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THE COILED SERPENT OF ARGUMENT: REASON, AUTHORITY, AND LAW IN A TALMUDIC TALE

DAVID LUBAN*

I. THE OVEN OF AKHNAI

One of the most celebrated Talmudic parables begins with a remarkably dry legal issue debated among a group of rabbis. A modern reader should think of the rabbis as a collegial court, very much like a secular appellate court, because the purpose of their debate is to generate edicts that will bind the community. The issue under debate concerns the ritual cleanliness of a baked earthenware stove, sliced horizontally into rings and cemented back together with unbaked mortar. Do the laws of purity that apply to uncut stoves apply to this one as well? This stove is the so-called "oven of Akhnai" (oven of serpents). Presumably, its horizontal bands separated by mortar made it look like a coiled serpent; but according to the Talmud, it is the oven of Akhnai because the legal debate coiled the rabbis in serpentine arguments. Therein lies a remarkable tale.[1]

> On that day, Rabbi Eli'ezer presented all the proofs in the world, but [the other Rabbis] did not accept them. [Rabbi Eli'ezer] said: "If the law is as I say, then this carob tree will prove it." The carob jumped a hundred cubits. (Some say: four hundred cubits.) They said: "One does not prove anything from a tree." Rabbi Eli'ezer then said: "If the law is as I say, then this aqueduct will prove it." The [water in the] aqueduct began to flow upstream. They said: "One does not prove anything from an aqueduct." Rabbi Eli'ezer said: "If the law is as I say, then the walls of the academy will prove it." The walls began to fall. Rabbi Yehoshua [Joshua] reprimanded

* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. I would like to thank Thomas Grey and Michael Seidman for comments on the first draft. I presented this paper at the Georgetown Faculty Workshop and the Chicago-Kent College of Law "Law &" Symposium. I am grateful to participants in both for their comments. Special thanks to Claire Hill for encouraging me to write this Article.

1. It is a tale whose significance for American legal theory has received extensive analysis in Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 841–47, 855–65 (1993). Stone's analysis intersects my own in numerous places; I note some as the paper proceeds. Stone observes that numerous writers on American legal theory have addressed the Oven of Akhnai story. *See id.* at 841 n.154.

> [the walls]: "If scholars argue a point of law, what business is it of yours?" To show respect for Rabbi Yehoshua, they did not fall further; and to show respect for Rabbi Eli'ezer, they did not straighten up; and so they are still leaning. Then Rabbi Eli'ezer said: "If the law is as I say, it shall be proven from heaven." A *bat kol* [a divine voice or echo] pronounced: "What have you against Rabbi Eli'ezer? The law is always as he says." Rabbi Yehoshua then stood up and said: "It is not in heaven" (Deut. 30:12). What does this mean? Rabbi Yirmiyah [Jeremiah] said: "As the Torah has been given from Mount Sinai, we take no heed of a *bat kol*—for at Mount Sinai You have already written in the Torah [that we should] 'follow the majority.'"[2]

There is more to the story than this. But this much is already stunning, and it already raises an important issue about, in the words of Scott J. Shapiro, "the paradoxical nature of authority. . . . Authorities claim the right to impose their will on others regardless of whether their judgments are correct. In doing so, they appear to place themselves above the truth—their right does not seem to depend on their being right."[3] Eliezer was right, and heaven itself proclaimed that he was right—but Joshua and the other rabbis insisted on their authority to ignore the voice of heaven.

One might object to Shapiro's way of posing the paradox by observing that he seems to treat matters of legal interpretation as though they are matters of fact, with a clear-cut right and wrong answer. Although some answers to legal questions are plainly wrong ("goats and grapefruits" is never the right answer to the legal question "what is the speed limit?"), there may be more than one acceptable answer to legal questions, and one job of authorities like courts is, plausibly, to settle on one such answer, not because it is uniquely right, but because it is reasonable and defensible and society needs a

