

Windows onto Jewish Legal Culture

Fourteen Exploratory Essays

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VOLUME ONE



 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK

4 Erroneous rulings

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1 Introduction

1.1 The dilemma posed by erroneous rulings

According to the prevailing western understanding of the judicial process, courts are duty-bound to apply the rules of the legal system within which they operate, however these rules were generated. A question immediately presents itself: what is the status of a court ruling that is perceived by its addressee as being based on a misunderstanding on the part of the judge, and thus, perceived as going against the system's rules? Is the ruling's addressee obligated to obey the ruling despite its alleged erroneousness? Note that this question differs from that of the case where the addressee is

critical of the ruling's moral implications. In the latter case, the addressee is unwilling to abide by the system's determination, on moral grounds, whereas in the former case, she simply wants the court to generate the correct ruling.

The former question can also be presented in the following way: is the binding nature of a court ruling dependent on its **substantive** correctness, or is its validity solely a function of **procedural** correctness?

The position of Jewish law on the question of what renders a ruling valid differs from that endorsed in contemporary western legal theory. According to talmudic law, the validity of legal rulings does not rest exclusively on procedure, but is also conditioned on substantive correctness, that is, consistency with the law. In Jewish law, there may indeed be circumstances in which someone who believes that a ruling is not consistent with the law will not be bound by it. The practical import of this conclusion is that under certain circumstances, the law itself directs an individual not to follow a ruling that was handed down by the court. We will explore precisely when this scenario is deemed to occur.

More specifically, the paradigm case on which we will focus is that of the duty to obey a halakhic judgment in a situation where one of the judges disputes the ruling because he considers it erroneous. Elsewhere in this volume,¹ we saw that the phenomenon of controversy is a hallmark of halakhic literature. In many instances the Sages took pride in the existence of controversy regarding the correct understanding of the law, and even encouraged the parties to various controversies to uphold, teach and defend their respective views. But in this chapter, our focus will not be on theoretical controversy in the context of study in the *beit hamidrash* (yeshiva, talmudic academy), but on the adducing of controversial laws in actual legal decision-making. Consider the following scenario: a court hands down a ruling that conflicts with the view held by one of the judges, and, as he is convinced of the correctness of his position, this judge claims that the court has erred, and has issued a ruling that runs counter to the law. Does the halakha require this judge to abide by the court ruling he considers to be erroneous, or does it recognize a more limited obligation to obey, one that permits the scholar who is convinced of the halakhic correctness of his own position to maintain it in the face of a ruling to the contrary? Does such a scholar have the right to act, or maybe even rule in his community, in a manner that deviates from the said ruling, or might he even have an obligation to do so?

Once again, it must be stressed that the dilemma in question does not arise out of a legal ruling that conflicts with an individual's moral outlook, creating a disparity between his legal obligations and his personal worldview. Rather, the dilemma arises out of rulings that, in the opinion

1 See Chapter One above, "Controversy."

of one of the members of the court, contravene the law itself, or in other words, are erroneous in their substantive interpretation of the law.

The dilemma posed by erroneous rulings has significant social and existential implications. Permitting scholars to conduct themselves, or even to rule, on the basis of their own reasoning and understanding of the law, contrary to rulings of the courts, will undermine the stability of the legal system in general, which will, in turn, threaten the broader social order. The ability to project a sense of reliability and integrity in its application of the law is crucial to the operation of any legal system, and without it, communal unity will crumble. On the other hand, true justice is also a paramount value, and desirable standards of truth and justice cannot be maintained by a judicial system without mechanisms that enable it to quickly correct mistakes, even at the expense of stability. This desideratum mandates a weakening of the obligation to abide by the court's legal determinations in the event of a mistaken judgment, so as to ensure that the legal system is not held hostage to erroneous rulings.

The question of the scope and limits of the duty to abide by erroneous halakhic rulings has garnered considerable attention from contemporary scholars.² In particular, they have grappled with the fact that for approximately the past two hundred years, Orthodox Judaism has endorsed the notion of deference to the halakhic pronouncements of preeminent authorities (*daat torah*). This phenomenon has motivated scholars to explore whether this far-ranging obligation has its roots in the Rabbinic sources, or is a more modern development.

Many scholars claim that two approaches to this issue can be found in the classic halakhic sources, one mandating a limited duty of compliance with legal authority, and the other—often presented by contemporary halakhic authorities as the sole legitimate stance—mandating full and thorough deference to the pronouncements of halakhic authorities. The law of the “rebellious elder” (*zaken mamre*), which will be discussed in section 2, is often claimed to reflect the latter approach, whereas the stance taken in tractate Horayot of the Mishnah, which will be discussed in section 3, is said to reflect the approach espousing a more limited duty to obey. In this chapter, we will claim, however, that the different Rabbinic sources do indeed present a coherent position on the duty of deference to legal authority. The Sages emphasize that the Sanhedrin's rulings are authoritative, and uphold a comprehensive obligation to comply with them. Generally speaking, they do not permit those holding dissenting opinions to act contrary to the rulings of the court. Moreover, they declare that the Sanhedrin has the power to establish the normative and binding law with respect to as-yet undecided legal questions. Nevertheless, they

2 See M.Z. Sokol (ed.), *Rabbinic Authority and Personal Autonomy* (Northvale NJ: 1992); J. Roth, “The justification for controversy under Jewish law,” 76 *California L. Rev.* 337 (1988); M. Walzer et al. (eds.), *The Jewish Political Tradition* (New Haven: 2000), vol. 1, ch. 7.

did limit the obligation of obedience to rulings of the Sanhedrin in those exceptional cases where an obvious and objective mistake had been made. Indeed, a sage is not permitted to abide by the erroneous ruling. We will see that these two principles—the principle of the authoritativeness of Sanhedrin rulings, on the one hand, and that of the duty not to abide by a clearly erroneous ruling, on the other—reinforce and complement one another, ensuring that obedience to rulings issued by the court will be intelligent, critical, and subject to the overriding constraint of truth.³

1.2 The High Court in Jerusalem

The Sages based their understanding of the role and status of the High Court on Deuteronomy 17:8–13:

- 8 If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, even matters of controversy within thy gates; then shalt thou arise, and get thee up unto the place which the Lord thy God shall choose.
- 9 And thou shall come unto the priests the Levites, and unto the judge that shall be in those days; and thou shalt inquire; and they shall declare unto thee the sentence of judgment.
- 10 And thou shalt do according to the tenor of the sentence, which they shall declare unto thee from that place which the Lord shall choose; and thou shalt observe to do according to all that they shall teach thee.
- 11 According to the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do; thou shalt not turn aside from the sentence which they shall declare unto thee, neither to the right hand, nor to the left.
- 12 And the man that doeth presumptuously, in not hearkening unto the priest that standeth to minister there before the Lord thy God, or unto the judge, even that man shall die; and thou shalt exterminate the evil from Israel.
- 13 And all the people shall hear, and fear, and do no more presumptuously.

3 This chapter touches on several philosophical issues that have been the subject of much debate in recent years: (1) Is Jewish law divine, i.e., does its obligatory nature derive from the fact that it is divinely revealed, or is it autonomous, i.e., is its source human? (2) Is Jewish law monolithic, upholding one unequivocal stance on any legal issue, or is it pluralistic, recognizing multiple and possibly incompatible stances? (3) Is Jewish law conservative, advocating slow—if any—development of its rules in response to changing circumstances, or is it innovative, easily adjusting its norms to address contemporary needs?

This biblical rule establishes that the High Court will sit in Jerusalem ("the place which the Lord thy God shall choose") as the ultimate authority on all areas of the law: purity and impurity, the Temple service, and even civil matters (verse 8). In all these realms, in the event that the law is not known ("there arise a matter too hard for thee in judgment"), one must go to the High Court to seek a ruling, and one is obliged to follow that ruling (verse 10). This obligation is repeated in verse 11 with a metaphor that likens obedience to the court to taking a specific path from which no divergence is brooked ("neither to the right hand, nor to the left").

The Rabbinic discussion of this passage focuses on the parameters of the obligation to obey the court, though not on the obligation to go to Jerusalem to seek a ruling, a point that was apparently considered obvious. The focal point of the Rabbinic deliberation is the right of an individual sage to claim that the court has handed down an erroneous ruling, and to conduct himself, or even issue a ruling for his community, in accordance with his own (contrary) opinion. The discussion of this question reflects the dilemma that confronted the Rabbis as they went about their decision-making: ought they give precedence to the values of stability and communal unity, or to the value of correctly and truly interpreting the law? In other words, ought they place more weight on the need to preserve unity within the halakhic enterprise, even in the absence of consensus with regard to a particular law, or on the desideratum of allowing each sage to follow his own path—that is, his own understanding of the law—when convinced of its truth?

It is important to clarify the basis of the Rabbinic position regarding obedience to court rulings. Is obedience required because of the presumption that the court always acts rightly—that is, that the court is infallible—or is it grounded in the court's fundamental authority? We must also investigate whether authority is invested in judges as individuals, due to the high esteem in which they are held, or granted to the court as an institution, due to its importance to the maintenance of society. Let us now begin this examination with a look at the key Rabbinic sources relating to the 'rebellious elder' (*zaken mamre*), a sage who does not comply with a ruling handed down by the Sanhedrin.

2 The rebellious elder (*zaken mamre*)

On the strength of the biblical injunction regarded as the proof-text for the obligation to abide by the ruling of the High Court in Jerusalem, the Rabbis set down the law of the "rebellious elder," a sage who contests the ruling of the High Court, claiming that it is erroneous.

The law of the rebellious elder is set out in the Mishnah:

An elder who rebels against the court's decision [is put to death], as it is said, "If there arise a matter too hard for thee in judgment" (Deut.

17:8). Three courts were [in Jerusalem]: one convened at the entrance to the Temple Mount, one convened at the entrance to the Temple Court, and one convened in the Hall of Hewn Stone. They come to the one at the entrance to the Temple Mount, and he [the elder] says, "Thus I expounded and thus my fellows expounded, thus I taught and thus my fellows taught." If they [the court] had heard [a tradition regarding the matter], they tell it to them; if not, they go on to those [judges] at the entrance to the Temple Court, and he says, "Thus I expounded and thus my fellows expounded, thus I taught and thus my fellows taught." If they had heard [a tradition regarding the matter], they tell it to them; and if not, these and those come to the High Court that is in the Hall of Hewn Stone, from which Torah goes forth to all Israel, as it is said, "from that place which the Lord shall choose" (17:10). If he returned to his town, and yet again taught in the manner he had before—he is exempt; but if he ruled that the teaching was to be acted upon—he is liable, as it is said, "And the man who acts presumptuously" (17:12); he is not liable until he rules that it is to be acted upon.

mSanhedrin 11:2

According to the mishnaic account, the deliberations move through successively higher instances, finally reaching the High Court in Jerusalem that convened in the Hall of Hewn Stone. Although the High Court rules against the stance taken by the sage in question, he nonetheless 'rebels' and continues to instruct his followers to act in a manner contravening the ruling handed down by the court. It is at this stage that the Rabbis impose the punishment specified in the biblical passage: "that man shall die; and thou shalt exterminate the evil from Israel."

2.1 Rationale for the obligation to comply with court rulings

Why does the Talmud relate to the rebellious elder with such severity? Does the gravity of the rebellious elder's offense reside in the very fact that he dares to challenge the law, or is it that he challenges the High Court in Jerusalem? In other words, does the gravity ascribed to his offense arise from the assumption that the rulings of the court are *ipso facto* correct, and thus in disputing the court's ruling, he is in essence rejecting the authority of the law itself, or does it arise solely from the fact that he rejects the authority of the court and the legal establishment?

