



A Late Antique Rabbinic Discourse on the Linguistic (In-)determinacy of the Law

Eva Kiesele¹

Accepted: 28 February 2022 / Published online: 29 March 2022
© The Author(s) 2022

Abstract

The late antique rabbis of Roman Palestine were seasoned jurists, experts on exegesis and legal interpretation. Yet rabbinic literature does not theorize. A positive account of rabbinic conceptions of language therefore remains a desideratum. I choose an alternative approach. Legal reasoning relies on language to ground the determinacy of the law. Jurists must thus confront language when it threatens to undermine the latter. Conversely, they may hold language to safeguard legal determinacy. Drawing on insights from legal theory, I turn to an unusual rabbinic rule of inference. Its earliest attested version suggests a universal possibility of inference “from the category of yes that of no, from the category of no that of yes.” I show that the ever-evolving uses of this rule allow us to observe a shift in linguistic attitude, increasingly acknowledging linguistic uncertainty. My findings tie in with recent advances in the study of rabbinic exegesis.

Keywords Indeterminacy · Law · Rabbinic · Midrash · Language · Late antiquity

1 Introduction: Language and Worldview(s)

Rabbinic literature is a vast late antique corpus spanning five centuries, two locales, and two languages. Products of an oral culture of instruction, the extant compilations were redacted in Roman Palestine and Sasanian Babylonia between the third and seventh century CE. If a single word can encapsulate the worldview(s) of the rabbis, it must surely be *torah*, ‘instruction’. In the biblical book of Deuteronomy, where this term first appears, *torah* denotes the divine law revealed to Moses. By the time of the rabbis, *torah* has developed to encompass the entire (rabbinic), homiletic and legal-interpretive tradition surrounding it. In a famous homily, personified *Torah* presents itself as the architectural blueprint used by God in creating the universe. Practical knowledge comes under the purview of *torah* inasmuch as it is expedient to the rabbinic way of life. *Torah* thus pervades all aspects of life. In turn, the rabbinic subject is trained to approach the world through the lens of *torah*.

The rabbinic retrojection of their own interpretive tradition to the revelation at Sinai entails an important consequence. As the sages continue to enhance the body of rabbinic learning—not least by shaping Mosaic law into an up-to-date, comprehensive legal system—the body of *torah* ever keeps growing. The language of divine revelation thus becomes imbued with a vast, if not unlimited, interpretive potential.

The rabbinic movement had taken shape following a period of intense factional strife, and the cataclysmic destruction of the Temple. This historical watershed is paralleled by a profound change in textual form. The monolingual long form prose characteristic of earlier Jewish literature is absent from the rabbinic corpus. Rabbinic texts are entirely composed of small forms—utterances, as it were—pitted against each other: apodictic teachings, anecdotes, biblical verses, statements attributed to named sages, and an anonymous voice highlighting contradictions, supplying explanations or normative understandings of other “utterances.” Rapid code-switching between Hebrew and the vernacular Aramaic, a plurality of method, and non-linear topical arrangement all contribute to a distinct look and feel of rabbinic texts. While these features may in part be owed to the oral production of these texts, they also suggest a culture of knowing that may best be described as “kaleidoscopic.”

✉ Eva Kiesele
eva.kiesele@fu-berlin.de

¹ Friedrich Schlegel Graduate School of Literary Studies,
Freie Universität Berlin, Habelschwerdter Allee 45,
14195 Berlin, Germany

The sages behind these texts are a highly educated elite, experts on exegesis and *halakhah*—the body of norms guiding the life of rabbinic Jews, or briefly, rabbinic “law.”¹ In spite of their scholastic outlook, rabbinic texts refrain from theoretical speculation; perhaps for the simplest of reasons. “Categories are created to serve *halakhah*—and no more” (Rosen-Zvi 2015, p. 55). The corpus does not offer us any extended discussion of language per se. For the same reason, we remain in the dark whether or to what extent rabbis may have been familiar with the Greco-Roman philosophical tradition (Hezser 1998).

If a positive account of rabbinic conceptions of language remains a desideratum, language has nevertheless garnered scholarly attention in at least four ways: hermeneutics of rabbinic exegesis, legal-theoretical perspectives on law and narrative, language use in legal speech acts, and finally, two recent contributions that address rabbinic literary production as an extended discourse over time (Furstenberg 2016; Dolgopolski 2013). This essay takes its cues from a prominent debate in legal theory about the role of language for the law and, more specifically, for reasoning with rules. As Brian Bix writes, “Law is guidance through language” (Bix 2012, p. 145). This fact may all too easily be overlooked. Yet language must become a concern for jurists if it threatens to undermine the determinacy of the law. Legal reasoning must rely on the capacity of language to *ground* legal determinacy. Challenges to this capacity take on greater urgency when legal decision-making is understood to be based on *rules* (Arulanantham 1998). Do rules “decide ahead of time how *all* cases within a class will be determined” (Schauer 1988, p. 539), thereby granting predictability to the law? Or do rules make a promise that they cannot keep? These considerations provide my point of entry to investigate the diachronic development of a single rule of inference. For the purposes of this essay, I use ‘linguistic indeterminacy’ in a broad sense encompassing all kinds of linguistic challenges to the law (for disambiguation, Kutz 1994). This notion brings into focus phenomena other than those that talmudic scholars commonly discuss under the headers of ‘indeterminacy’ or ‘polysemy’ (Stern 1988). While the latter is concerned with the multiplicity of meaning assigned to single verses in rabbinic exegesis, the legal-theoretical variety of indeterminacy directs our attention to those cases where an unequivocal meaning is sought but cannot be achieved. These two might of course interlace. It is my hope that a perspective from legal reasoning may enrich a discussion that has, so far, largely been limited to semantics. An extensive body of research on early rabbinic exegesis informs this essay.

¹ The customary rendition of *halakhah* as ‘law’ is too narrow, but may still be the best option available (Neis 2019).