2. THE JEWISH POLITICAL TRADITION: VOLUME ONE: AUTHORITY 263–64 (Michael Walzer et al. eds. & trans., 2000) [hereinafter: AUTHORITY] (translating BABYLONIAN TALMUD, Bava Metzia *59b). Because I read only a few words of Hebrew, I work with several translations (and a little help from my friends). Other translations are the old Soncino Press version, THE BABYLONIAN TALMUD, Seder Nezikin, Baba Mezia 352–53 (H. Freedman trans., 1935) [hereinafter: SONCINO TALMUD], and the new Artscroll/Mesorah edition, THE SCHOTTENSTEIN EDITION TALMUD BAVLI, 2 Tractate Bava Metzia $59a^3$–$59b^3$ (Rabbi Nosson Scherman & Rabbi Meir Zlotowitz, eds. & trans., 2001) [hereinafter: ARTSCROLL TALMUD]. The beautifully produced Artscroll edition, with its facing Hebrew and phrase-by-phrase translation, is particularly useful.

The translations use various transliterations of the Hebrew names. I follow the following convention: I will use the translation's version when I am quoting it—hence, "Eli'ezer," "Yehoshua," "Yirmiyah"—but a standard English transliteration in my own text.

3. Scott J. Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 383 (Jules Coleman & Scott Shapiro eds., 2002). Shapiro introduces his article with the Oven of Akhnai story. *Id.* at 382.

single authoritative answer. Against this view, some legal philosophers (most notably Ronald Dworkin) hold that there is one and only one right answer,[4] so that assimilating matters of legal interpretation to matters of fact is no error. Shapiro's way of framing the paradox of authority fits comfortably with the right-answer thesis. I do not propose to review the debate over this thesis here, though I return to it subsequently. For the moment, we may content ourselves with noticing that the Oven of Akhnai story plainly assumes the right-answer thesis. That's the whole point of bringing the *bat kol* into the story. It proclaims that Eliezer is right, and the news about the One Right Answer comes straight from the brooding omnipresence in the sky. So Shapiro's way of posing the paradox accurately captures what is going on in the Oven of Akhnai story.

The story is a powerful one, and I suspect that one source of its power is that Eliezer's appeal to the *bat kol* has strong psychological resonance with most readers. If you have ever been frustrated in an argument because the other people were simply not getting it, not seeing that you were right and they were wrong, you will surely sympathize with Eliezer's passionate "Let heaven prove it!" and the fantasy that some *bat kol* might finally echo down from heaven and make them understand. In his film *Annie Hall*, Woody Allen finds himself standing in a theater line behind an obnoxious man pontificating about the theories of Marshall McLuhan. Allen immediately produces Marshall McLuhan, who tells the man, "You know nothing of my work!" To film this scene, Allen recruited the real Marshall McLuhan for a cameo appearance as a kind of *bat kol*. The scene delights us because it fulfills an infantile fantasy we all have about finally making the idiots see that we're right and they are wrong. The fable of the *bat kol*, like Allen's cinematic fantasy, answers to a thoroughly objectivist image of the truth and a psychological need all of us sometimes feel to force the disbelievers to see what is indisputable.[5]

4. *See* Ronald Dworkin, *No Right Answer?*, *in* LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P.M.S. Hacker & J. Raz eds., 1977).

5. Robert Nozick, in a discussion of the coercive power of arguments, comments wryly on the fact that even though "philosophy is carried on as a coercive activity, the penalty philosophers wield is, after all, rather weak," because the other person "can skip away happily maintaining his previous belief." PHILOSOPHICAL EXPLANATIONS 4 (1990). Nozick goes on: "Perhaps philosophers need arguments so powerful they set up reverberations in the brain: if the person refuses to accept the conclusion, he *dies*. How's that for a powerful argument? Yet, as with other physical threats ('your money or your life'), he can choose defiance. A 'perfect' philosophical argument would leave no choice." *Id.*

But to the pig-headed, nothing is indisputable. Rabbi Joshua won't even listen to the *bat kol*. Imagine that in a Supreme Court argument about the intent of the Framers of the Constitution you could march in James Madison, like Marshall McLuhan, to announce to the justices, "You know nothing of my work!" And then imagine that the Supreme Court says, in effect, "Go away, James Madison. Who cares what you say about your own intent?" The willfulness of Rabbi Joshua seems equally perverse. He cares about his own authority, it seems, more than he cares about the truth of what he says. But his authority rests solely on his claim to be expounding precisely the truth that he now insists he doesn't wish to hear.