In the continuation of the Mishnah, the scope of the law of the rebellious elder is further limited in such a way that we can conclude that the law of the rebellious elder is intended to defend the authority of the court, and not necessarily the authority of the halakha itself. The rebellious elder is punished by death not because he weakens the rule of law, but because he undermines the standing of the highest court in the judicial system. The

Mishnah distinguishes between the sage who rules that a Torah law is to be abrogated, and one who rules that a law established by the Rabbis is to be abrogated:

Greater severity applies to [an elder who contradicts] the words of the Scribes than to [an elder who contradicts] the words of the Torah. [One who says] "There is no [precept of] phylacteries (*tefilin*)," in order to transgress the words of the Torah—is exempt [from the law of rebellious elder]; [one who says] "[Phylacteries have] five⁴ compartments" in order to add to the words of the Scribes—is liable.⁵
mSanhedrin 11:3

The precept of donning phylacteries is set down in the Torah, but the details of the precept, such as the structure of the phylactery boxes, were promulgated by the Sages. The Mishnah asserts that a sage who disputes the law of phylacteries itself is exempt, whereas a sage who disputes the details of the law, which were set down by the Sages, is liable.

The Early Authorities give different explanations for the exemption of the rebellious elder from liability for disputing the law of phylacteries. According to Rashi, the rationale is as follows: "This is not considered a legal ruling, since one can go and read it in the schoolhouse." In other words, the precept of phylacteries is a matter so obvious that even schoolchildren know it.⁶ Hence, such a ruling is inherently repudiated, and cannot even be considered a legal ruling.

Maimonides, on the other hand, explains the exemption as follows:

[The Sages of the Mishnah] said that he [the elder] is exempt if he admitted that it [the precept of phylacteries] is obligatory but he disobeys it due to rebelliousness, as [the Mishnah] says: "in order to transgress the words of the Torah," while admitting that it is a transgression. Therefore, he does not incur death by the court, because we do not put to death one who disobeys a positive commandment. But, if he said that there is no precept of phylacteries due to heresy, he is executed because he is a sectarian, not because he is a rebellious elder.... Have you ever seen a case where one who expresses belief and conviction that there are two or three deities—which is undoubtedly a repudiation of the biblical declaration that 'God is One'—about which we say that this person is not to be executed, or

4 The Sages specified that there are to be four compartments; see bMenahot 3b.

5 Although all of the *halakha* is often referred to under the rubric "words of the Torah" (*divrei torah*), here the term is used in a more restricted sense to refer to laws specifically stated in the biblical text. The expression "words of the Scribes" (*divrei sofrim*) refers to laws introduced by the Sages via tradition or interpretation.

6 See bSanhedrin 33b, bShavuot 14b, bHorayot 4a.

that he is a rebellious elder?! Rather, he is executed because he excluded himself from the community, that is to say, the community of Israel.

Maimonides, *Commentary on the Mishnah*, mSanhedrin 11:3

The mishnaic account portrays the rebellious elder as seeking to usurp the authority of the High Court in Jerusalem, as Maimonides goes on to assert:

Because the rebellious elder does not destroy the edifice of the Torah or repudiate the whole Oral Law in its entirety, he is not considered like the Sadducees or the Boethusians, but rather, he is someone who considers his own opinion to be above that of the High Court, and Scripture deems him liable to be put to death to preserve [the court's] honor.

The following baraita⁷ sharpens this Mishnah and enables us to distinguish two rationales underlying the law of the rebellious elder:

R. Joshua said: Three things did Zeira, an inhabitant of Jerusalem, tell me: [In the case of] A husband who wishes to retract (*limhol*) his having suspected his wife [of unfaithfulness]—his having suspected her is retracted. A stubborn and rebellious son whose father and mother wish to excuse (*limhol*) him—he is excused. A rebellious elder whom the court wishes to excuse (*limhol*)—he is excused. And when I came to my colleagues in the south, about two of the things they agreed with me, but about the rebellious elder they did not agree with me, so that controversy would not proliferate among Israel.

bSanhedrin 88a-b⁸

The baraita is premised on the assumption that one who has been harmed may ordinarily waive his rights with regard to the person who harmed him—for example, a parent may forgive his wayward son and thus release him from the punishment specified in the law of the “stubborn and rebellious son,” and a husband may forgive his wife and thus release her from the need to undergo the waters of bitterness ordeal⁹ to prove her innocence.

It appears that, in the opinion of Zeira, the transgressive aspect of the rebellious elder's offense is the injury he inflicts on the **personal honor and prestige** of the members of the court. Hence, they are permitted to forgive him for his actions and exempt him from punishment. Zeira's colleagues opposed this interpretation and its implications. In their opinion, the culpable aspect is not the insult to the judges' personal honor and prestige,

7 See also bSota 25a.

8 See also jSanhedrin 8:6 (26b); Sifre Deuteronomy, Ki Teitze, 218 (Finkelstein edition p. 251).

9 See Numbers 5:11–31.

but rather, to the standing of the High Court as an **institutional authority**, the body that unites the world of Jewish law and ensures that “controversy will not proliferate among Israel.” Hence members of the court do not have the authority to forgive the rebellious elder for his actions.

2.2 The rebellious elder’s ruling

As we stated above, the rebellious elder is convicted for issuing a directive contrary to the ruling of the High Court, thereby undermining its authority. But what distinguishes acceptable criticism from directives considered confrontational and subversive? Is the rebellious elder punished for every expression of a position contrary to that upheld by the High Court? Is he punished for a ruling that he alone follows, or only if he instructs others to follow his ruling? We will see that a range of different positions on these questions can be found in the sources, reflecting the different views as to the obligation to obey the court.

Clearly, expressing an opinion must be distinguished from carrying out an action. The rebellious elder is entitled to oppose the High Court’s ruling in various ways. He can simply express his opinion, and assert that the ruling of the High Court is in error; he can also carry out an act that contravenes the court’s ruling. But he can also go beyond merely expressing his opinion as a theoretical view, and direct others to act in a manner that contravenes the High Court ruling.

In which of these situations should the rebellious elder be punished? What is the underlying rationale for punishing the rebellious elder—to prevent incitement, or to prevent rebellion against the legal establishment? If preventing incitement is the rationale, the focus will be on punishing the rebellious elder when he causes others to refuse to abide by a ruling of the High Court—for instance, when he directs others to act contrary to the court ruling, or so acts himself, thereby serving as a role model. From this perspective, it would be less serious for the rebellious elder to act contrary to the ruling of the High Court in the privacy of his own home, where others are unaware of his behavior, or if the rebellious elder emphasizes that his conflict with the court is theoretical in nature, and as regards his actual practice, he accepts the court ruling. On the other hand, if preventing rebellion against the judicial establishment is the rationale, we would expect that any infringement of a court ruling, even if carried out in private, would be deemed serious—indeed, perhaps even the mere expression of theoretical opposition to the court’s opinion would be deemed serious.

Keeping these considerations in mind, let us examine in parallel three Rabbinic sources that address this issue—the Mishnah we considered above, a baraita, and a Tosefta—beginning with the first two.

- i. If he returned to his town, and yet again taught in the manner he had before—he is exempt, and if he ruled that the teaching was to

be acted upon—he liable, as it is said, “And the man who acts presumptuously” (17:12); he is not liable until he rules that it is to be acted upon.

mSanhedrin 11:2

- ii. The Rabbis taught: he [the elder] is not liable unless he acts in accordance with his ruling, or directs others [to act in accordance with his ruling] and they act in accordance with his ruling.

baraita in bSanhedrin 88b

It is clear that in two cases, the rebellious elder is exempt from punishment for his action: (1) if he expressed theoretical opposition to the court's ruling, but did not instruct others to act in accordance with his own view; and (2) if he acted in a manner contravening the court's ruling, but did not issue a ruling that such conduct was lawful.

Beyond this, the Mishnah and the baraita seem to diverge. From the Mishnah it seems that the very fact that the rebellious elder issues a ruling that contravenes the court's ruling is sufficient to render him liable, and it is not necessary that he or others actually act in accordance with his ruling. In contrast, the baraita deems him liable only if his directive leads to performance of an act that contravenes the court's ruling.

In contrast to the Mishnah and the baraita, the Tosefta is more nuanced, and open to various interpretations:

A rebellious elder who ruled and acted in accordance with his ruling is liable; if he ruled but did not act in accordance with his ruling, he is exempt; if he ruled in order that it be acted upon (*hora al menat laasot*), then even if he did not act, he is liable.

tSanhedrin 14:12

At first glance, the Tosefta seems to be inconsistent. From the first two clauses, the rebellious elder seems to be deemed liable if his ruling leads to an action that contravenes the court's ruling (as in the baraita). But the last clause appears to indicate that he can be found liable on the basis on his ruling even if it does **not** lead to an action (as in the Mishnah).

The key to resolving this apparent inconsistency lies in the difference between the expression “ruled” (in the first two clauses), and “ruled in order that it be acted upon” (in the last clause). To understand the significance of the difference, we must adduce a distinction widely invoked in Jewish law, namely, the distinction between a ruling “intended as a statement of the law” (*lehalakha*) and a ruling “intended for implementation” (*halakha lemaase*). The former is a halakhic ruling that does not call for its own implementation. It is given with the recognition that it may remain a purely theoretical injunction. In contrast, a ruling that is intended for implementation is issued with the intention that it be implemented in practice.

The first two parts of the Tosefta deal with instances where he ruled “as a statement of law.” This explains why the rebellious elder is not to be punished in cases where he issues a ruling contravening that of the court, but no action is carried out in accordance with his ruling. He is to be punished only in cases where his ruling results in the performance of actions that contravene the court’s ruling. The last clause in the Tosefta passage, however, deals with a law “intended for implementation,” *horaa lemaase*, or as the Tosefta puts it, “he ruled in order that it be acted upon.” Here, the ruling itself suffices to convict the rebellious elder, regardless of whether it was actually implemented.¹⁰

The distinction is also found in *jSanhedrin* 11:3 (30a): “If he ruled **not** in order that it be acted upon—he is exempt, [if he ruled] in order that it be acted upon, even if it was not acted upon—he is liable.”

We can conclude from these sources that when a court’s ruling is contrary to the position of a particular sage, he is permitted (and perhaps even obligated) to continue to teach his tradition or his line of reasoning, though it is contrary to the court’s ruling. However, when he teaches this position, he must emphasize that in practice it is not to be acted upon, but rather, the ruling issued by the court is to be acted upon.

The principle that a sage may publicly dispute the court’s ruling and seek to disseminate his own ideas, as long as he emphasizes that they are not to be acted upon unless the court changes its ruling, reflects the very essence of the talmudic enterprise. Talmudic debate does not seek only to establish the law to be applied in practice, but also to clarify and profoundly understand the various opinions on any given issue. Hence it is legitimate to publicly take issue with a court ruling, but illegitimate to act or instruct others to act in a manner conflicting with that ruling. The fact that it is permissible for the sage to continue to teach his opinion, to disseminate it, and to try to convince students of its correctness, clearly demonstrates that the elder’s transgression is not that he challenged the correctness of the High Court’s ruling.