In what follows, I offer a diachronic study of a rabbinic rule of inference. In its earliest attested version, this rule suggests a universal possibility of inference from affirmation to negation, and vice versa: “from the category of ‘yes’ that of ‘no’, from the category of ‘no’ that of ‘yes’.” The rule appears to promise a context-independent rigidity—it is *formal* (Schauer 1988). This formal character sets it apart from other rabbinic rules of reasoning. A substantially different version of this rule is found in texts of the same period but from a different school of thought. Subsequent generations of sages put it to ever novel uses. Over time, the referents of ‘yes’ and ‘no’ shift considerably. Tracing its curious career across texts compiled in Roman Palestine during the third and fourth centuries CE, I show that the ever-evolving uses of this rule allow us to observe shifting linguistic attitudes. While the earliest attested version of the rule appears to reflect a belief in determinacy of the divine language of the Torah, later uses increasingly challenge the notion of linguistic determinacy. I briefly engage the Babylonian version of this rule in my concluding remarks.

For clarity’s sake, I henceforth use ‘Rule’ with a capital ‘R’ to refer to this rule, and ‘rule’ with a lowercase ‘r’ when speaking of rules, in general. Rabbinic sources are cited according to the manuscripts chosen by the Historical Dictionary of the Hebrew Language (available at <http://maagarim.hebrew-academy.org.il/>). Important terms are transliterated for the benefit of the non-specialist. All translations are mine.

2 The Place of Rules in Early Rabbinic Exegesis

The earliest attestations of the Rule appear in a group of exegetical works (*midrashim*) by the first few scholastic “generations” (*tannaim*). Rather than assuming a merely derivative position vis-à-vis the biblical text, these works mediate between biblical law and lore, on the one hand, and rabbinic legal practice and teaching as handed down by oral tradition, on the other. The rabbis’ reading practices reflect this mediating role. *Midrash* knows numerous hermeneutic principles. They constitute accepted norms, which exegetes not seldom draw on to anchor in Scripture a point already established by oral tradition.² Special terminology is in place to mark homilies as conscious choice or to rank them “according to the level of elegance as well as the proximity to the local context” (Rosen-Zvi 2014, p. 289).

² Recent scholarship increasingly emphasizes a function of *midrash* as “re-scripturizing” rabbinic tradition. Paz (2014), Rosen-Zvi (2014), Kahana (2015). Cf. Halbertal (1997).

Scholars have long noticed that the tannaitic *midrashim* were compiled and redacted by two different exegetical schools, known by the names of their leading sages, Rabbi Yishmael and Rabbi Aqiva. Although material was shared, adopted, and revised, it is possible to identify the origin of passages on the basis of midrashic methods and terminology, characteristic exegetic principles, attributions or parallels (Kahana 2006). It emerges that the two schools notably differed in their appreciation of *din*, roughly ‘logical reasoning’, and of interpretive rules. The school of Rabbi Yishmael embraces more rules and principles, and favors inferential reasoning over complex homilies. “The hierarchy of the sources is unequivocal: inference (*din*), explicit verses, simple homilies, and only lastly complex homilies” (Rosen-Zvi 2014, p. 284; cp. Yadin 2004, Kahana 2006). In marked contrast, the school of Rabbi Aqiva prefers to closely focus on individual verses, basing its expositions on select words and even letters, and appears much more reluctant to rely on logical reasoning. Tzvi Novick identifies four patterns in Aqivan *midrash*, in which long expositions of *din* are crowned by the surprise revelation of what the verse really implies: it consistently proves the opposite of the logical inference (Novick 2012).

3 The Rule in the School of Rabbi Yishmael: Learning Punishment from Stated Reward

The Rule forms part of a fixed building block in material from the school of Rabbi Yishmael. It appears in almost identical fashion in five expositions. The underlying verses all express *positive* commandments,³ each followed by a promise of longevity in reward for fulfillment.⁴ All verses exhibit the same syntactic construction. I discuss an exposition from the Mekhilta de-Rabbi Yishmael, on the commandment to honor one’s parents, in Ex 20:11.⁵

*Honor your father and your mother.*⁶ If you honored them—so that (*lema’an*) *your days may be long*; and if not—so that your days may be short. For the words of

Torah are a shorthand (*notariqon*), for thus the words of Torah are to be interpreted: from the category of ‘yes’ that of ‘no’ (*mikhlah hen lav*), from the category of ‘no’ that of ‘yes’ (*mikhlah lav hen*).⁷

The exegetes seek to learn the consequences of non-fulfillment from the stated reward. To this end, they paraphrase the verse as a conditional. They re-read a final conjunction as consecutive. This is an option for which biblical Hebrew allows (Oren 2013). On this reading, the verse states a sufficient condition: “whenever you honored your parents, your days will be long.”⁸ They add a complementary conditional: “if not, your days will be short.” The inference is said to reflect an inherent quality of the words of Torah. Following the stated rationale, words of Torah context-independently allow for an inference from the category of ‘yes’ to that of ‘no’, and vice versa. ‘Yes’ and ‘no’ refer to fulfillment and non-fulfillment of the commanded action, respectively. Thus, all commandments are held to impart a lesson on their fulfillment and non-fulfillment alike. This exegetical position matches a known tendency of the school of Rabbi Yishmael to attribute interpretive agency to Scripture itself (Yadin 2004, p. 50).⁹

How do they impart the lesson? I entertain two possibilities: the complementary lesson may be inferred *sylogistically*, or it may be seen as *implied*. The first possibility leads to the absurd conclusion that there can be no neutral actions, as I explain. The two conditionals take the form “If p, then q; if not-p, then not-q.” The second can be said to follow from the first only on an added premise: that p and q are mutually exclusive, and comprehensive. The entire realm of human action is then divided into subcontraries, one of (positive) fulfillment, rewarded by a longer lifespan, and one of (negative) not-fulfillment (dishonoring the parents), punished by a shortening of one’s life. A threat of shortening one’s life makes little sense if it refers to a temporal aggregate at the time of death. But if it applies to any moment in one’s life, it must apply even to individual acts. Thus, for the syllogism to be valid, there can be no neutral action.