II. THE PLATONIC INTERPRETATION

Let us move for a moment from Jerusalem to Athens. The problem here is one that deeply preoccupied Plato. In some sense, it was the central question of his philosophy (and thus of all Western philosophy, if Whitehead was right that all philosophy is a series of footnotes to Plato). There is a difference between truth and mere opinion. But, Plato believed, the multitude consistently mistakes their own opinions for the truth, and most people don't really care to change their minds. Furthermore, the sophists—the lawyers—actually deny the distinction between truth and opinion. They care about winning arguments, not getting the right answer; and, when Socrates shows them that in reality they understand nothing, he wins nothing but their hostility. In the end, they kill Socrates. (Stay tuned to find out what happens to Rabbi Eliezer.) Plato's effort to ground the distinction between truth and opinion, and to expose the demagoguery of the sophists, drives the argument of many of his most famous dialogues, the *Gorgias*, *Protagoras*, *Republic*, *Sophist*, *Theaetetus*, *Phaedrus*, *Laws*, and—of course—the *Apology*, the trial of Socrates. In the Oven of Akhnai story, Rabbi Joshua assumes the role of the Sophist—his "It is not in heaven!" sounds remarkably similar to Protagoras's "Man is the measure of all things"—and Eliezer plays Socrates.

This Platonic and objectivist interpretation appears to be a straightforward way of reading the Oven of Akhnai parable. But I have not given the whole parable yet, and as we add more of the story we will discover that this is not the only way of reading it. In the pages that follow, I aim to explore some alternative readings of the fable, each of which—I hope—sheds additional light on the problems of

truth, authority, and interpretation that the story raises. Call the first reading, the one I have just offered, the *Platonic interpretation*. In it, Eliezer is the good guy, and Joshua represents the forces of authoritarian sophistry ranged against the good and the true.

III. GOD SMILED: THE HUMANISTIC INTERPRETATION

The follow-up on the part of the story already told immediately casts doubt on the Platonic interpretation.

> [Some time later,] Rabbi Natan met Elijah [the prophet]. He asked him: "What did the Holy One do at that moment?" [that is, the moment when Rabbi Yehoshua said "It is not in heaven!"] Elijah replied: "God smiled and said: 'My children have defeated me, my children have defeated me.'"[6]

God's amusement as He admits defeat is certainly one of the most startling images in any monotheistic religious text I am aware of. The philosopher Ted Cohen thinks that laughing at logical absurdities—absurdities like a group of rabbis disregarding God's will to win a debate about its meaning—is closely connected with the roots of Jewish humor.[7] I do not know whether Cohen is right about the unique Jewishness of making jokes based on logic pushed to the point of absurdity, but he is certainly right that it fits in with a significant strain within Jewish culture—and, I will argue, this is the strain that corresponds most closely with contemporary secular legal culture.

A. Cheder *Culture and Debate*

The Jews are the People of the Book, engaged in what historian Paul Johnson once called a "great enterprise in social metaphysics,"[8] namely organizing an entire way of life around a body of law spun out of books by scholars and students studying and arguing together in a *cheder*, a school. First among those books is the Torah, the Five Books of Moses, and especially the laws given in the book of Deuteronomy. Taking the Torah, and the rest of the Hebrew Bible, as their starting point, the rabbis created the Oral Torah, the corpus of elaborations and interpretations that a secular lawyer may think of as

6. AUTHORITY, *supra* note 2, at 264 (translating Bava Metzia *59b). Other translations say that God laughed, not smiled, but the verb (*chaich*) means "to smile"; "to laugh" is *tzachek*. But I don't think anything turns on this point of translation. In both translations, the point is to give God a sense of humor.

7. TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 45–68 (1999). Cohen makes this point specifically about the Oven of Akhnai story. *Id.* at 57.