It is important to note that the very fact that the sage is permitted to teach his dissenting opinion sharpens the obligation to obey the court. Where the sage is convinced of the correctness of the court’s ruling, obeying it is not a manifestation of true obedience, since the sage does so not merely because the court ruled that it was the law, but on the basis of his own understanding and belief that the ruling is correct. Real obedience to the court is manifested only when the sage claims that the court ruling

10 R. David Pardo’s commentary, *Hasdei David*, explains the Tosefta as follows: “With regard to ‘he ruled,’ a distinction is to be made. For even if he so ruled, if he did not so rule as the law intended for implementation (*halakha lemaase*), but rather, as a hypothetical principle, he is exempt. But if he ruled in order that it be acted upon, even if no one acted in accordance with his ruling, neither he nor anyone else—he is immediately liable.”

R. Kahana said: If he [the rebellious elder] says, '[My ruling is] based on tradition,' and they [the other judges] say, '[Our ruling is] based on tradition'—he is not killed. If he says, 'So it seems to me,' and they say, 'so it seems to us'—he is not killed. All the more so if he says, 'It is based on tradition,' and they say, 'so it seems to us'—he is not killed. Only when he says, 'So it seems to me,' and they say, 'It is based on tradition' [is he killed].

bSanhedrin 88a

In R. Kahana's opinion, tradition is superior to interpretation. The High Court's unique status, the factor mandating the punishment of death for one who undermines its decisions, does not derive from the quality of its judicial judgment, but from the superiority of its legal traditions. The idea here is that the High Court's traditions of the law are weightier than any interpretation that might be proposed by an individual on the basis of his own understanding.

In practice, R. Kahana significantly limits the scope of the law of the rebellious elder. R. Kahana takes the view that a claim based on tradition is stronger than a claim based on logic. Hence, the rebellious elder is guilty only if he bases his claim on an argument **weaker** than that of his colleagues. If his claim is based on an equally-strong or stronger argument, he is not punished. It follows from R. Kahana's approach that when the High Court's position is based on exegesis and reasoning, the rebellious elder who rules against it will not be punished, since his claim will be justified by an argument of equal or greater strength. The fact that he questions the High Court's ruling is not in itself a transgression. The rebellious elder is only liable when, on the strength of his own logic alone, he seeks to deviate from a received tradition.

There is no question that R. Kahana's understanding of the law reflects an agenda that seeks to limit the scope of the law of the rebellious elder, and thereby reduce the institutional authority of the judicial establishment. R. Kahana was a Babylonian Amora, and his opinion is consistent with the Babylonian Talmud's anti-establishment attitude. At the time, the Jewish community in Babylonia did not have official institutions, and this engendered a fundamental tendency to restrict the power and status of those institutions that did emerge. This, in turn, gave rise to a strengthening of the duty not to obey an erroneous court ruling, and, as we will see, more severe punishment for one who does acquiesce in such a ruling.¹¹

R. Eleazar, an Amora from the land of Israel, disagrees with R. Kahana's approach, objecting to the limitation he seeks to impose on the law of the rebellious elder. R. Eleazar remains loyal to the simple and more inclusive

11 On the differences between the attitudes of the Amoraim of Babylonia and those of the land of Israel with respect to the judicial process, see H. Ben-Menahem, *Judicial Deviation in Talmudic Law—Governed by Men, Not by Rules* (Chur, Switzerland: 1991), 55–98.

meaning of the Mishnah, which does not mention any of the distinctions employed by R. Kahana. The continuation of the talmudic *sugya* reads:

R. Eleazar said: Even if he says, "[my ruling is] based on tradition," and they say "so it seems to us"—he is killed, so that controversy will not proliferate within Israel.

The thrust of R. Eleazar's stance is expressed in his concluding remark, "so that controversy will not proliferate within Israel." This reason applies equally to all the situations in which the rebellious elder disputes the High Court's ruling, regardless of the epistemic grounds for the elder's and the court's respective views. On this approach, the rebellious elder's offense is not his divergence from the High Court's ruling on the strength of a weaker argument, but the divergence itself. The grounds for the views upheld by the rebellious elder and his colleagues are irrelevant; the only relevant point is whether the **substance** of the elder's view is in keeping with that of the High Court. We can therefore characterize R. Eleazar's view as encapsulating an expansive approach to the obligation to obey rulings handed down by the High Court.

In the *sugya* in tractate Sanhedrin of the Babylonian Talmud, the law is decided in accordance with the view of R. Eleazar.¹² The proof adduced for this decision is the baraita, discussed above, that implies that the principal rationale for the law of the rebellious elder is "so that controversy will not proliferate within Israel"; that is, to preserve the unity of the law, as determined by the High Court.

3 Tractate Horayot of the Mishnah

Tractate Horayot deals with mistakes by community and national officials. It discusses the status of erroneous court rulings and mistakes made by the High Priest or the *nasi* (Prince), as well as the sacrifices to be brought by these office-holders if they err. The first two *mishnayot* of tractate Horayot set down the law pertaining to the individual who acts upon an erroneous court ruling. These *mishnayot* appear to endorse an approach quite different from that taken in the *sugya* of the rebellious elder. The Mishnah establishes that there are situations in which not only is there no obligation to obey an erroneous court ruling, but there is actually an obligation to refuse to obey.

3.1 The prohibition against acting upon an erroneous ruling

The first chapter of mHorayot assumes as a given that it is forbidden to obey an erroneous court ruling, and addresses the punishment incurred for acting upon such a ruling:

12 See bSanhedrin 88b and Maimonides, *Code*, Laws concerning Rebels 4:1.

If the court handed down a ruling [entailing the] transgressing of any of the commandments in the Torah, and an individual went and acted upon its ruling ... he is exempt, because he relied on the court. If the court handed down a ruling, and one of its members knew that it had made a mistake, or a student himself qualified to rule went and acted upon its ruling [knowing that it had made a mistake] ... he is liable, because he did not rely on the court [i.e., he did not have available to him the excuse that he relied on the court]. This is the general rule: whoever relies on himself is liable, and whoever relies on the court is exempt.

mHorayot 1:1

Jewish law distinguishes between one who transgresses under duress (*anus*) and one who transgresses inadvertently (*shogeg*). In both cases, the transgression is not intentional. The latter's transgression is the result of a deficiency in either his knowledge of the law or his perception of reality. One who transgresses under duress is generally completely exempt from punishment and any other legal sanctions, whereas the inadvertent transgressor often must atone for his transgression by bringing a sin-offering, though he does not incur the punishment meted out for a transgression committed willfully. The Mishnah raises the question of whether one who acts in accordance with an erroneous court ruling is required to bring a sin-offering, or is deemed completely exempt from doing so. In determining the answer, the Mishnah distinguishes between a sage and a layman. A layman who innocently follows the court's ruling is exempt from bringing a sacrifice "because he relied on the court." In effect, he can be viewed as someone who was forced (*anus*) to act contrary to the law, since his reliance on the court ruling was reasonable, given that it can be assumed that the court will hand down the correct ruling.

The sage, however, who knows that the court's ruling is mistaken, is not exempt from bringing a sin-offering, since he is not 'forced' to act contrary to the law. He should have used his own judgment, and refused to obey the court's erroneous ruling.

Thus, the Mishnah is clearly premised on the assumption that there is no obligation to obey an erroneous court ruling, and in certain circumstances doing so is indefensible. These circumstances will be discussed below.

3.2 Degrees of exemption

In certain cases, those who have complied with an erroneous court ruling do not incur any legal consequences, and are deemed exempt from punishment or the sin-offering requirement. In the Tannaitic and Amoraic sources, different accounts of who is exempt are presented. As we saw, the Mishnah declares that a layman who obeys an erroneous court ruling is completely exempt, as he is not expected to apply his own critical judgment to rulings

handed down by the court, inasmuch as the court is authorized to render such decisions. In contrast, in obeying the court's ruling without exercising his own judgment, a sage, who knows the law, errs.

The Talmud takes a more severe approach with regard to both the sage who obeys an erroneous ruling, and a layman who does so. With regard to the former, the Talmud asks why the Mishnah considers him to have transgressed unintentionally (*shogeg*) rather than willfully (*mezid*). Presumably, given his knowledge that the ruling was mistaken, he knew it was forbidden to carry out the act in question. Therefore, the Talmud claims, this sage should receive the full punishment meted out for the act in question, and it ought not suffice for him to simply bring a sin-offering, the sanction applicable in the case of an inadvertent transgressor. "It is a case where he knew [the said act] is prohibited, but erred with regard to the commandment of hearkening unto the words of the Sages" (bHorayot 2b).

In other words, the Talmud is suggesting that the mishnaic law is restricted to the case of a scholar—someone well-versed in the intricacies of the law, and in possession of professional legal judgment—who is indeed aware that the court ruling is mistaken, but errs in his understanding of the obligation to obey the court, taking it to be absolute, and thus to apply even to erroneous rulings. This interpretation would render most cases of erroneous action in accordance with a court ruling—where the individual in question is not a layman but someone capable of issuing legal rulings—instances of willful transgression.

Thus, it appears that the obligation to follow the High Court's ruling is by no means absolute, and in practice, one who knows that the court has erred is forbidden to defer to its ruling.

The Babylonian Talmud also strengthens the law articulated in mHorayot with respect to the layman who follows an erroneous ruling. Adducing a baraita, the Talmud claims that although the opinion put forward in mHorayot is indeed upheld by some Tannaim, it is only a minority opinion. The majority opinion does require this individual to bring a sin-offering. Regarding the law in mHorayot, the Amora R. Judah said the following in the name of Samuel:

This [that the layman is exempt from having to bring a sin-offering] is the opinion of R. Judah, but the Rabbis said: "An individual who acts in accordance with the [erroneous] ruling of the court is obligated [to bring a sin-offering]."

bHorayot 2b

We have seen, then, that the Talmud tends to strictness in its interpretation of the law governing one who acts on an erroneous court ruling. The layman, who the Mishnah considers to have acted under duress, is regarded by the Talmud as one who erred inadvertently, and is thus obligated to bring a sin-offering. And the scholar, who the Mishnah

considers to have erred inadvertently, is regarded by the Talmud as one who acted willfully.

3.3 Types of rulings

The scope of the obligation to obey court rulings can also be viewed from another perspective: the type of ruling and the nature of the error involved. The law does not regard all errors in the same way. mHorayot 1:3 addresses the court's obligation to bring a sacrifice called the "bullock [brought] because of the hidden thing" (*par heelem davar*) if it inadvertently issues an erroneous decision. It also addresses the type of error referred to in the mishnaic passage we have been discussing, mHorayot 1:1.

In a situation where most or all of the community acted upon an erroneous court ruling and transgressed, they are exempt from having to bring a sin-offering. Instead, the court is obligated to bring a sin-offering called a "communal bullock [brought] because of the hidden thing" (*par heelem davar shel tzibur*) or "bullock brought for transgressing any one of the precepts" (*par haba al kol hamitzvot*). The Rabbis derived this law from the biblical verse: "And if the whole congregation of Israel shall err, the thing being hid from the eyes of the assembly, and do any of the things which the Lord hath commanded not to be done, and are guilty: when the sin wherein they have sinned is known, then the assembly shall offer a young bullock for a sin-offering, and bring it before the tent of meeting" (Lev. 4:13–14). In essence, the offering brought by the communal leaders exempts the individuals within the community from having to bring a sin-offering.

