabbis of the third century would have found the issue of conflict resolution compelling. The rabbinic estate represented a collection of diverse interest groups, which was attempting to reorganize the hierarchy of Israel from its priestly past towards a future where communal status would be attained through mastery of rabbinic traditions.¹² They therefore created a document that required discipleship. The Mishnah came to be called the "Oral Torah" because it could only be learned through repetition, memorization, and active study. The old divisions of caste and class would have to be understated and a procedure would have to be developed to prevent new rifts from developing. Without the Temple to serve as a unifying focus, post-70 Judaism would become, for the rabbis, a tradition based on the mastery of a peculiar form of legal discourse -- discourse about laws formulated for a utopia. That process of study could provide the basis for a new way of life only if it did not further divide the people it was designed to serve. Eduyyot attempts to lay some ground rules. In

typically Mishnaic fashion, the tractate's underlying issue is found not in the details of the laws discussed, but in the way the laws are ordered and in the repeated glosses and narratives which frame the legal miscellany. By concentrating on the laws themselves scholars who use the tools of form criticism and form analysis have misread the tractate, seeing in it a path rejected by the Mishnah's ultimate framers rather than their statement of editorial principles.¹³

Notes

1. E.D. Hirsch, Jr., *Validity in Interpretation* (New Haven and London: Yale Univ. Press, 1967) p. 72.
2. Shaye J. D. Cohen has developed this idea most fully. "The Significance of Yavneh: Pharisees, Rabbis and the End of Jewish Sectarianism" *HUCA* 55 (1984) pp. 27-53.
3. Martin Jaffee, "The Mishnah in Talmudic Exegesis: Observations on Tractate Maaserot of the Talmud Yerushalmi" in William Scott Green, ed. *Approaches to Ancient Judaism IV* (Chico: Scholars Press, 1983) pp. 138-9.
4. Defined in Umberto Eco, *The Role of the Reader* (Bloomington and London: Indiana Univ. Press, 1979).
5. Many of these points are developed more fully in Jacob Neusner, *Judaism: The Evidence of the Mishnah* (Chicago: Univ. of Chicago Press, 1981).
6. See Neusner, *Judaism*. Neusner's work relies on a claim to recover the original intention of the Mishnah's redactors through the method of form analysis. It is noteworthy that in his analysis of the relation between the Mishnah and its successor documents he applies a competing hermeneutic, that of reader response critics. See his discussion of the Mishnah and the Babylonian Talmud in *Judaism: The Classical Statement* (Chicago: Univ. of Chicago Press, 1986).
7. Translation follows J. Neusner, *The Tosefta V* (New York: KTAV, 1981) p. 295.
8. For example, in Mishnah Eduyyot 1:6 cited below, the late second-century authority Rabbi Judah is quoted.
9. Compare, for example, Mishnah Eduyyot 1:3, discussed below, and Mishnah Niddah 1:1.
10. Most recently in Jacob Neusner, *The Oral Torah* (New York: Harper and Row, 1987) p. 188-216.
11. The translations which follow are based on the Hebrew as well as the translations of Danby and Blackman. I have provided a basic commentary through the inclusion of explanatory language in square brackets.
12. Howard Eilberg-Schwartz, "Creation and Classification in Judaism: From Priestly to Rabbinic Conceptions," *HR* 26 (1987) p. 380.
13. My understanding of this unique tractate owes much to discussions with Professors Shaye Cohen and David Kraemer, both of the Jewish Theological Seminary. This study was sponsored, in part, by the Conservative movement's OMETZ program.