8. PAUL JOHNSON, A HISTORY OF THE JEWS 149 (1987).

corresponding roughly to the common law or, in a civil law system, the jurisprudence growing out of the civil code. In the second century, some influential rabbis (led by Rabbi Judah the Prince) codified the Oral Torah into a bulky legal treatise, the Mishnah. "Codified" and "treatise" are not exactly the right words, however, because the Mishnah is structured as a series of fragmentary arguments among legendary rabbis, and frequently their arguments are left unresolved. The original purpose of the Mishnah remains mysterious; no one knows whether it was intended as a legal code, a schoolbook, or something else entirely.[9] The Mishnah in its turn received oral elaboration, and three hundred years later some of these rabbinical debates were recorded in the vast, multi-volume Babylonian Talmud. The Mishnah and Talmud (together referred to collectively as "Gemara"), plus a few other collections of rabbinic debates, became in their own turn the source-books for the sprawling bodies of interpretations and responsa that make up the Oral Torah, which to this day continues to expand in observant communities.

Like the Mishnah, the Talmud takes the literary form of an enormously elaborated dialogue among legendary rabbis. The Talmud proceeds through the Mishnah, clause by clause, with the rabbis debating fine points of law and interpretation, and frequently going off on tangents. Their debates, like those in the Mishnah itself, are frequently left inconclusive.[10] In the eleventh century, Rashi, the most influential sage of the middle ages, wrote a line-by-line commentary on the Talmud, and a group of Rashi's descendants wrote another. Since then, every printed edition of the Talmud includes both commentaries, arranged around the margins of the pages so that the commentaries surround the text. The visual appearance of the pages is striking. A reader examining a page of the Talmud, with its text surrounded by text surrounded by text will have little difficulty understanding the imagery of the Oven of Akhnai, with rabbis enwrapping the oven with discussions like a coiled snake. Each page is printed in coils of argument. Thus, the entire Gemara, the central legal source-book of traditional Judaism, takes the form not of a hornbook but a dialogue, a never-ending polyphonic argument in an idealized *cheder*. The text itself mirrors the form of life— self-

9. THE MISHNAH: A NEW TRANSLATION at xiii (Jacob Neusner trans., 1988) [hereinafter MISHNAH NEW TRANSLATION].

10. For a useful discussion of the hermeneutic possibilities in this body of texts, see MICHAEL FISHBANE, *Law, Story, and Interpretation: Reading Rabbinic Texts*, *in* AUTHORITY, *supra* note 2, at xxxix.

government through endless legal argument—to which it gave rise. With no state of their own, no authority to enact enforceable legislation, and no police, Jewish communities in the Diaspora had only the rabbis and the *cheder* to fall back upon.

Recognizing the centrality of the *cheder* as a social institution—it is at once school, legal academy, parliament, and public forum—helps us understand the amazing imagery of God smiling in delight as His children defeat him at the game of dialectic. Of course the primary imagery is of an indulgent parent smiling and conceding a point to a well-loved, clever, argumentative child. But it is equally a scene from a *cheder* with God as teacher. Every teacher will immediately recognize God's amused affection at Joshua and Jeremiah. A tennis coach whose pupil wins a nifty point from her, a chess teacher whose student finds a winning move that the teacher overlooked, a law professor whose students notice something important in a judicial opinion that the professor had never thought of, will all smile to themselves and think "My children have defeated me!"—even if, or especially if, the teacher knows that it isn't likely to happen again for quite a while. God's response is, quite simply, a teacher's delight at the success of the academic enterprise—the growing skill and independence of his or her students.