The types of mistaken rulings that obligate the court to bring such an offering are as follows:

If the court issued a ruling uprooting an entire precept, saying that there is no precept of marital separation [during menstruation] (*nida*) in the Torah; there is no [precept of the] Sabbath in the Torah; there is no [precept prohibiting] idol worship in the Torah—they are exempt. If they issued a ruling annulling part and sustaining part, they are liable. How so? If they said, "There is a law of the menstruant in the Torah, but if [a husband] lay with [his wife] while she maintains a day-to-day observation [but has not immersed in the mikve], he is exempt; there is a [precept of the] Sabbath in the Torah, but one who carries something from a private domain to a public domain¹³ is exempt; there is [a precept prohibiting] idolatry in the Torah, but one who merely bows down [to an idol, but does not prostrate himself] is exempt—they [the court] are liable, for it is said, "the thing being hid" (Lev. 4:13)—some thing, but not the entire precept.

mHorayot 1:3

13 Carrying objects from a private to a public domain is prohibited on the Sabbath.

In contrast to what we might expect, the Mishnah establishes that the court is liable to bring a sin-offering in cases where its ruling was inconsistent with one of the component details of a precept, but not in cases where it negated the whole thrust of a precept. How is this rather paradoxical position to be explained? Apparently, a ruling that negates the whole thrust of a precept does not obligate the court to bring a sin-offering because it is so radical that it is not considered a bona fide court ruling at all. Conversely, one who follows such a ruling is obligated to bring a sin-offering because he ought to have known that such a ruling was not to be obeyed. But in the case of a ruling that negates a component detail of a precept, it is plausible that a layman might err and comply with the ruling. Should that transpire, he is exempt, and it is the court that must bring the sin-offering.

There is, then, a parallelism between the distinctions established in this Mishnah and the distinctions set out in the Mishnah of the rebellious elder discussed earlier. We saw that a rebellious elder is punished if he rules that a Rabbinic law is to be transgressed, but not if he rules that a law explicitly set out in the Torah is to be transgressed. Rashi explains that the latter is not considered a bona fide ruling because it is inherently repudiated: "This is not considered a ruling, since one can go and read it in the schoolhouse." Here, in mHorayot, we find the same basic principle: a court ruling that is radically and patently erroneous, such as a ruling that uproots in its entirety one of the precepts of the Torah, is not considered a bona fide ruling. Those who act upon such a ruling are obligated to bring a sin-offering. In the case of a less serious mistake by the court, however—though here too, the ruling is unlawful and not to be complied with—an individual's claim that he acted on the ruling in good faith is accepted.

4 Compatibility of the Mishnah in Horayot and the Mishnah of the rebellious elder

Analyzing the types of judicial error referred to in the two main mishnaic passages we have examined, mHorayot and the law of rebellious elder, is instructive. These passages deal with judicial error in different circumstances. mHorayot deals with instances where court rulings are erroneous in an absolute sense. The Mishnah uses the term "mistake" (*taut*), indicating that the error can be proven.¹⁴ Hence the continuation of the first chapter of mHorayot addresses the question of a court that recognizes its mistake.

¹⁴ An interesting question that the Mishnah does not address is how it came about that the court issued such a patently erroneous ruling. One explanation invokes the historical background: "This Mishnah is talking about a court, composed of Hellenists during the time of the evil Antiochus, that permitted things that were specifically forbidden in the Torah" (Sifra Devei Rav [Finkelstein edition], vol. 1, 203). Nevertheless, in the Talmud, the discussion is preserved without reference to its historical context.

It speaks of an objective error that is clear and unequivocal, and therefore invalidates the ruling. Moreover, the scenario under consideration is one where the court is not seeking to decide an interpretive controversy or an open legal question. On the contrary, the court is addressing a legal matter regarding which the law has long been decided, and revisiting the law would exceed the court's authority. In other words, the cases in question are cases where the court's role is solely to apply the decided and unequivocal law, as expressed in available legal sources, to a given situation. Given this scenario, mHorayot establishes that erroneous court rulings have no validity, and one who hears of such a ruling should refuse to comply with it. It follows that the court itself, having recognized and retracted its mistake, is obligated to bring a sin-offering for its transgression.

In contrast, the Mishnah of the rebellious elder addresses a situation in which a controversy is brought to the court for a decision. Each side to the controversy is convinced of the correctness of its position, but cannot unambiguously prove it. The point of contention is an open legal question that can, in theory, be decided either way; though the court issues its ruling, the rebellious elder contends that the question should not have been decided as the court decided it.

It is significant that mSanhedrin's description of the process by which it is determined that a sage is a rebellious elder describes a scenario where the legal point at hand is an open legal question, a precedent-setting issue on which a definitive and binding decision has not yet been rendered. The Sages present different solutions, based either on tradition or logical arguments: "Thus I expounded and thus my fellows expounded, thus I taught and thus my fellows taught." The open question is brought to the High Court for a decision. From this point on, the High Court's decision obligates all members of the judiciary, even those who initially presented an opposing opinion. A sage who refuses to adopt the court's decision is deemed a "rebellious elder," and his punishment is death. He is not punished for attacking the law itself, but for undermining the court's status as an institution with the authority to decide the law.

Now an open legal question is not necessarily an interpretive controversy, and the controversy could arise due to the existence of opposing traditions, or because although the court has a tradition—"If they [the court] had heard [a tradition regarding the matter]"—this tradition was hidden and did not become part of the halakhic corpus, the corpus of decided and well-known law. In the latter situation, the controversy conducted by the Sages is essentially a mechanism that transforms the hidden tradition into a binding component of the halakhic corpus.

It is important to remember that the High Court in Jerusalem is not an ordinary court, and functions not just as a judicial body, but also as a legislative body. Hence the matters brought before it are often precedent-setting questions that cannot be left in limbo and must be decided.

Not all contemporary theorists of Jewish law interpret the two mishnaic passages we have examined—the rebellious elder and mHorayot—as **complementary** sources that together offer a comprehensive answer to the question of the duty to defer to legal authority, as has been argued here. Those who challenge the account presented here claim that the passages represent two **opposing** approaches to the obligation to defer to legal authority, approaches that compete with each other in the rabbinic literature. This position is expressed in the following passage:

What makes an individual or an institution an authority? Several different answers to this question can be discerned in the Jewish tradition. One approach suggests what might be called a 'knowledge' model of halakhic authority. This model assumes that the validation of authority emerges from specific knowledge of a clearly defined area that gives the authority an advantage over those who do not have such knowledge. ... The premise of this approach is that the Sages' authority is based only on knowledge, hence when contrary to the truth, their rulings need not be obeyed. Moreover, this truth is not the exclusive province of the Sages, but freely knowable by everyone, since it is that which determines the veracity of the Sages' ruling. In truth, the Sages' authority is not grounded in powers granted them to create and establish the law as they wish, but rather, its source is the Torah, which they know. Therefore, where they make a mistake, obedience to their ruling is a mistake, and is even forbidden. And we find this idea expressed explicitly in ... mHorayot...

But the Jewish tradition also suggests another model of halakhic authority, the 'command' model. According to this model, a legal authority is granted the prerogative to command, to issue directives that prescribe acts be carried out, and to subject members of the community to his authority. The latter have an absolute obligation to obey the rulings of the authorities. On the command model, authority is not necessarily based on the specific knowledge base of the authority, but rather on the power granted to individuals or institutions to establish obligatory societal norms. Therefore, in cases where it appears to those under this authority that the authority figure has erred, they still have an obligation to obey.¹⁵

Those who uphold the thesis that there is an unresolved tension in the Talmud between two opposing stances on obedience to legal rulings often cite, in support of their claim, a purported corresponding tension in traditional Rabbinic exegesis of the verse "thou shalt not turn aside from the sentence which they shall declare unto you, neither to the right hand, nor to the left" (Deut. 17:11).

15 A. Sagi and Z. Safrai, *Between Authority and Autonomy in Jewish Tradition* (Hebrew), (Tel Aviv: 1997), 10-13.

The Jerusalem Talmud suggests that the verse be read as asserting that since one who comes before the court can distinguish between right and left, he is **forbidden** to follow an erroneous ruling:

Is it possible that if they say to you regarding right that it is left and regarding left that it is right, you should listen to them? Therefore Scripture teaches that one is to go right and left—when they say to you regarding right that it is right, and regarding left, that it is left.

jHorayot 1:1 (45d)

A different exegesis reaches the opposite conclusion, namely, that the verse seems to establish an absolute obligation to defer to legal authority:

“Neither to the right hand, nor to the left” (Deut. 17:11)—even if they show you [lit., show to your eyes, *marim beeinekha*] regarding right that it is left, and regarding left that it is right, listen to them.

Sifre Deuteronomy, Shoftim, 154 (Finkelstein edition, p. 207)

This Midrash uses an uncommon turn of phrase: “even if they show to your eyes,” giving rise to a number of variant readings in various MS.¹⁶

- a. The reading in *Yalkut Shimoni*, Oxford manuscript: “even if they **rule** (*morin*) regarding right that it is left.”
- b. The reading in the Oxford MS of Sifre: “even if they show (*marim*) regarding right that it is left.”
- c. The reading in *Pesikta Zutra*: “even if it **seems** (“*dome beeinekha*”) in your eyes regarding right that it is left”
- d. The reading in Song of Songs Rabbah (Vilna edition, parasha 1, “*ki tovim dodekha miyayin*,” 2): “even if they **say** to you (*sheyomru lekha*) regarding right that it is left.”

Despite these attempts to harmonize, by means of textual emendation, what seem to be expressions of opposing views as to the duty to comply with court rulings, it is difficult to reconcile these Rabbinic exegeses. Nevertheless, another contemporary scholar has convincingly argued that there is no contradiction between them, as they refer to two different situations:

It seems that no one paid attention to one particular word in the phrasing of the baraita in the Jerusalem Talmud: “one is to **go** (*lalekhet*) right and left.” In the verse (Deut. 17:11), it does not say that. Rather, it says: “the sentence which they shall declare unto you, neither to the right hand, nor to the left.” In fact, this word [*lalekhet*] supports a

16 These are listed in the Finkelstein edition of Sifre.

different explanation of the matter, and in particular, a different source, namely, Deuteronomy 28:14: "And you shall not turn aside from any of the words that I command you this day, to the right hand, or to the left, to go (*lalekhet*) after other gods to serve them." The explanation is that the exegesis in the Jerusalem Talmud addresses the situation where "the court handed down a ruling [entailing the] transgressing of any of the commandments in the Torah," namely, "the words that I command you this day." In this situation, one is not to hearken to the words of the Sages unless they rule that right is right and left is left, and there is no doubt as to what is right and what is left. The question is whether "to go" to the right or the left [i.e., to deviate from the true law, as the court has done]—and [the answer is that] one should not turn aside from the words [of the Torah]. On the other hand, in the law of the rebellious elder (Deut. 17:11) [i.e., the dictum in the Sifre], the discussion relates to "the sentence which they shall declare unto you," that is, the pronouncements spoken by the Sages, which, regardless of whether they are right or left, are not to be turned aside [i.e., deviated] from.¹⁷

This resolution of the apparently contradictory approaches to compliance with court rulings distinguishes between the dictum in the Jerusalem Talmud, which addresses the case where a court rules that a law from the Torah is to be transgressed, stating that such a ruling is not to be obeyed, and the dictum in the Sifre, which speaks of a ruling handed down by the Sages, stating that even if it appears to be erroneous, such a ruling is indeed to be obeyed.¹⁸ This distinction corresponds, to a considerable extent, to the distinction drawn in this chapter between the Mishnah in Horayot, which deals with a court ruling that is patently erroneous insofar as it is contrary to the decided law, and the law of the rebellious elder, which deals with a court ruling that decides an open legal question.