³ I adopt a rabbinic distinction between *positive* commandments (*dos*) and *negative* commandments (*don’ts*).

⁴ The commandment to honor one’s parents, in Ex 20:11, its second formulation in Deut 5:15; the commandment to teach one’s children Torah, in Deut 11:19; and the commandment to use a just weight, in Deut 25:15.

⁵ The other instances appear in the reconstructed Midrash Tannaim on the second formulation of the same commandment in Deut 5:15; Midrash Tannaim on Deut 25:16; Midrash Tannaim on Deut 11:19, and its parallel in Sifre Deuteronomy 46 on the same verse. The latter passage was identified as Yishmaelian already by David Zvi Hoffman (Hoffmann 1887, p. 66f; cp. Epstein 1957, p. 625).

⁶ Ex 20:11.

⁷ In tannaitic usage, *klal* designates a ‘general term’; hence, ‘generality’ or ‘category’ here.

⁸ I rule out the alternative reading as implausible. The parallelism requires that we treat both conditionals in the same manner. On the assumption of a *final* reading of the conjunction, both conditionals state a necessary condition: “Only if you honored your parents, your days will be long,” and “your days will be short *only if* you did not honor your parents.” The latter is a promise that the exegetes are not likely to have made.

⁹ “For the Rabbi Ishmael midrashim, Scripture is not saturated with meaning, the legitimate object of varied and potentially infinite interpretation. Instead, a division of labor is evident: interpretation ventures only into areas that Scripture has vacated of meaning, but recedes in the face of meaning” (Yadin 2004, p. 61).

Let us assume, then, that the exegetes viewed the complementary lesson as *implied*.¹⁰ Thus, the Rule suggests that all positive precepts imply a lesson about the failure to fulfill the commanded action, and all negative commandments a lesson about their transgression. It remains unclear how exactly this implication is to be uncovered. Some testing quickly reveals that periphrastic restatements on the model of our homily work well for commandments stated alongside their reward, but yield rather perplexing lessons when applied to other commandments.¹¹ In fact, “commandments stated alongside the giving of their reward” (*mitzvot shematan skharan betzidan*) present a larger exegetical concern in tannaitic literature (cf. Zanella 2019). This version of the Rule may belong to this discourse, and suggest its universal applicability only for this group of commandments.¹² If this hypothesis is correct, we may then conclude that the exegetes behind this version of the Rule embraced a notion that the language of these divine imperatives grounds their own completion.

4 The Rule in the School of Rabbi Aqiva: the Uncharted Area of the Law

We encounter a profoundly different version of the Rule in *midrashim* from the school of Rabbi Aqiva. All four instances in the Aqivan collections reflect the same use. Turning to explicit verbal negations in *negative* commandments, these exegetes draw on their version of the Rule to gauge the *unregulated realm of action*. Two out of four instances appear in a passage adopted from the school of Rabbi Yishmael. The third one appears right behind it, clearly echoing the adopted material. The most plausible explanation for this textual data is a redactional carry-over.

¹⁰ I use this term with some hesitation. The interpretive arguments of the sages frequently rely on aspects of the legal language that we moderners would characterize as pragmatic. But it is far from clear that the modern analytical distinction between semantic and pragmatic aspects of meaning would have meant anything to them. The rabbis do not have a clearly discernible notion of lexical meaning; their sense of meaning is one.

¹¹ Take, for example, Num 15:39. This positive commandment has the same syntactic structure as the verse in our homily; unlike it, it states an end rather than a reward. “That shall be your fringe; look at it and recall all the commandments of the Lord and observe them, so that you will not follow your heart and eyes, after which you use to go astray.”—If you looked and recalled..., so that you will not follow; if not, so that you *will* follow...” The commandment of adding fringes to one’s garment would seem to *doom* the person failing to fulfill it to go astray. This is hardly a plausible implication of a commandment.

¹² Lacking this information, we misread it. As Andrei Marmor notes, “conversational implicatures cannot be frequently relied upon in determining the communicative content of legislative speech” (Marmor 2008, p. 440).

The exegetes adopted the Rule along with its context, and reworked it. Tendentious reworkings of this kind have been documented for other exegetical formulas (Kahana 1999, 2006, p. 35f.). Only the fourth instance stands on its own.¹³

I discuss the aforementioned triplet. It is found in the Sifra, a third-century *midrash* on the book of Leviticus. While properly attributed to the school of Rabbi Aqiva, many textual witnesses of this compilation incorporate some extensive insertions of Yishmaelian material. Our triplet starts out at the end of one of such insertion, and continues through the following, Aqivan text. The insertion, known as Mekhilta de-Miluim, covers Leviticus 8:1–10:7. The end of this biblical portion relates how Nadav and Avihu, the sons of Moses’ brother Aaron, first anointed high priest of Israel, offer up an illicit offering on God’s altar. Enraged, God consumes them by fire. God’s subsequent injunctions on pain of death to Aaron and his surviving sons continue into the next biblical portion. The biblical text itself thus invites an exegetical bridge. The Rule appears twice in the final sections of the Mekhilta de-Miluim, and almost immediately afterwards in the Aqivan material on the next portion. We know from this echo that the material passed through the hands of a redactor.¹⁴ Thrice, the Rule is applied to the divine appeal, “lest you die” (*velo tamutu* and *pen tamutu*, respectively). I cite only the relevant sections.

[1] *Do not tear your vestments*—do not rend your clothes. *Lest you die*—from the range of implication of the ‘no’ (*mimashma lav*) you learn the ‘yes’. ... *You shall not go outside the entrance of the tent of meeting*—might this equally apply when they are officiating and when they are not officiating? (No.) Scripture says, *Outside the sanctuary he shall not go; he shall not profane*.¹⁵ At what time does he not go outside? *He shall not profane*—clearly (only) when officiating.

