

Hard Cases:

Facing Law's Challenges in Anglo-American Legal Theory and Rabbinic Literature

Part of *America at 250: Jewish Ideas and the American Experiment*

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I. Anglo-American Legal Theory

1. Legal Positivism

A law is a command which obliges a person or persons to a *course* of conduct. Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*.

John Austin, *The Province of Jurisprudence Determined*, Lecture I (1832)

Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons; or to past judicial decisions in particular cases.

H.L.A Hart, *The Concept of Law* (Oxford University Press, 1961)

2. Legal Interpretivism

It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.

Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977)

3. Legal Realism and Critical Legal Studies

In a legal system with a relatively extensive body of precedent and with well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past decisions. Conversely, however, it will also always be possible to show how today's decision is inconsistent with the precedents...

Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* (1983)

"There are no determinate continuities derivable from history or legal principle. Rather, judges must choose which conceptions to rely on. Their choice is constrained, but explaining the constraints demands a sociological explanation of the ways in which the system within which they operate is deeply entrenched and resistant to change."

Tushnet, "Following the Rules Laid Down" (1983)

“The implication of our critique... is to turn the dilemma of doctrine upside down. It is to say that, if any conceptual practice similar to what lawyers now call doctrine can be justified, the class of legitimate doctrinal activities must be sharply enlarged.”

Roberto Mangabeira Unger, “The Critical Legal Studies Movement,” *Harvard Law Review* (1983)

II. Rabbinic Literature

1. Pluralism

Bavli Eruvin 13b

Rabbi Abba said that Shmuel said: For three years Beit Shammai and Beit Hillel disagreed. These said: “The *halakha* is in accordance with us,” and these said: “The *halakha* is in accordance with us.” A Divine Voice emerged and proclaimed: “These and those are the words of the living God...”

And the *halakha* is in accordance with Beit Hillel.”

And since both these and those are the words of the living God, why were Beit Hillel privileged to have the *halakha* established according to them? Because they were agreeable and forbearing, and they would teach both their own statements and the statements of Beit Shammai. Not only that, but they prioritized the statements of Beit Shammai to their own statements.

אמר רבי אבא אומר שמואל: שלש שנים נחלקו בית שמאי ובית הלל, הללו אומרים: הלכה כמותנו, והללו אומרים: הלכה כמותנו. יצאה בת קול ואמרה: אלו ואלו דברי אלהים חיים הן...

והלכה כבית הלל. וכי מאסר שאלו ואלו דברי אלהים חיים, מפני מה נכו בית הלל לקבוע הלכה כמותו? מפני שגזיין וצלוכין היו, ושוגין דבריהן ודברי בית שמאי, ולא עוד אלא שמקדימין דברי בית שמאי לדבריהן.

2. Creativity

Bavli Shabbat 69b

Rav Huna said: If someone was walking on a journey or in the desert, and he lost track of which day is Shabbat, he counts six days and then observes one day. Hiyya bar Rav says: He first observes one day and then he counts six days.

אמר רב הונא: הנה מהלך בדרך או במדבר ואינו יודע אימתי שבת, מונה ששה ימים ומשמר יום אחד. חייא בר רב אומר: משמר יום אחד, ומונה ששה.

3. Authority

Bavli Yevamot 87b-88a

Mishnah: If a woman's husband went abroad, and people came and said to her "Your husband has died," and she remarried, and afterwards her husband returned—she must leave each one, and she needs a *get* from each one...

"She must get a divorce from each one." Rav said: This was taught only in a case where she remarried on the basis of one witness's testimony about the death of the first husband. But if she was remarried on the basis of two witnesses' testimony, she does not need to leave the second husband. They laughed at him in the West: The first husband has come and is standing there, and you are saying she doesn't need to leave the second husband?!

הַאִשָּׁה שֶׁהִלְךָ בְּעֵלָהּ לְמַדִּינַת הַיָּם, וּבָאוּ וְאָמְרוּ לָהּ "מֵת בְּעֵלֶיךָ", וְנִיֶּסֶת, וְאָחֵר כִּף בָּא בְּעֵלָהּ — תִּצָּא מִזֶּה וּמִזֶּה, וְצָרִיכָה גַם מִזֶּה וּמִזֶּה...
גט מזה ומזה...

תִּצָּא מִזֶּה וּמִזֶּה וְכוּ'. אָמַר רַב: לֹא שָׁנוּ אֶלָּא שְׁנֵי נִיֶּסֶת בְּעֵד אֶחָד, אֲבָל נִיֶּסֶת עַל פִּי שְׁנֵי עֵדִים — לֹא תִצָּא. מִחֻכּוֹ עָלֶיהָ בְּמַעֲרָבָא: אֵתָא גַבְרָא וְקָאֵי, וְאֵתָא אִמְרַתָּ לֹא תִצָּא?
במערבא: אתא גברא וקאי, ואתא אמרת לא תצא?

III. Takeaways

In full awareness of the fact that they were a scandal in the eyes of others, the rabbis breached conceptual boundaries by insisting that a law could be divine *and* divorced from truth, divine *and* not inherently rational, divine *and* subject to moral critique and modification... the Torah is divine because it originates in the will of the god of Israel, and the attribution of divinity to the Torah does not confer upon it the qualities of universal rationality, truth, and stasis; on the contrary, Israel's god divorces law from truth, issues commands that sometimes lack intrinsic rationality, and modifies his Law in response to the needs and circumstances of his people—and these very features are *proof* rather than *disproof* of the Torah's divinity.

Christine Hayes, *What's Divine About Divine Law* (Princeton University Press, 2015)