This is, one might say, a humanistic, feel-good reading of the Oven of Akhnai story, and for short I will refer to it as the *humanistic interpretation*.[11] Instead of a wrathful God who strikes down Rabbi Joshua for spurning the divine voice, God chuckles indulgently at the clever bit of dialectic that Joshua uses to trap the Almighty in His own words. For of course what Joshua has done—at least as Rabbi Jeremiah interprets him—is nothing more than pointing out that a prior commandment of God, the "follow the majority" passage in Exodus 23:2, has preempted the *bat kol*. A human cannot really defeat God. All that a human can do is appeal to God against Himself. It's like the method for playing simultaneous chess against two powerful champions. Play the white pieces against one, and the black pieces against the other. Place the champions in separate rooms. Observe the first champion's move with the white piece, then go into the

11. We find it, for example, in JOSEPH TELUSHKIN, JEWISH LITERACY 156 (1991). Rabbi Telushkin's well-known pedagogic book quotes the scholar Hyam Maccoby: "This extraordinary story strikes the keynote of the Talmud. God is a good father who wants His children to grow up and achieve independence." *Id.* Stone notes that Robert Burt adopts the humanistic interpretation. Stone, *supra* note 1, at 841–43 (citing Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1691–92 n.31 (1991)).

other room and play the identical move against the other champion. Wait to see what he replies with the black pieces, then go back into the first room and play that move against the first champion. In effect, you are playing the two champions against each other, and you get at least one win (or two draws) out of the games.

B. Wit-Versus-Might Stories and the Rule of Law

Rabbi Joshua's method of using God's own rules to evade the outcome dictated by the *bat kol* carries powerful resonance in Jewish culture. A favorite genre within Diaspora Jewish folk-humor concerns the powerless Jew who outwits a powerful persecutor by trapping him in his own rules. One might call these wit-versus-might stories. For example:

> The Grand Inquisitor in Seville trumps up accusations against Rabbi Pinkhes, the leader of the Jewish community. He orders a trial by divine will: the rabbi must draw one of two rolled-up pieces of paper, with "guilty" and "innocent" written on them, and if he draws the slip marked "guilty" he will be executed. The whole town gathers to watch the spectacle. Secretly, the malicious Inquisitor writes "guilty" on both pieces of paper. But the rabbi suspects that this is what the Inquisitor has done, and when he draws his piece of paper, instead of reading it he immediately pops it in his mouth and swallows it. The Inquisitor leaps to his feet in astonishment and anger. The rabbi calmly says, "Don't worry, your excellency. You still have the other piece of paper, and from it you can learn the verdict. If it says 'innocent' I must have chosen 'guilty'; and if it says 'guilty' then I must have chosen 'innocent.'" Rabbi Pinkhes's quick thinking saves him.[12]

Or this one:

> Zev Ben Shmuel has become a court jester in Babylonia—until he imprudently responds in kind to an anti-Jewish insult from a Babylonian nobleman, and under pressure from the outraged nobleman the king reluctantly sentences him to death. The king, however, grants Zev one final favor: he gets to choose the manner of his death. "Hanging, poisoning, being devoured by wild beasts, anything you wish, we shall carry it out." Zev replies, very simply, "Old age." To keep his word, the king releases Zev, and Zev indeed lives to a ripe old age.[13]

12. NINA JAFFE & STEVE ZEITLIN, WHILE STANDING ON ONE FOOT: PUZZLE STORIES AND WISDOM TALES FROM THE JEWISH TRADITION 7–10 (1993).

13. *Id.* at 23–25.

Or this:

> A wicked caliph devises a plan to eliminate the Jews in his kingdom. He instructs the guards to ask every Jew to say something about himself. If he lies, they are told to behead him; but if he tells the truth, they are to hang him. Benjamin, a Moroccan Jew, comes to the kingdom on business, and the guards seize him and order him to tell them something about himself, explaining the caliph's murderous order with a malicious smirk. What does Benjamin reply to save himself?
>
> The answer: he says, "Today you will behead me." Of course, if they behead him he has told the truth, and they have disobeyed the caliph's orders to hang, not behead, the truth-tellers. But they also disobey if they hang him, for hanging is the fate reserved for truth-tellers, and he hasn't told the truth. The only way they can avoid disobedience is to do neither, and Benjamin hastily returns to Morocco with his life intact.[14]

Dozens, perhaps hundreds, of similar stories and jokes exist, all set in the framework of the persecution and oppression of Diaspora Jews.