5 Interim summary

The Mishnah seeks to outline the role and authority of the High Court in Jerusalem. Its point of departure is that the Torah, like any text, is in need of interpretation, and the interpretive process is likely to lead to controversy. The High Court is given the authority to resolve controversies and create uniform law that is binding on all. A sage who directs others to contravene a High Court ruling is a 'rebellious elder' who is liable to be put to death, as he has threatened the court's stability and authority. Yet the Mishnah

17 S.Z. Havlin, "On 'literary redaction' as a basis for periodization in Jewish law" (Hebrew), in Shamma Friedman (ed.), *Saul Lieberman Memorial Volume* (Jerusalem and New York: 1993), 164.

18 See Ben-Menahem, n. 11 above, 165–73.

also makes a strong statement as to the limits of judicial authority and the obligation to obey court rulings. The court has incontrovertible authority only where the law is in need of definitive interpretation. Where the law is clear and is not in need of interpretation, and a court ruling undermines the law—the situation discussed in mHorayot—the Mishnah concludes that the ruling is invalid and should not be obeyed.

In mHorayot, examples are adduced to establish the principle that a court ruling contrary to an uncontroversial law is not a valid ruling but a mistake, and not to be acted upon. The biblical idiom that serves as a proof-text for mHorayot is “and the thing be hid” (Lev. 4:13), or in the mishnaic formulation, “and one of its members knew that they had made a mistake.” These locutions presuppose that there is indeed an **objective legal truth**, and what is needed to bring it to light is **knowledge**, not interpretive acumen. One can know it, forget it, or be mistaken about it, but its meaning is not in question. Tractate Horayot does not deal with the obligation to obey court rulings, but rather, with the results of mistaken obedience. An erroneous court ruling has no validity, hence there is no obligation to heed it. The only question is whether one who complies with such a ruling in good faith is deemed to have acted under duress (exempting him from bringing a sin-offering) or inadvertently (obligating him to bring a sin-offering).

6 Medieval understandings of the obligation to comply with court rulings

Although we have cast doubt on the claim of some scholars that the **Rabbinic** sources reflect profound disagreement over the obligation to comply with court rulings, it is clear that among the medieval commentators, there was indeed such a disagreement. Some saw the obligation to defer to legal authority as far-reaching, others sought to limit the duty to defer and broaden the space for judicial discretion. There are also a number of intermediate positions. The different views are all anchored in the Rabbinic sources, some of which we explored above. Let us now take a closer look at some medieval understandings of the obligation to defer to the court.

6.1 Maimonides

Maimonides' position appears to echo the Rabbis' position as presented above.

On the one hand, Maimonides sets down a broad and far-reaching obligation to comply with rulings of the High Court. In his *Book of Precepts*, Maimonides articulates this obligation as follows:

We are commanded to hearken to the High Court and do everything they command, be it a prohibition or a dispensation. And in this regard

there is no difference between that which they decide on the basis of reasoning, and that which they derive by way of the exegetical principles by which the Torah is expounded, or that which they agree reflects a secret of the Torah, or for that matter, anything that they take to be correct and to strengthen the Torah. All [that they mandate], we are obligated to hearken to and to carry out, and to uphold what they say and not transgress it.

Maimonides, *Book of Precepts*, positive commandment 174¹⁹

In the continuation of his remarks, Maimonides adduces Sifre Deuteronomy as a supporting allusion (*asmakhta*), citing the sentence that precedes the one quoted above:

And the language of the Sifre is: "And according to the judgment which they shall tell thee, thou shalt do" (Deut. 17:11)—this is a positive commandment."

Yet it seems that Maimonides takes the opposite position elsewhere:

If the court ruled that it is permissible to eat all of the *heilev* [prohibited fat] of the stomach, and one person in the community knew that they had erred and that the stomach *heilev* was prohibited, and he ate it in reliance on the court's ruling, because they thought that heeding the court even when it erred was a commanded act—the one who ate it is obligated to bring a fixed²⁰ sin-offering for having eaten.... What case are we talking about? When the one who knew that they erred was a sage or a student who had reached the level of being able to issue rulings. But if it was an ordinary person, he is exempt, since his knowledge of forbidden things is not certain.

Code, Laws concerning Offerings for Transgressions
Committed through Error, 13:5

The relationship between these two Maimonidean passages seems to mirror that between the Rabbinic ruling in *mHorayot* and the law of the rebellious elder, as explained above. In the *Book of Precepts*, in which Maimonides establishes the obligation to obey court rulings, he is speaking of an open legal question for which there is no definitive answer in the halakic sources. The obligation to obey exists where the court has rendered its opinion on an interpretive question: "that which they decide on the basis of reasoning, and that which they derive by way of the exegetical principles by which the Torah is expounded," and so on. By

19 Maimonides repeats this point in detail in *Code*, Laws concerning Rebels 1:1–2.

20 I.e., a sin-offering with a fixed value, as opposed to an offering that varied in accordance with the offerer's means.

contrast, in the *Mishne Torah's* Laws concerning Offerings for Transgressions Committed through Error, Maimonides is addressing situations similar to those discussed in tractate Horayot, namely, where the court has made a clear and unequivocal legal mistake, and it is therefore forbidden to act in accordance with the court's ruling. It is no coincidence that in the Laws concerning Offerings for Transgressions Committed through Error, Maimonides adduces clear-cut examples similar to those given in mHorayot, for instance, "If the court ruled that it is permissible to eat all of the *heilev* [prohibited fat] of the stomach." For no court has—nor could it have—the authority to permit something that is forbidden by the Torah. The law constitutes the limit of the court's authority, and no court has the authority to diverge from it. In a situation where one knows that the court's ruling is mistaken, one is forbidden to comply with it.

6.2 Nahmanides

Nahmanides is widely viewed as having set out a comprehensive, well-ordered and cohesive position as to the authority of the court and the nature of its rulings. He is seen as an unyielding advocate of the court's institutional authority. It has even been claimed that Nahmanides put forward a forced interpretation of mHorayot because it was compatible with this outlook.²¹

With regard to the passage in Deuteronomy that establishes the obligation to defer to court rulings, Nahmanides discusses the question of whether there is an obligation to comply with a mistaken ruling. Citing the Sifre's exegesis of the biblical verse "you shall not turn aside from the sentence which they shall declare unto you, neither to the right hand, nor to the left," Nahmanides made the following oft-quoted comment:

Even if in your heart, you know that they are mistaken, and it is clear in your eyes, just as you know right from left, you must do as they command you. And do not say, 'how can I eat this completely forbidden fat,' or 'how can I kill this innocent person,' but say, 'so the Master who commands the commandments has commanded me, to observe all His commandments as I will be directed by those who stand before Him in the place that He shall choose; and He gave me the Torah subject to their opinion—even if they are mistaken.'

Nahmanides, *Commentary on the Torah*, Deuteronomy 17:11²²

21 G. Blidstein, "Even if he tells you right is left: the validity of moral authority in the *halakha* and its limitations" in M. Boer (ed.) *Studies in Halakha and Jewish Thought Presented to Rabbi Emanuel Rackman* (Hebrew), (Ramat Gan: 1994), 230.

22 Note that other Early Authorities take this same position, e.g., Rabbenu Nissim, *Drashot Haran*, lecture 11; *Sefer Hahinukh*, commandment 496; Mahara of Prague, *Gur Arye*, Deuteronomy 17:11.

Thus, Nahmanides' view is unequivocal: it is obligatory to heed the court's ruling in every instance, "even if they are mistaken." Note that one of the examples used by Nahmanides to demonstrate the obligation to obey court rulings, the ruling that forbidden fat is to be eaten, is similar to the rulings mentioned in mHorayot, which expressly **forbids** acting upon an erroneous ruling.

Nahmanides presents two arguments for his position, arguments that to some extent contradict each other. The first invokes apprehension about the danger of rifts and discord that might be engendered by controversy. Granting every individual the authority to act in accordance with his own judgment could cause the societal fabric, and halakhic uniformity, to unravel. To forestall such a situation, it was established that the court was to be the authoritative interpreter of the Torah, and that compliance with its rulings was obligatory:

For the Torah was given to us in writing, and it is known that all the opinions that derive from it will not be the same, and controversies will proliferate, and the Torah will become many Torahs. And Scripture definitively set down the law that we must heed the High Court that stands before God in the place that He shall choose. . . . For He gave the Torah subject to their opinion, even if in your eyes it is as if they interchange right and left.

The second argument takes a different tack. Nahmanides claims that one must assume that the court is correct because its members are infallible:

And even more so, you should think that they say of right that it is right, for the spirit of God rests on those who serve in His holy place, and He will not abandon His righteous ones. They are always protected from mistakes and failure.

There is an important difference between these rationales. Consider the case of a sage who sought to teach—strictly as a matter of theory—an opinion contrary to the court's ruling. If Nahmanides' second rationale for compliance with court rulings is deemed correct, we would expect that the sage would not even teach the rejected opinion as a theoretical possibility, stressing that it was not to be put into practice. Whereas if we uphold the first rationale, teaching a dissenting view would be permissible as long as the sage expounding it emphasizes the distinction between theory and practice and does not instruct others to act on the dissenting view, contrary to the court's ruling.

An anecdote from tractate Rosh Hashana of the Mishnah provides a good illustration of the practical import of the first rationale. Before presenting the story itself, some background is useful. During the Tannaitic period, the beginning of each new month (*rosh hodesh*) (and thus the

calendar and festivals occurring in that month), were determined by a judicial process in which witnesses testified that they had seen the new moon, the re-emergent lunar crescent. The Mishnah describes a controversy that arose from an incident in which Rabban Gamaliel accepted testimony relating to the new moon, and R. Joshua thought that it should be rejected:

It once happened that two [witnesses] came and said, "We saw [the new moon] in the east in the morning and in the west in the evening." R. Johanan b. Nuri said, "They are false witnesses!" When they came to Yavne, Rabban Gamaliel accepted them [i.e., their testimony]. And another two [witnesses] came and said, "We saw it at its proper time, but by [the next] night, it was not visible," and Rabban Gamaliel accepted them. R. Dosa b. Horkinos said, "They are false witnesses! Can they testify about a woman that she gave birth, and on the morrow her belly is between her teeth²³?" R. Joshua said to him, "I see [the point of] your words." Rabban Gamaliel sent for him, "I order you to come before me, with your staff and with your money, on the day on which Yom Kippur falls, according to your calculation." R. Akiva went and found him in distress; he said to him, "I can adduce [Scriptural] proof that whatever Rabban Gamaliel has ruled is [valid]." . . . He [R. Joshua] took his staff and his money in hand, and went to Yavne to Rabban Gamaliel on the day on which, according to his calculation, Yom Kippur fell. Rabban Gamaliel stood up and kissed him on the head, and said to him, "Come in peace, my master and my student! My master in wisdom, and my student because you accepted my words."

mRosh Hashana 2:8-9

From the way the incident is reported, it is clear that R. Joshua did not accept Rabban Gamaliel's opinion in principle. Nevertheless, at the level of practice, that is, in the way he actually conducted himself, he chose to defer to Rabban Gamaliel's ruling. Moreover, the Mishnah indicates that R. Joshua was, to use the talmudic expression, greater in wisdom, hence his opinion was probably the correct one, yet even so, R. Gamaliel's view was deemed authoritative. It appears that the Mishnah is endorsing the idea of obedience to court rulings in the realm of conduct, but does not demand that the court's position be accepted on the theoretical level as well.