¹³ *Mekhilta de-Rabbi Shimon bar Yohai* on Exodus 21:8. The passage can only be reconstructed from the 13th-century Midrash ha-Gadol and reflects the wording of the rule found in the Babylonian Talmud, *mikhlal lav ata shomea hen*. Nonetheless, its use accords with the other three instances. The Rule is applied to the words “whom he did not designate” in Ex 21:8. The sages infer from the word ‘not’ that a man is free to designate (for himself or his son) another person’s daughter sold to him as a servant.—Wording from the Babylonian Talmud often comes to dominate later texts and printed editions. This is likely the case here.

¹⁴ This find does not necessarily imply that the Rule originated in the school of Rabbi Yishmael, nor that its form in the Mekhilta de-Rabbi Yishmael was necessarily its original form. Other versions of the Rule may have existed but been lost. Both attested versions may go back to models predating the rabbis. On the origin of the Mekhilta de-Miluim in the school of Rabbi Yishmael, Hoffmann (1887) p. 66f., and Epstein (1957) p. 625.

¹⁵ Lev 21:12.

Lest you die—from the range of implication of the ‘no’ (*mimashma lav*) you learn the ‘yes’. ...

[2] *Tent of meeting*—I know only about the tent of meeting; whence do I know to include Shilo and the temple? Scripture says, *it shall be a statute forever throughout your generations. Lest you die*—from the range of implication of the ‘no’ (*mimashma lav*)¹⁶ you learn the ‘yes’.

Constructed around negative commandments accompanied by a threat of premature death, the triple exposition closely resembles the building block preserved in the *midrashim* from the school of Rabbi Yishmael. Significantly, though, the underlying verses constitute a negative mirror image of those expounded in the latter. Details suggest an entirely different function of this version of the Rule.

The rationale for the Rule, “For the words of Torah are a shorthand (*notarikon*), for thus the words of Torah are to be interpreted,” is absent. This Rule does not assert an inherent quality of the words of Torah, nor does it suggest its universal applicability. The disjunction here operates on a ‘range of implication’ (*mashma*), rather than on a ‘category’ (*klal*). The term *mashma* is used by both schools and *aural* in nature; literally, ‘what can be heard’. Rosen-Zvi argues that it “does not discuss the possible *meaning* of a word or verse, but rather what could be legitimately inferred from it.” As he notes, *mashma* marks ‘what can be heard’ from the biblical text *after* midrashic intervention (Rosen-Zvi 2014, p. 281). The Sifra combines this noun with the cognate verb. Literally, the exegetes “hear what can be heard” from the verse. While the ‘no’ denotes the non-fulfillment of a positive precept in the Yishmaelian homilies, it here refers to a verbal negation in the verse: “lest you die.” The Aqivan exegetes expound an implication semantically “encoded” in the verse (Marmor 2011, p. 90).¹⁷

This difference in the interpretation of ‘yes’ and ‘no’ in the two schools matches a conceptual difference observed by Aharon Shemesh. In his genealogy of the central rabbinic notion of ‘positive’ and ‘negative’ commandments, Shemesh discerns two conflicting definitions. An older, ‘performative’ definition is aimed at the action commanded. This definition dominates Yishmaelian *midrash*. A younger, ‘linguistic’ definition hinges on the biblical wording of the commandment; it is closely associated with the school of Rabbi Aqiva. Shemesh emphasizes that the difference between these two definitions lies in the very notion of ‘commandment’. A

commandment is an act in one case, but a text in the other (Shemesh 2002). The distinct exegetic terminology, the referential ‘category’ in the school of Rabbi Yishmael, and the aural ‘range of implication’ in the school of Rabbi Aqiva, is indicative of this difference.

Lastly, the inference from affirmation to negation is absent from this version of the Rule. What is the function of the one-legged Rule in this homily? *Do not tear/do not go outside ... lest you die*—unless you tear/go outside, nothing will happen to you. Rather than seeking to learn further prescriptive content from the law, these exegetes draw on the Rule to stake out those areas that are *not* covered by the law. It is instructive, I believe, to consider once more the negation in these two tannaitic versions of the Rule. The Mekhilta de-Rabbi Yishmael seeks to learn a lesson about not honoring one’s parents. Not honoring is said to be punishable by a shortening of one’s days, and must therefore be understood as dishonoring. Thus, ‘yes’ and ‘no’ in the Mekhilta stand for logical contraries. Rabbinic Hebrew does not have a lexical distinction between ‘not’ and ‘non-’, yet it is clear from the homily that the Sifra takes interest in the *non*-violation of commandments. The Sifra knows of an infinite judgment in the law.

The Aqivan formulation of the Rule wins the day in Palestinian rabbinic literature. Babylonian rabbis use a slightly different formulation of the Rule, as we shall see shortly. But theirs, too, knows only an inference from negation to affirmation. The second leg of the Rule, the inference from affirmation to negation, never returns in the classical rabbinic corpus.

5 Divine and Human Language Compared (Palestinian Talmud, Tractate *Shevuot* 7:1)

The Palestinian Talmud (red. ca. 370 CE) is a discursive legal commentary, which follows the order and tractates of a tannaitic legal compilation, called Mishnah. The instances of the Rule found in this text continue the wording found in the Sifra. Yet again, we find it put to novel uses. In a cluster of three closely related passages, the sages of the Talmud apply the Rule to vows and oaths—human utterances governed by biblical verses in substance, but not in wording. Two knotty discussions on the use of antonyms and negations, such as “not unconsecrated shall be whatever I do not eat” or “may God *not* smite you if you come and testify for me,” create a lasting association of the Rule with Rabbi Meir, disciple of Rabbi Aqiva and a prominent tannaitic authority in his own right—known for his analytical skills, and principled dissent on several counts.¹⁸ A third debate, from the talmudic

¹⁶ The printed edition of the Sifra has the wording of the Rule as found in the Babylonian Talmud. Cp. n13.

¹⁷ Andrei Marmor observes in modern law that “implications which are semantically encoded inevitably form part of the content of the law” (Marmor 2011, p. 90). Marmor’s ‘semantically encoded implications’ correspond to Gricean ‘conventional implicatures’.

¹⁸ Palestinian Talmud, *Nedarim* 1:4 and *Shevuot* 4:13. We shall see below that the same authority is credited with highlighting ways in which disjunction may *fail*. There is no need to construct a homog-

tractate on oaths (*Shevuot*), refers to Rabbi Meir's Rule to contrast human and divine language.

At stake in this debate is the settlement of monetary disputes by means of an oath. Already the Bible establishes a mechanism to exempt a temporary custodian of animals from restitution on condition of an oath that he has not laid hands on them.¹⁹ Tannaitic law adds a complementary mechanism to claim outstanding payments by means of an oath.²⁰ In its discussion of the latter, the Palestinian Talmud asks whether a litigant who fails to take the oath must then pay. The legal result is uncontroversial: whoever does not take the oath, must pay. The passage adduces three different ways of anchoring this result in the law.

“Whoever takes an oath enjoined in the Torah (takes the oath and does not pay).”²¹ From the range of implication of what is said (*mimashma shene'emar*), *An oath before the Lord shall decide between the two of them*,²² we do not know that he must pay in case he does not take the oath.²³—What does Scripture say? *The owner shall accept (the oath), and he shall not pay*. This actually means (*ela*): because the owner accepted the oath, he is exempt from paying.

Rabbi Haggai asked before Rabbi Yosi, And why is [the following] according to Rabbi Meir? It is even according to the rabbis! Did not Rabbi Assi say in the name of Rabbi Yohanan, “The words of Rabbi Meir: from the range of implication of the ‘no’ (*mimashma lav*) you learn the ‘yes’—*the owner shall accept (the oath), and he shall not pay*. So, if he does not take an oath, he will pay.” Rabbi Hiyya taught, “(An employer may) lay down that a nonpaid custodian or a hired custodian will be treated as equivalent to a borrower.”²⁴

Footnote 18 (continued)

enized image from these two conflicting presentations. But if we so desire, we might say that the Palestinian Talmud rhetorically casts Rabbi Meir as an analytical *formalist*, rather than as a proponent of linguistic determinacy.

¹⁹ Ex 22:9–10.

²⁰ Mishnah *Shevuot* 7:1.

²¹ Loc. cit.

²² Ex 22:10.

²³ “From the range of implication of what is said ... we/I do not know” is a distinct exegetic phrase attested a scant few times in tannaitic midrashim and about a dozen times in the Palestinian Talmud. I understand it to mean that the biblical words in question do not yield the desired inference. Being beyond the implication of these words, additional support is needed to produce the desired result. Cp. Rosen-Zvi (2014) p. 281.

²⁴ A borrower must compensate the owner for any loss incurred. Cf. Tosefta *Bava Metzia* 8:19, Mishnah *Bava Metzia* 7:10.

Rabbi Hanina said, As far as the language of Torah is concerned, all concede that from the range of implication of the ‘no’ (*mimashma lav*) you learn the ‘yes’. What they differ about is the language of humans.

The anonymous voice submits a paraphrase of the verse, ascribing consecutive force to the conjunction ‘and’ in the verse. Rabbi Meir is reported to learn the result by applying the Rule to the word ‘not’ in *he shall not pay*. Rabbi Hiyya anchors the legal result in a received rabbinic teaching, rather than the biblical verse. Rabbi Hanina then comments on Rabbi Meir's use of the Rule—on the attempt to learn an unstated norm from a semantically “encoded” implication. According to Rabbi Hanina, all agree that this can be done with the language of Torah. Thus, all agree that the language of the divine precepts is sufficiently determinate to ground inferential reasoning. In passing, we learn that some Palestinian sages harbor doubts whether the same holds true for *human* language.

6 The Failure of Inference in Declarations Pertaining to the Future (Palestinian Talmud, *Eruvin* 3:5, *Qiddushin* 3:4)

In the final passage I wish to discuss, the Palestinian Talmud refutes the notion that human language can *reliably* ground inferential reasoning. The passage is shared by tractates *Eruvin* (Sabbath domains) and *Qiddushin* (Betrothals). Though unrelated in subject matter, both legal contexts revolve around a human declaration. Both declarations pertain to the future, both can be conditioned. Yet in a world in flux, what is true at one moment may not be true at another moment. And thus, inference from ‘no’ to ‘yes’ may fail. The entire unit is cast as a quest for the rationale behind a certain position ascribed to Rabbi Meir. I first introduce the earlier laws this passage comments on, Mishnah *Qiddushin* 3:4 and Mishnah *Eruvin* 3:5.

Mishnah *Qiddushin* permits a man to condition his betrothal to a woman as follows. “You are betrothed to me on condition that...,” then adding a stipulation of his own making. Minute differences in wording can be decisive, as an ill-defined condition opens the door to an invalid marriage of the woman with another man, and thus, to “bastard” children. In casuistic fashion, two rulings detail several stipulations, and the legal status of the bride pending fulfillment. According to these rulings, she remains *not* betrothed until the condition has been fulfilled.²⁵ The Mishnah then cites Rabbi Meir, who dissents on grounds of principle.

²⁵ Mishnah *Qiddushin* 3:2–3; cp. Mishnah *Gittin* 7:5.