Returning to Nahmanides, it remains to be determined whether the two rationales are indeed distinct and to some degree inconsistent with each other, or whether the second rationale is simply an attempt on Nahmanides' part to reassure those who fear that in following the court they might not be acting in accordance with the 'true' law. They need not fear, he may be

23 I.e., she is noticeably pregnant.

declaring, since the possibility of error is minimal, given that those on whom "the spirit of God rests" are not prone to err.²⁴

Regardless of whether the rationales are distinct, Nahmanides' position on the duty to obey the court is problematic. First, it is difficult to reconcile with mHorayot. How can we reconcile Nahmanides' teaching that it is permissible to eat meat that the court rules kosher though we have certain knowledge that it is forbidden fat, with mHorayot, which teaches that under those circumstances it is forbidden to act upon the court's ruling? Sensitive to this problem, Nahmanides addressed it elsewhere as well. In that context, he offers a different and novel interpretation of the *sugya* in Horayot. He still maintains that the obligation to defer to legal authority is broad and far-reaching, but notes that a basic condition, established in mHorayot, must be met:

But there is a condition, which can be discerned by one who looks carefully at the first chapter of mHorayot. And it is that if, at the time of the Sanhedrin, there was a sage who was competent to issue rulings, and the High Court ruled that something was permitted and he thought that they erred in their ruling... he must appear before them and present his claims to them, and they must debate the matter with him. And if most of them agree to reject his opinion, and find fault with his reasoning, he must retract, and afterwards, after they have removed him and rendered a decision as to his claim, conduct himself in accordance with their opinion. This is what follows from those laws [of tractate Horayot]. But in any case, he must accept their opinion after the final decision.

Hasagot Haramban, Sefer Hamitzvot, root 1

For a court ruling to be binding on a sage who disagrees with it, even when he believes that the judges have made an unequivocal objective error, they must have considered and discussed his claim. Only then does the ruling bind the sage, even if he continues to oppose it. But if his view has not been considered, he is not obligated to comply with the court's ruling.

According to Nahmanides, then, compliance with court rulings is obligatory, even according to mHorayot. But this is so only if the court has considered dissenting opinions. If an opinion has not been deliberated on by the court, its ruling does not obligate the sage who holds the dissenting view. Some contemporary scholars take this 'concession' by Nahmanides to be rather forced, and driven by a desire to reconcile the two Rabbinic sources, mHorayot and the law of the rebellious elder.²⁵ We maintain, however, that the novel condition introduced by Nahmanides is consistent with his advocacy of strong judicial authority. Though compliance is

²⁴ See Blidstein, n. 21 above, 222.

²⁵ *Ibid.*, 230.

obligatory, if court rulings are to be valid, any opposing views must have been considered and refuted, for if the court has not weighed the opinion of a sage who disagrees with its ruling, we cannot say that the court has indeed rejected the dissenting opinion.

6.3 The Riva and the Abarbanel: distinguishing erroneous legal rulings from acceptable judicial divergence from the law

The Tosafist R. Isaac b. Asher (Riva) takes a very different approach to the question of the obligation to defer to the court. His point of departure is the impossibility of an obligation to follow an erroneous ruling. In response to Rashi's comment (based on the Sifre) that one is obligated to obey the court even if it rules that right is left, the Riva retorts: "And do we listen to a sage who says that something impure is pure and something prohibited is permitted?"

The Riva makes an innovative distinction. He maintains that we must distinguish between two types of court rulings. When the court makes a mistake in applying a law from the Torah, there is no obligation to follow the mistaken ruling. One who believes that the court's ruling is inconsistent with Torah law should not heed it, but rather, do what he deems correct. But when the court **knowingly** deviates from the Torah law on the strength of the legislative authority with which it is endowed, it is obligatory to follow the court's ruling, even if at first glance it appears contrary to Torah law:

Necessarily, the solution [to the paradoxical nature of Rashi's comment] is that we must apply it [only] to the decrees (*gezerot*) and enactments (*takanot*) of the Sages: "regarding right that it is left"—such as [the injunction that] blowing the shofar does not supersede the Sabbath²⁶ ... "and regarding left that it is right"—such as adding to those with whom sexual relations are prohibited.²⁷

In the Riva's opinion, the Sifre's exegesis, which Rashi upholds, does not address the obligation to comply with erroneous rulings. Rather, it deals with rulings the court hands down on the basis of its legitimate authority to deviate from Torah law. These rulings might appear mistaken to one who is unaware that the court has this authority, but are not, in fact, mistaken. In essence, the Riva construes the dictum as addressing, not erroneous court rulings, but the court's legislative authority to deviate

26 "The blowing of the shofar does not supersede the Sabbath"—The blowing of the shofar is a central commandment of the Rosh Hashana holiday. Despite its centrality, and despite the fact that the Torah permits the blowing of the shofar on the Sabbath, the Sages decreed that when Rosh Hashana falls on the Sabbath, the shofar is not blown.

27 "Adding to those with whom sexual relations are prohibited"—the Torah defines a specific group of relatives with whom sexual relations are prohibited (*arayot*): one's mother, father, child, sibling, etc. The Sages added additional relatives.

from Torah law by way of decrees and enactments. On his interpretation, the court's authority to set norms that, in effect, deviate from Torah law, is anchored in the Sifre's exegesis of Deuteronomy 17:11. The Riva is thus limiting the scope of the obligation to comply with erroneous court rulings, asserting that one ought not heed a ruling that something impure is pure or something prohibited is permitted.

A somewhat different approach is taken by the Abarbanel, a renowned late medieval commentator. The Abarbanel addresses a classic jurisprudential problem: the relationship between laws, which are inherently general, and their implementation in particular circumstances.²⁸ The central dilemma was already formulated by Aristotle, who noted that the general law cannot possibly cover all possible situations to which it is intended to apply. This could give rise to a miscarriage of justice in certain cases, even though it is clear that the law itself is good and appropriate in a general sense. The Abarbanel upholds the Aristotelian view that in a particular case where the general law is not appropriate, judges are permitted to deviate from the law, so that they can achieve a just outcome in the particular circumstances of the case before them. He argues that the emphasis on obedience to court rulings is motivated by the desire to reinforce the authority of judges who find it necessary, in particular cases, to deviate from the law as written in order to avert an unjust outcome. Though it might appear, he explains, that such judges have deviated from the law and therefore erred, and that the legally-correct decision would have been the very opposite of what they decided, one is obliged to comply with their ruling. Judges, Abarbanel explained, take into account not only the relevant legal principles, but also the unique circumstances of the case under consideration:

And on this issue, [the Torah] warned that one should "not turn aside from the sentence which they shall declare unto thee, neither to the right hand, nor to the left." This means to say: even though they went outside the letter of the general law and shifted it to the left, or if the correct outcome was to the left, they issued a decree to the right, one may not turn aside from their decision. For as to that which they have decreed in this case, even though in relation to the general principles it appears to [render] right left and left right, nevertheless, in terms of the truth of this particular case and the nature of this localized matter, they are only saying of right that it is right and of left that it is left, for that is what it is appropriate to do, and nothing else.

Abarbanel, Deuteronomy 17

We thus see that, like the Riva, the Abarbanel takes neither the biblical verse nor the Sifre's exegesis to apply to an erroneous court ruling. He

28 See Chapter Eight below, "Equity."

does not construe these sources as applicable to a situation where someone has knowledge of the factors taken into consideration by the court, and on that basis contends that the court erred, but rather, as applicable to a situation where someone has knowledge of the law, but not of the particular circumstances of the case in question. The Abarbanel claims that such an individual must obey the court ruling even if it is not in harmony with the law on the books, for in deciding the law the judge must demonstrate not only mastery of the relevant legal principles, but also sensitivity to the unique features of the case in question.

6.4 R. Issachar Eilenburg

Later, in the seventeenth and eighteenth centuries, we find a different approach to the problem of erroneous rulings, an approach less enthusiastic about categorical deference to the legal establishment. This approach views the individual as obligated to use his own independent judgment to critically evaluate the correctness of court rulings. Those he deems erroneous are not to be acted upon.

One of the chief advocates of this position was R. Issachar Ber Eilenburg, author of the *Beer Sheva* commentary on the Talmud. In explaining mHorayot, which asserts that an erroneous ruling is not to be followed, R. Eilenburg points out the contradiction between this law and the Sifre's exegesis of Deuteronomy 17:11, which, as we saw, appears to call for obedience even to a ruling wherein the judges declare that right is left and left is right. To reconcile this apparent inconsistency, he offers a novel reading of the Sifre:

That which was stated in the Sifre, "even if they show you [lit., show to your eyes] regarding left that it is right," can be explained as follows: even if you think in your heart, according to your own assessment, that they erred in judgment, and ruled of left that it was right, but do not know for certain that they made a mistake in the law. And the Sifre's formulation was precise—"even if they show to **your** eyes," and so on. And that which we learned in the baraita that I quoted above—"Is it possible that if they say to you regarding right that it is left and regarding left that it is right, you should listen to them? Therefore Scripture teaches that one is to go right and left—when they say to you regarding right that it is right and regarding left that it is left" (jHorayot 1:1 (45d))—this means, [do not act upon their ruling] when you know with certainty that they made a mistake in the law by permitting something forbidden; that is my opinion.²⁹

Beer Sheva, Horayot 2:2 s.v. *kehai gavna mezid hu*

29 See also *Peirush Amudei Yerushalayim*, jHorayot 1:1 (45d) s.v. *kehada detani*.

On R. Eilenburg's interpretation, the Sifre is not speaking of one who **knows with certainty** that the court has erred, but of one who **suspects** this is so, but does not know with certainty. R. Eilenburg bases this exegesis on the formulation: "even if they show to your eyes," taking this to refer to subjective conjecture that the court may be wrong, rather than objective, unequivocal knowledge. According to R. Eilenburg, the Sifre asserts that one who merely **thinks** that a ruling is erroneous is to defer to the judges and their discretion. However, if one has come to a firm conclusion that the court has erred, this overrides the obligation to defer to the court's ruling.

7 Erroneous lower court rulings

Thus far, we have discussed instances in which the High Court in Jerusalem issued a determinative ruling as to the law. Such determinations are not, obviously, the sole or even the primary activity of the legal system. The legal system is also called upon to adjudicate cases involving conflict between two parties. Decisions in such cases are generally not issued by the courts of higher instance, often called the Supreme Court or High Court, but rather the lower courts, usually local courts that address practical matters as opposed to matters of principle. This is a particularly important distinction in the context of the Jewish legal system, which, for the greater part of its history, has not had a functioning high court. Judicial decisions can, therefore, be issued only by courts of lower instance. Historically, such courts have not always operated as formal institutions.

In this section, we will examine how the principles discussed above in the context of rulings of the High Court in Jerusalem apply in the context of halakhic rulings issued by lower courts. We will first look at two categories of unambiguous and objective error that invalidate legal rulings: mistakes relating to facts and mistakes relating to law. We will then examine two other categories of halakhic error, which, though they cast doubt on a ruling's veracity, are not considered unambiguous and objective, and hence do not render the ruling invalid.

7.1 Mistake of fact versus mistake of law

The erroneous rulings discussed in *mHorayot* are legal errors, that is errors in interpreting or applying the law. At times, however, court rulings may be found to be in error with respect to facts: the court may err in its determination of the facts of the case.