Rabbi Meir says, Any stipulation is invalid unless it is like the stipulation of the Gadites and Reuvenites, as it is said, *And Moses said to them, If the Gadites and the Reuvenites will cross over (the Jordan with you and the land shall be subdued before you, then you shall give them the land of Gilead for a possession); but if they will not cross over with you armed (they shall have possessions among you in the land of Canaan).*²⁶ Rabbi Hananya ben Gamliel says, It was necessary to state the matter (explicitly), for were it not so, the range of implication (*mashma*) would include (the notion) that they will not even inherit in the land of Canaan.²⁷

Gadites and Reuvenites serve as precedent for a stipulation of the following type: “if A, then B; if not A, then C,” where C can be the contrary “not-B” but not an indeterminate “non-B.” Rabbi Meir insists that in order to ensure a well-defined legal status at all times, one must specify the outcome in case of fulfillment and non-fulfillment of the condition alike. Yet his departure from wider consensus consists not in the double stipulation per se. We know from another tannaitic teaching that others embraced the double stipulation in betrothal before Rabbi Meir.²⁸ Rather, it consists in his repeated proposal to treat an equivocal condition as *fulfilled* until the opposite is proved.²⁹

Mishnah *Eruvin* 3:5 addresses a more complex scenario. Someone states his intention to escape from gentile persecution on the Sabbath. Sabbath being a day of rest, his movement is restricted to a distance of 2000 cubits from home.³⁰ But he may expand his scope of movement in *one* direction by means of an *eruv*, a virtual domain defined around a symbolic temporary home, such as a pot of food which he places no farther than 2000 cubits beyond his regular home domain. Unawares whence the gentiles will arrive, he makes a conditioned declaration.

A person may define his *eruv* conditionally and say, If the gentiles came from the east, *my *eruv* shall be to the west; if they came from the west, *my *eruv* shall be to the east. If they came from here and there, I shall go in the direction I desire³¹; if they did not come either

from here or from there, I shall be like the residents of my town.³²

This ruling opens the discursive unit shared by both tractates.³³ Rabbi Eleazar raises a question. Who taught the double conditional ‘if they came; if they did not come’? The answer is: Rabbi Meir. But which Rabbi Meir? What was his rationale? The majority of sages believe it was “Rabbi Meir of *Qiddushin*.” Rabbi Yosi inclines towards “Rabbi Meir of *Eruvin*.” The two personas constructed by the Talmud stand for distinct ways in which disjunction may fail.

The passage adduces further teachings to support each view. The majority opinion relies on a betrothal formula contingent on rainfall.

The fellow sages say, Rabbi Meir of *Qiddushin*, for it was taught: One who says to a woman, ‘You are betrothed to me on condition that rain will fall—(if) rain fell, she is betrothed; and if not, she is not betrothed’. Rabbi Meir says, Whether rain fell or not, she is betrothed—unless he doubles his stipulation. All concede that in case he said to the woman, ‘You are betrothed to me after rain has fallen’—(if) rain fell, she is betrothed; and if not, she is not betrothed.

The rainfall conditional poses a problem of temporal openness. The legal status of the woman is defined prospectively: if rain will fall, she is betrothed. Until rain actually falls, this condition is neither fulfilled, nor can it be said to be not-fulfilled. The woman is betrothed—yet at the same time, not betrothed. Were it not for Rabbi Meir’s second stipulation, she would remain suspended in an undetermined legal status.

Rabbi Yosi bases his alternative view on the preceding ruling in Mishnah *Eruvin*:

Rabbi Yosi says, Rabbi Meir of *Eruvin*, as we learned,³⁴ “If there is a doubt (about his *eruv*)—Rabbi Meir and Rabbi Yehuda say he is a *hamar gamal*. Rabbi Yosi and Rabbi Shimon say, A doubtful *eruv* is valid. Rabbi Yosi said, Rabbi Meir said this only to be more stringent.

A person realizes at twilight that the pot of food constituting his temporary home is in a state of doubt: if it was emptied before sunset, fell out of reach, or rolled beyond the limits of the domain, his *eruv* is null and void. Rabbi Meir and Rabbi Yehuda make him freeze. The *hamar gamal*, the proverbial

²⁶ Numbers 32:29–30, abbreviated.

²⁷ Mishnah *Qiddushin* 3:4.

²⁸ Tosefta *Qiddushin* 3:2.

²⁹ He advocates this view throughout the third chapter of Tosefta *Qiddushin*.

³⁰ The permissible domain is defined as a square around one’s permanent home or town, extending 2000 cubits in each direction.

³¹ In this way indicating the location of his *eruv*.

³² Mishnah *Eruvin* 3:5. In the final case, he falls back on the regular domain of 2000 cubits around his hometown, seeing that he cannot make use of either prepared *eruv*.

³³ Tractate *Qiddushin* has a brief introductory paragraph before citing this ruling. The remainder of the discussion is identical in both tractates except for minor variations.

³⁴ In Mishnah *Eruvin* 3:4.

ass and camel driver, is pulled in opposite directions by his animals (as the traditional commentators point out, one is led by its head and the other driven from behind). Our person is bound by both domain limits, incapable of moving beyond the intersection of the two domains. In the worst case, home and pot 4000 cubits apart, his existence is confined to an infinitesimal line between them. The same holds true for the scenario in Mishnah *Eruvin* 3:5. If someone prepares two *eruvim* but fails to state his decision for one of them before the Sabbath, he will be bound by both. He can avoid this outcome by adding that he will be like any resident of his town if the gentiles do not arrive at all.

The scenarios invoked present two different ways in which legal determination may fail. The rainfall conditional yields an inclusive disjunction between ‘betrothed’ and ‘not betrothed’. The doubtful *eruv* can, in the worst case, produce a failed exclusive disjunction, where the person can move neither in this domain nor in that domain. In both cases, Rabbi Meir recognizes the problematic. In either case, he takes the principled stance that an equivocal condition ought to be *considered* fulfilled although it has not factually been fulfilled. Because the logical contrary of fulfillment, the *not*-fulfillment of the condition, has not been proved, the condition ought to be considered (positively) fulfilled. Rabbi Meir seeks to ensure that the language of the law disposes of only two values, ‘fulfilled’ and ‘not fulfilled’, rather than three, ‘fulfilled’, ‘not fulfilled’, ‘non-fulfilled’. He is seeking to ensure, it seems, that the language of the law is logically determinate.

The double stipulation presents a *procedural* solution that ensures that the opposite is proved at all time. Our passage readily accepts the argument of “Rabbi Meir of *Eruvin*.” In contrast, it exhibits notable hesitation *vis-à-vis* the reasoning of “Rabbi Meir of *Qiddushin*.” The text records matter-of-factly that the sages adopted the *symphonon*, a mold for writs of betrothal that indeed contains a double stipulation. The procedural solution is thus accepted. But the passage does not accept Rabbi Meir’s demand to treat a condition as fulfilled until the opposite is proved. An anonymous voice suggests that the conjunction *al mnat* (‘on condition’) obviates a second stipulation. Following this voice, a conditioned declaration only takes effect once the declaration corresponds to reality. We are then told that the *symphonon* was adopted only to avert a minor procedural issue: who would be entitled to annul the betrothal in case the condition has not been met? Since the second stipulation effects an automatic annulment, no further person is needed. The true subject of this discussion is the force of a conditional.

At this point, the passage points to an apparent contradiction in Rabbi Meir:

Rabbi Yosi ben Rabbi Bun said, Everywhere Rabbi Meir accepts “from the range of implication of a ‘no’

you learn the ‘yes,’” and here he doesn’t?! Rabbi Matanya said, He opted for stringency in the case of prohibited sexual relations.

The passage seems unwilling to accommodate Rabbi Meir’s demand to fix the language of the law. The voice behind this text is content to rely on the force of the conjunction *al mnat*. Rather than giving in to Rabbi Meir’s demand, the text asks, why does he rely on the implication of the ‘no’ in other cases, but not in this one?! Rabbi Matanya quickly explains away Rabbi Meir’s principled demand as a response to a narrow, local problem.

This passage, extraordinarily long and elaborate by the standards of the Palestinian Talmud, combines two separate legal areas into one discussion. The only point of contact between these two areas of expertise—Sabbath domains and the laws of betrothal—is their reliance on conditioned declarations pertaining to the future. In both cases, the procedural solution of a double stipulation had been found already in tannaitic times, roughly a century and a half before this passage was redacted.³⁵ In typical talmudic fashion, the passage walks its reader, or rather, its learner, through the pitfalls of such declarations. “Rabbi Meir of *Eruvin*” and “Rabbi Meir of *Qiddushin*” alert the learner to ways in which predication can fail in a world in flux. The learner is encouraged to ponder the option of treating conditionals in a way that runs counter to ordinary language use, and learns that there is no need to resort to such drastic measures, since even Rabbi Meir proposed his treatment of conditionals only in a high-stake case. My humble point here is the following. The didactic goal of this passage is entirely linguistic in nature. Not because the rabbis were interested in theoretical speculation, but because they were jurists—and because language is of vital importance to jurists.

7 Concluding Remarks

Two different wordings and four different uses of the Rule highlight shifting linguistic attitudes. The Rule attested in material from the school of Rabbi Yishmael serves to make substantial additions to the law, allowing the exegetes to infer punishments not stated in the Torah. It satisfies Schauer’s criteria for formalism, indistinguishable in his view from “rulism:” the idea that a rule applies mechanically, even in the face of perplexing outcomes, because the rule provides the reason for its own application. “The rule itself

³⁵ The voice behind the juxtaposition of “Rabbi Meir of *Eruvin*” and “Rabbi Meir of *Qiddushin*” is Rabbi Mana, one of the latest sages mentioned in the Palestinian Talmud. This gives us a *terminus a quo*. The passage was likely redacted in the second half or final third of the fourth century CE.

has a normative force” (Schauer 1988, p. 535). Following the homily, the words of Torah are characterized precisely by the possibility of such mechanical rule-following.³⁶ They fully ground legal determinacy.³⁷

The Sifra draws on its own version of the Rule not to complete the law but to stake out its limits. Do these homilies differ in their linguistic attitudes? I believe they do. As I indicated above, in the Mekhilta the disjunction operates on referential ‘categories’ of ‘yes’ and ‘no’, where these stand for fulfilled and not-fulfilled commanded action, respectively. The disjunction operates on the semantic content of the verses. This is not the case in the Sifra. Following Aharon Shemesh’s observation, the school of Rabbi Aqiva treats commandments as texts. We can specify further: for the Aqivan exegetes, a commandment is a text *as it has been said*, in the precise formulation as it has been posited. The exegetes gain access to it by hearing “what can be heard.” Hearing what can be heard can only take place locally, contextually, and involves the expectations of the hearer. It attends to pragmatic aspects of meaning. I understand the minor difference in the wording of the Rule, *mashma* rather than *klal*, to signal that the Aqivan version of the Rule operates in a different manner. The Yishmaelian Rule is a semantic rule; the Aqivan version finely attuned to semantically encoded implications.

The Palestinian Talmud clearly approves of this tool. Rabbi Meir accomplishes stunning leaps with it in two knotty discussions about double negations in vows and oaths.³⁸ However, at some point doubts appear to emerge regarding the applicability of this Rule to human language. This, at least, is the passing suggestion of our passage in tractate *Shevuot*. If the attributions in this passage can provide a rough estimate, these doubts are voiced during the first half of the fourth century CE. Doubts give way to skepticism in the extended passage from tractates *Qiddushin* and *Eruvin*.

³⁶ Azzan Yadin-Israel argues that the school of Rabbi Yishmael viewed Scripture as a “presponsive” text: “The reader’s responses are assumed and accounted for in the biblical text, while Scripture does not so much respond to the interpreter as *prespond*; for the Mekhilta and the Sifre Numbers, the Torah is a *presponsive* text” (Yadin 2004, p. 133).

³⁷ Azzan Yadin-Israel compellingly rebuts Hananel Mack’s earlier attempt to trace a locus classicus of midrashic “polysemy” in the Babylonian Talmud back to the school of Rabbi Yishmael (Yadin 2003). On the tannaitic motif that God said several commandments simultaneously (*bedibbur ehad*), cp. Paz (2014) p. 290–301.

³⁸ Palestinian Talmud, *Nedarim* 1:4 and *Shevuot* 4:13.

³⁹ The Babylonian Talmud has a distinct version of the Rule, “from the category of ‘no’ (*mikhlal lav*) you infer the ‘yes’.” The historical relationship between this version and the preserved Palestinian ones is unclear.