The *Tosefta* discusses a case where, on a particularly cloudy Sabbath day, it had not been clear whether the sun had set and it was permitted to do work, or had not yet set and the prohibition against working was still in force. According to the *Tosefta*, if the court ruled that the Sabbath had ended, and it later became clear that the sun had not set and the ruling was

in error, the decision would not be a “[valid] ruling” (*horaa*), but a “mistake” (*taut*): “If the court ruled that the Sabbath had ended and afterwards the sun shone—this is not a [valid] ruling, but a mistake.”³⁰

In other words, although the law provides a defense for one who acts in accordance with a court ruling that embodies a legal error, no such defense is available to one who acts on a ruling that was based on a mistake of fact. The factual error renders the court’s decision devoid of the status of a valid court ruling and makes it simply a mistake, compliance with which is forbidden. One who acts upon such a mistake is transgressing, though this transgression is not considered a malicious act, but rather, an unwitting one. The important point is that in contrast to a ruling based on a ‘mistake of law,’ a judicial decision that is based on a mistake of fact is not considered a valid legal determination at all. It is important to note that the ‘facts’ in question are not necessarily common knowledge, and a factual error is not necessarily a mistake that is manifest and widely recognized. On the contrary, if the overcast sky misled the judges, causing them to think the sun had set, it is reasonable to conclude that others would also have made the same mistake and therefore should not be blamed for acting in accordance with the ruling. Nevertheless, the principle here is that an erroneous factual determination renders the ruling invalid whether the error is recognizable or not.

An interesting Amoraic controversy relating to this point arose with regard to family law. The Mishnah states that if, after being informed that her husband had died, a woman remarries, and subsequently it becomes clear that the information was incorrect and her first husband is still alive, she must be divorced from both husbands. The question that arises in this context is whether—since it is known, retrospectively, that the woman violated the prohibition against adultery, albeit unwittingly—she should be subject to sanctions for her transgression.

The Mishnah states that a distinction must be made between a woman who decided to remarry on her own, and a woman who consulted a court and remarried on the basis of its ruling.

If she married with the court’s authorization—she has to leave [both husbands], and she is exempt from [having to bring] a [sin]-offering. If she did not marry with the court’s authorization—she has to leave [both husbands], and she is obliged to bring a [sin]-offering. The court’s power is such that it exempts her from [having to bring] a [sin]-offering.

mJebamot 10:2

It follows from this Mishnah that one who acts in accordance with an erroneous court ruling is exempt from any punishment. As Rashi puts it:

³⁰ tHorayot 1:6 (Zuckerman edition).

"One who acted in accordance with a court ruling is exempt" (bJebamot 87b). And clearly, the court being referred to here is not necessarily the Sanhedrin in Jerusalem.

Yet the Mishnah's assumption that such a court decision is a valid ruling and serves as a legitimate defense for the woman who heeds it and transgresses, is revisited in the talmudic discussion in bJebamot 87b. Some Amoraim, specifically, Zeiri and Rava, take such a ruling to be analogous to the case where the court erred in deciding that the sun had set and the Sabbath had ended. If so, they argue, the court ruling does **not** serve as a defense for the woman who has, on the basis of the ruling, gone ahead and remarried, hence she must bring a sin-offering. These Amoraim maintain that the law is not in accordance with this Mishnah, for given that the error in question is factual rather than legal, the court's decision is a mistake (*taut*), not a valid ruling (*horaa*). By contrast, R. Nahman upholds the mishnaic law, arguing that the court's decision is indeed a valid ruling, and that a woman who remarries on the strength of the ruling is exempt from having to bring a sacrifice. In his opinion, despite the fact that it later became clear that her first husband was still alive, the ruling permitting her to marry cannot be considered a "mistake."

It seems, then, that these Amoraim differ regarding the question of whether to characterize the pronouncement of the husband's death as a statement of fact, or as a statement of law, namely, a declaration that the woman's legal status is such as to permit her to remarry. The position of Zeiri and Rava would seem to be plausible, inasmuch as the court declared the husband dead, yet later it became apparent that he was still alive, and thus according to the principle established by the aforementioned Tosefta, the decision was not be a "[valid] ruling" (*horaa*), but a "mistake" (*taut*). But what can R. Nahman's reasoning be? Does he accept the law established by the Tosefta? And if so, how is the court's determination that the sun had set and the Sabbath had ended different from the determination that the husband had died and the widow was free to remarry?

Addressing this question, the Talmud explains that according to R. Nahman, the ruling in the remarriage case differs from other factual determinations. According to the halakhic rules of evidence, a court ruling must generally be based on the testimony of two witnesses. An exception to the rule is made in the case of a woman seeking the court's permission to remarry. The Rabbis issued an enactment stipulating that in this situation, the testimony of just one witness will suffice to establish the husband's death. This is the basis for R. Nahman's argument that the court ruling permitting the woman to remarry is not a **factual** determination, since factual determinations can only be made on the basis of the testimony of two witnesses. Rather, it is a legal determination made in accordance with the ritual laws, viz., the laws governing that which is prohibited and that which is permitted. The court does not, and cannot, determine whether the husband is dead or alive, since two witnesses have not testified before

it regarding the matter. In such a situation—that is, in a situation of uncertainty, a situation in which there is a legal doubt, given that only one witness has attested to the husband's death—what the court can, and does, do, is establish, from a legal perspective, that the woman is permitted to remarry. If so, on R. Nahman's reasoning, this decision is deemed to be a legal ruling (*horaa*), not a determination of fact. Hence when the ruling is later found to be in error, the woman who has remarried on the strength of the ruling is exempt from having to bring a sin-offering.

The case where a woman is granted a dispensation to remarry is thus a difficult case to categorize, as it can plausibly be seen as generating a factual determination (Zeiri and Rava), but also as generating a legal determination (R. Nahman). Despite the existence of this case, the classification of which is controversial, all the halakhic authorities accept the conceptual distinction between a court decision that is based on a mistake of law, which is regarded as a valid ruling, and a court decision that is based on a mistake of fact, which is not regarded as a valid ruling, but as a mistake.

This distinction seems to support the point made above regarding a court ruling that is objectively mistaken, with which one who is cognizant of the error is forbidden to comply. In *bJebamot* a distinction is made between different types of objective error. In the case of an objective legal error, one who acts upon the ruling, even though he ought not to have acted as he did, has a valid defense. In the case of an objective factual error, such as a determination that the sun has set when in fact it has not, one who acts upon the ruling has no valid defense.

7.2 Mistakes in judgment (*shikul hadaat*) versus mistakes in legal knowledge (*dvar mishna*)

The principle that a court decision that is objectively and unequivocally erroneous is not considered a valid ruling is also evident in another aspect of the judicial process. A *sugya* in tractate Sanhedrin addresses the question of how to rectify a miscarriage of justice caused by an erroneous ruling. The Talmud points out a contradiction between two Tannaitic sources. A Mishnah asserts that an erroneous decision can be reversed.

In monetary cases, a decision—whether it was to acquit or to hold liable—can be reversed: in capital cases, a decision can be reversed [in order] to acquit, but not to hold liable.

mSanhedrin 4:1

In other words, the Mishnah is asserting that any erroneous ruling in monetary cases can be reversed. Yet a baraita in the Babylonian Talmud implies that a court that has issued an erroneous ruling cannot reverse its decision. The ruling remains valid, but the judge must compensate the party injured by his erroneous ruling:

If [a judge] judged the case and acquitted the liable party while holding the non-liable party liable, or declared impure that which was pure, and declared pure that which was impure—what he did is done [i.e., cannot be undone], and he must pay [compensation] from his own property.

bSanhedrin 33a

This seeming contradiction between the sources posed a challenge to the Amoraim, who sought to resolve it in various ways. R. Sheshet suggested that the conflict be reconciled by distinguishing between two types of errors that can mar court rulings. Errors of the more serious type render court rulings invalid, whereas those of the second type do not.

Rav Sheshet said: Here he erred regarding a point of legal knowledge (*dvar mishna*), there he erred in judgment (*shikul hadaat*). For R. Sheshet said in R. Asi's name: If he erred regarding a point of legal knowledge, the decision is reversed, if he erred in judgment, it is not reversed.

bSanhedrin 33a

Let us try to demarcate the categories "*dvar mishna*" and "*shikul hadaat*." The Talmud explains that a mistake classified as an error regarding "a point of legal knowledge" (*dvar mishna*) results from the judge's having overlooked an important legal source that, had it been taken into account, would have resulted in his handing down a ruling contrary to that which he in fact handed down. The judge's having overlooked this source, which expressed a view contrary to his own, conclusively establishes that the judge's ruling is mistaken. Since, had he been familiar with this source, he would have reached a different decision, his ruling is invalid. Once again, we see that an objective mistake by the judge, in this case a mistake of law stemming from ignorance of a binding halakhic source, renders the ruling invalid. A twentieth century halakhic authority, R. Meshulam Rata, noted that a mistake arising from ignorance of a binding halakhic source is similar to a mistake "as to the reality [of the situation]," that is, to what we have called a mistake of fact.³¹ Both bring about the same legal outcome: the ruling is deemed invalid.

The concept of an error in judgment (*shikul hadaat*) is vaguer and more difficult to define. Indeed, an explanation given by the Amora R. Papa, far from elucidating the notion, makes it even harder to understand:

If, for example, two Tannaim or two Amoraim hold opposed views, and the law has not been declared to be in accordance with the view of this one, or in accordance with the view of that one, then should it happen that [a judge] rules in accordance with one of the views, while

31 *Responsa Kol Mevasser*, 1, #51.

the general practice is to rule in accordance with the other—this is [a mistake in] judgment (*shikul hadaat*).

bSanhedrin 33a

This question has garnered much contemporary scholarly interest. In the opinion of Asher Gulak, a mistake in *shikul hadaat* is an instance where the judge's reasoning is found wanting and draws criticism. Gulak took R. Papa's description, not as a definition or general characterization, but rather as just an example of an instance of the exercise of *shikul hadaat*. He then abstracted from this example to formulate a general principle, namely, that a mistake in *shikul hadaat* is an error in the judge's reasoning.³²

Hanina Ben-Menahem explains the term 'mistake in judgment' (*shikul hadaat*) differently. In his opinion, whereas a mistake regarding a point of legal knowledge (*dvar mishna*) results from the judge's overlooking an important legal source, a mistake in judgment results from the judge's overlooking a salient **judicial practice**. This refers to a legal matter regarding which, though that the law has not been conclusively decided one way or the other, the judiciary's practice is to rule in a certain way. The judge who has made a mistake in 'judgment,' has erred, according to Ben-Menahem, by ruling in a manner that diverged from the prevailing judicial practice at the time. According to this explanation, R. Papa's statement is, contrary to Gulak's opinion, not merely an **illustration** of behavior exemplifying error in judgment, but rather an exhaustive **characterization** of such error.³³

Regardless of which interpretation of the notion of 'error in judgment' is accepted, all agree that according to talmudic law, when a legal ruling overlooks a valid and unquestionably authoritative legal source—that is, when there has been a mistake regarding a point of legal knowledge (*dvar mishna*)—the ruling is void, and not to be complied with.

7.3 'A sage has already ruled'

We have seen that an unequivocal mistake nullifies an erroneous ruling. This is consistent with the principle established in mHorayot, namely, that one is not to comply with an erroneous legal ruling. But this same principle mandates that in the case of a ruling that cannot be deemed erroneous with absolute certainty, one is obligated to act in accordance with the ruling. This principle is reflected in a *sugya* in bSanhedrin 29b, which raises the question of the scope of the judge's obligation vis-à-vis rulings, handed down by earlier courts, with which he does not concur.

In the *sugya*, the Talmud discusses the legal value of an individual's declaration regarding his debts. Is it viewed as a declaration that obligates

32 Gulak, *The Foundations of Jewish Law* (Hebrew), (Berlin: 1922), 4:180.

33 Ben-Menahem, n. 11 above, 136–37.

him and can serve as the basis for a legal claim by the lender, or is the declaration purely rhetorical—say, to present a poverty-stricken ‘front’ so as to keep creditors and beggars at bay—and devoid of evidentiary value? The Amora R. Nahman set down the presumption that “One is wont to disclaim abundance [of wealth],” viz., that we must be skeptical about declarations of debt, since people tend to declare that they have no money, or that they owe money they do not really owe, so as not to appear wealthy in the eyes of others. Hence such a declaration cannot serve as evidence for one who claims to be a creditor. Given this presumption, the Amoraim disagreed over how to address a similar declaration made by someone on his deathbed. The question arose in the context of the following case: “A certain man was nicknamed ‘the mouse lying on the *denarii*’³⁴ [the miser]. Before his death, he declared: ‘I owe money to so and so and to so and so.’”

The Talmud recounts that after he died, the named men came and made a claim against the heirs for payment of his debts to them. R. Ishmael b. R. Jose ruled that R. Nahman’s presumption does not apply in this case, since the person in question made the declaration just before his death, a time when people do not lie. Hence the declaration is to be viewed as obligating him, and the heirs are thus obligated to discharge the debts that their father acknowledged. After this ruling, the heirs paid only half of the debts, and the creditors therefore turned to another judge, R. Hiya, seeking payment of the second half of the debt. Contrary to R. Ishmael b. R. Jose, R. Hiya responded in accordance with R. Nahman’s presumption, ruling that it applies even to someone about to die, and that the heirs were thus exempt from repaying the debt. The creditors then asked R. Hiya whether they had to return the half they had already been paid on the basis of R. Ishmael’s ruling. R. Hiya said they did not have to, asserting: “A sage has already ruled.”³⁵

The upshot of the story is that though R. Hiya disagreed with R. Ishmael b. R. Jose with regard to the law, and contended that the ruling should be the opposite of what R. Ishmael had decided, he refused to void R. Ishmael’s ruling. The import of the “a sage has already ruled” principle is that the first ruling retains its force, and another judge does not have the authority to overturn it even when he clearly disagrees with it.

Let us examine R. Hiya’s position more closely. If it was clear to R. Hiya that his view was correct, and not that of R. Ishmael b. R. Jose, why didn’t he agree to overturn the first decision? And why didn’t he allow the heirs to recover the monies taken from them contrary to the law? The key to understanding R. Hiya’s position is to note that the difference of opinion between the two judges arose from their divergent views of human nature,

34 *Denarius* (pl. *denarii*)—a Roman coin.

35 bSanhedrin 29b. Some commentators read the *sugya* as saying that it was the heirs who approached R. Hiya, seeking repayment of the half of the estate that they had paid to the creditors.

and was not a disagreement over a decidable point of law. Hence we cannot say that in R. Hiya's opinion, R. Ishmael's view was indisputably mistaken. Had R. Hiya maintained that there had indeed been such a mistake, it stands to reason he would have declared the judgment mistaken and annulled it. But given that there is no 'right answer,' R. Ishmael's ruling stands and is final. Alfasi, an eleventh-century codifier, explains this as follows:

As to the judgment exercised when R. Ishmael b. R. Jose and R. Hiya disagreed: R. Hiya had no proof to confirm that R. Ishmael b. R. Jose had made a mistake. Therefore, he did not have the power to overturn his action, and because of this, said, "A sage has already ruled."³⁶

This example further underscores the point that disagreement over a legal question does not necessarily indicate that one side is mistaken. In most cases where there are two opposed rulings, the legal system will seek to decide between them. Yet in the case under discussion, **both** the opposed rulings are accepted as valid **concurrently**: the ruling of R. Ishmael b. R. Jose with respect to the first half of the debt, leaving the heirs' money in the creditors' possession, and that of R. Hiya with respect to the second half of the debt, rejecting the creditors' claim. Even if it is disputed, a ruling that cannot be conclusively demonstrated to be erroneous is valid and binding with respect to the case in which it was handed down. R. Hiya cannot overturn R. Ishmael's ruling vis-à-vis the situation in which it has already been applied, and his own stance can be expressed only in adjudicating other issues that come before him for judgment.

7.4 'If a sage has declared something forbidden, his colleague may not declare it permitted'

The principle that 'finality of judgment' applies to rulings that cannot be proven to be in error is also manifest in a case, reported in the Tosefta, where someone sought to have an already-decided matter brought before a new judge. A baraita in tEduyot ruled:

If he asked one sage and he declared it impure, he may not ask another sage. If he asked a sage and he declared it pure, he may not ask another sage.

tEduyot 1:5 (Zuckerman edition)³⁷

³⁶ Alfasi, bSanhedrin 12b (Alfasi pagination); see also *Piskei Harosh*, Sanhedrin, ch. 3, sec. 26.

³⁷ On some versions of this Tosefta, the prohibition against asking for another opinion applies only in the first case, where the first judge declared it impure.

As formulated in the Tosefta, the addressee of this law is the individual who requested a court ruling. As noted in a recent scholarly analysis of this issue, however,

in a number of talmudic *sugyot*... the baraita is invoked as an argument against a sage who has permitted something that his colleague had forbidden. For example, "Has it not been taught: 'If a sage declares something impure, his colleague is not authorized to declare it pure, or if he has declared something forbidden, his colleague is not authorized to declare it permitted?'"³⁸

In both formulations, the law does not address theoretical questions about purity and impurity, but rather, it addresses the status of a ruling handed down in a concrete case. With respect to abstract discussion of legal questions, discussion that is not connected to an actual case, there are almost no limitations on a sage who wishes to take issue with views expressed by his colleagues. Controversy is a cornerstone of the Rabbinic sources, and indeed, of halakhic discourse in general.³⁹ The law in question, however, is not about abstract discussion, but, as we said, about an attempt to dislodge a legal ruling that has been handed down.

It should be noted that the law does not require the second judge to rule, in new cases that come before him, as did the first judge. On the contrary, in those cases he is at liberty to render a decision as he sees fit. It only prevents the second judge from ruling on a case that has already been decided by another judge.

What is the rationale for the law of the 'sage who declared something impure'? Why does the first judge's ruling commit the second judge to accept that ruling only with respect to the specific case on which the first judge ruled, but not with respect to cases that come before him in the future? Would it not make sense, for the sake of halakhic uniformity, for the ruling of the first judge to bind the second judge from that point on, that is, with respect to any future cases he might adjudicate? This would correspond to the common law doctrine of **binding precedent**—a ruling that has been issued is binding in other similar cases.

On the other hand, if the second judge is not committed to this ruling in future cases, why is he obliged to accept this ruling in this particular case, and not allowed to re-hear the case and perhaps overturn it? Consistency would require that the first ruling not bind the second judge at all and that he be free to overturn the first decision if he sees fit.

38 S. Ettinger, "The prohibition against consulting two authorities and the nature of halakhic truth," 18 *Jewish Law Annual* (2009), 1-2. Ettinger notes that the passages where the baraita is formulated as a directive addressed to judges include, among others, bHulin 44b; bNida 20b, bBerakhot 63b.

39 See Chapter One above, "Controversy."

The explanation offered by most of the Early Authorities is based on the principle of finality of judgment.⁴⁰ The Ritba explains the prohibition against the second sage's rendering an opinion in the case as follows:

Do not say that "he may not ask" applies only *ab initio*, in deference to the honor of the first [sage]. For if he asked, [it applies] even *ex post facto*. The purity declared, and the dispensation issued by the second [sage], are of no consequence. For the first one is a sage who is qualified to issue a legal ruling that something is prohibited or impure, which he did, hence he turned it into a 'prohibited thing.'... and it is so even if the second is greater than the first "in wisdom and in number"⁴¹.... And it stands to reason that since the first sage has turned it into a 'prohibited thing,' it can never be permitted, even if it transpires that he was mistaken.

Hidushei Haritba, bAvoda Zara 7a

On this understanding, when the first sage issued his ruling, and no categorical error was discovered in it regarding a point of legal knowledge, it became final and binding, and what he ruled impure became completely forbidden. The ruling, however, did not become a precedent-setting ruling, and in other cases the second sage—or even the first—can rule differently.

Note that not only does the second judge not have the **right** to hand down a ruling contrary to the first judge, he does not have the **legal authority** to do so. Hence if he nonetheless proceeds to hand down a ruling contrary to that of the first judge, his ruling is void. Moreover, the ruling remains in force even if the first sage later changes his mind and adopts the second sage's view, and even if the second sage is wiser than the first.

In commenting on the law of the 'sage who declared something impure,' the Rabad of Posquières invokes the distinction, discussed above apropos bSanhedrin 33a, between mistakes in judgment (*shikul hadaat*) and mistakes regarding legal knowledge (*dvar mishna*).

If a sage declared something impure, his colleague may not declare it pure; if he declared it forbidden, his colleague may not permit it—and if he permitted it, it is not permitted. And it seems to me that this is so when they disagree as to a matter of judgment (*shikul hadaat*), but if the first made an error regarding a matter of legal knowledge (*dvar mishna*),

40 See Chapter Five below, "Finality of judgment," and see Ettinger, n. 38 above, 1–19.

41 Alluding to the rule that one court may not reverse decisions made by another unless it is greater "in wisdom and in number" (mEduyot 1:5).

[his ruling] is retracted and his colleague may permit [the matter in question].

Rabad, bAvoda Zara 7a (Sofer edition, p. 12)

It is important to reiterate that in saying that a ruling is binding, and precludes other sages from disputing the matter further, this refers only to the realm of actual legal rulings in concrete cases, but not to the domain of theoretical study of the law. Even when the law has been definitively decided, another sage can challenge it at the theoretical level, as long as he acts in accordance with what has been declared the normative practice. The Rosh, R. Asher b. Yehiel, stressed this distinction in discussing the obligations of the second sage, who wishes to express a position contrary to that handed down by the first:

And if the second believes that the first is mistaken, he should go and argue with him. If he can prove that he erred regarding a matter of legal knowledge, he should make him retract it. And if he disagrees with him as to a matter of judgment, that is, if his reasoning leans toward permitting that which the first prohibited, but he cannot prove it from the Mishnah or the Amoraic teachings, he should say: 'I say this, but I am not permitting what you have prohibited, since you declared it prohibited, and rendered it a prohibited thing, and I do not have the power to make you retract.'

Piskei Harosh, Avoda Zara, ch. 1, sec. 3

The doctrine of finality of judgment, *res judicata*,⁴² bars repeated consideration of a case on which a final decision has already been rendered, for two main reasons: to strengthen the status of the court within society, and to protect the individual from having to defend in court a position he has already defended. Important as these desiderata are, it is clear that the doctrine of finality does, in some cases, lead to miscarriage of justice, the perpetuation of error, and obstruction of attempts to ascertain the truth. The talmudic Sages' approach to the question of obedience to legal rulings seeks to balance these considerations. On the one hand, legal rulings, once rendered, are taken to be final. It was clear to the Rabbis that a legal system in which rulings are subject to incessant critical review was untenable, and would gravely impair the halakha as a normative system. On the other hand, they could not ignore the cardinal Torah value of seeking and upholding truth. Hence they mandated that if a ruling is objectively mistaken, it is not to be complied with. Moreover, even when a legal ruling has been handed down and is valid and final, it does not constitute a binding precedent that constrains judges adjudicating future cases, nor does it limit the study and teaching of contrary positions.

42 See Chapter Five below, "Finality of judgment."