In the Babylonian Talmud, the Rule is defunct.³⁹ Not even once is it used to make an inference. The Babylonian Talmud only ever mentions the Rule to state that “Rabbi Meir does not have it.” The brilliant sage now rejects the Rule. Narrowly, the dissociation of the Rule from Rabbi Meir solves a textual problem that already the Palestinian Talmud had raised. His demand for double stipulation cannot be reconciled with an embrace of the Rule.⁴⁰ More broadly, though, the defunct nature of the Rule in the Babylonian Talmud points to a profound change in legal culture. Leon Wiener Dow refers to the mind-boggling discussions that open some talmudic tractates, seemingly unsettling all that is to follow. Babylonian passages such as these, he argues, present the learner “with a meditation on the indeterminate nature of halakhic discourse” (Wiener Dow 2017, p. 63) The diachronic development of the Rule offers us a microhistory of shifting linguistic attitudes of the rabbis, from the semantic “rulism” of the school of Rabbi Yishmael to the pragmatic interests of the later Palestinian generations, and growing doubts about the determinacy of human language. Its curious career ends where Babylonian legal culture embraces the indeterminacy of the law.

Funding Open Access funding enabled and organized by Projekt DEAL.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

References

- Arulanantham AT (1998) Breaking the rules? Wittgenstein and legal realism. *Yale Law J* 107(6):1853–1883
- Bix B (2012) Legal interpretation and the philosophy of language. In: Solan LM, Tiersma PM (eds) *The Oxford handbook of language and law*. Oxford University, Oxford, pp 145–156
- Dolgopolski SB (2013) *The open past: subjectivity and remembering in the Talmud*. Fordham, New York
- Epstein YNH (1957) *Prolegomena ad litteras tannaiticas: Mishna, Tosephta et interpretationes halachicas*. Hebrew University, Jerusalem

⁴⁰ The redactional voice of the Babylonian Talmud points to this contradiction in tractate *Nedarim* 11a.

- Furstenberg A (2016) Safot hasiah hatalmudi: iyyun filosofi bedarkei hahithavvut shel hahalakha ha-amora'it (The languages of Talmudic discourse: a philosophical study of the evolution of Amoraic halakha). Magnes, Jerusalem
- Halbertal M (1997) Mahapakhot parshaniyot behithavvutan (Commentary revolutions in the making). Magnes, Jerusalem
- Hezser C (1998) Interfaces between rabbinic literature and Graeco-Roman philosophy. In: Schäfer P, Heszer C (eds) *The Talmud Yerushalmi and Graeco-Roman culture II*. Mohr Siebeck, Tübingen, pp 161–187
- Hoffmann DZ (1887) *Zur Einleitung in die halachischen Midraschim*. Driesner, Berlin
- Kahana M (2006) The Halakhic Midrashim. In: Safrai S, Safrai Z, Tomson PJ, Schwartz J (eds) *The literature of the sages. Second part: Midrash and Targum, liturgy, poetry, mysticism, contracts, inscriptions, ancient science and the languages of rabbinic literature*. Brill, Leiden, pp 3–105
- Kahana M (2015) Hadrashot bamishnah vehahalakhot bamidrash: behinat zikot gomlin (The relations between exegeses in the Mishnah and Halakhot in the Midrash). *Tarbiz* 84(1–2):17–76
- Kahana M (1999) Hamekhiltot lefarshat Amalek (The two Mekhiltot on the Amalek portion: the originality of the version of the Mekhilta d'Rabbi Ishma'el with respect to the Mekhilta of Rabbi Shim'on ben Yohay). Magnes, Jerusalem
- Kutz CL (1994) Just disagreement: indeterminacy and rationality in the rule of law. *Yale Law Journal* 103(4):997–1030
- Marmor A (2008) The pragmatics of legal language. *Ratio Juris* 21(4):423–452
- Marmor A (2011) Can the law imply more than it says? On some pragmatic aspects of strategic speech. In: Marmor A, Soames S (eds) *Philosophical foundations of language in the law*. Oxford University, Oxford, pp 83–104
- Neis RR (2019) The seduction of law: rethinking legal studies in Judaic studies. *JQR* 109(1):119–138
- Novick T (2012) Din and debate: some dialectical patterns in Tannaitic texts. *JSIJ* 11:187–215
- Oren M (2013) Purpose clause: Biblical Hebrew. In: Khan G (ed) *Encyclopedia of Hebrew language and linguistics*. Brill, Leiden
- Paz Y (2014) Misofrim lemelumadim: parshanut hazal lamiqra le'or haparshanut hahomerit (From scribes to scholars: rabbinic exegesis in light of the Homeric commentaries). Dissertation, The Hebrew University of Jerusalem
- Rosen-Zvi I (2014) Structure and reflectivity in Tannaitic legal homilies, or: how to read Midrashic terminology. *Prooftexts* 34(3):271–301
- Rosen-Zvi I (2015) The Mishnaic mental revolution: a reassessment. *JJS* 66(1):36–58
- Schauer F (1988) Formalism. *Yale Law J* 97(4):509–548
- Shemesh A (2002) The development of the terms 'positive' and 'negative' commandments. *Tarbiz* 72(1–2):133–150
- Stern D (1988) Midrash and indeterminacy. *Crit Inq* 15(1):132–161
- Wiener Dow L (2017) Indeterminate midrash, indeterminate halakha. In: Baris ML, Liska V (eds) *Judaism, law and literature (=JLAS 27)*. Deborah Charles, Liverpool, pp 50–72
- Yadin A (2003) The hammer on the rock: polysemy and the school of Rabbi Ishmael. *JSQ* 10(1):1–17
- Yadin A (2004) *Scripture as logos: Rabbi Ishmael and the origins of Midrash*. University of Pennsylvania, Philadelphia
- Zanella F (2019) *Vergeltungsvorstellungen in der tannaitischen Literatur*. Mohr Siebeck, Tübingen

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.