As the last story illustrates, they fit in with a familiar modern genre of logic puzzles. Logician and puzzle-master Raymond Smullyan offers a typical example (which I mention now because we shall return to it later). The king in the Arabian Nights grows tired of Scheherazade's stories and announces that he must now execute her. The quick-witted Scheherazade makes a last request: "'I will ask you a question,' said Scheherazade, 'a question answerable by *yes* or *no*. All that I ask is that you answer *yes* or *no*, and that you promise to answer truthfully.'"[15] Confronted with such a seemingly-harmless request, the king gives his word. Scheherazade then poses her question, and as he works out the answer, the king discovers (to his own secret delight) that to keep his word he cannot execute her. What is Scheherazade's question? (Before reading the answer in the footnote, you may want to try your hand at solving the puzzle.[16]) Obviously,

14. *Id.* at 34–37. The greatest of all these stories, however, is the tale of Berl and the Priest, in COHEN, *supra* note 7, at 91–94. It is too lengthy to reproduce here, so I'm afraid you have no alternative but to find a copy of Cohen's book (which has a lot of great jokes in it, as well as many interesting thoughts about the significance of jokes).

15. RAYMOND SMULLYAN, THE RIDDLE OF SCHEHERAZADE AND OTHER AMAZING PUZZLES, ANCIENT AND MODERN 79 (1997).

16. One question that works is this: "Will you answer this question *no* and take my life?" On purely logical grounds, the king cannot answer "yes," because then his answer to the "will you answer this question *no*?" clause would be false. And if he answers "no" and executes her, he will likewise have broken his word: his answer to the entire two-part question would be false. Thus the only way to keep his word is to answer "no" and spare Scheherazade. *Id.* at 223. The

Smullyan's Scheherazade story is nothing but a wit-versus-might story in which the clever Jew is disguised in clever-Arab-princess' clothing.

What is striking about the wit-versus-might stories is that they merge so seamlessly with the *cheder* culture of legalism, rules, and argument. Of course, nothing actually prevents the Inquisitor from ordering the rabbi's death—nothing except his own word and his own rules. The Diaspora Jew, without an army or a martial culture, has just one weapon to use against the oppressor: his wits, sharpened by hundreds of hours of *cheder* dialectic, coupled with the weak commitment of his oppressor to maintain at least a semblance of respect for the rules of law and of logic. If the chief virtue of a rule-of-law culture lies in substituting rational debate for violence, in order to protect the weak, then the wit-versus-might stories represent the rule of law in microcosm. And Rabbi Jeremiah's interpretation of Joshua's "It is not in heaven!", with its dialectical trick of pre-empting the *bat kol* with the Torah, may stand as a kind of paean to the humanizing power of the rule of law. (Of course, in this story God is not a malicious oppressor, and his reaction is delighted amusement and not the Inquisitor's frustrated rage.)

C. Truth as Coercion

The humanistic interpretation of the Oven of Akhnai story displays Rabbi Eliezer in an entirely different light from the Platonic interpretation. In the Platonic interpretation, Eliezer was Socrates confronting authoritarian sophists. In the humanistic interpretation, Eliezer is the true authoritarian. When he fails to convince the other rabbis with arguments, he resorts to magic and brute force. The dead giveaway is his third miracle: "If the Halakhah accords with me, let the walls of the study hall prove it," at which point the walls begin to collapse on the rabbis. In his growing anger and frustration, Eliezer resorts to physical threats; like the blind Samson, he prepares to bring the building down on the rabbis' heads. Symbolically, he attempts to demolish the entire practice of dialectic and argument, of give and take within the culture.[17] The walls of the *cheder*, which the tale tells

question "Will you either answer this question *no* or spare my life?" does the job equally well: the answer "no" is false because its truth logically contradicts the first clause of the question, while the answer "yes" can be truthful only if he spares her life. *Id.* at 222–23.

17. Scott Shapiro's interpretation of the Oven of Akhnai emphasizes a similar point:

> Eliezer manifested a vice that is not uncommon among the pious, a vice which might be called "excessive purism." Excessive purists always insist on acting in the technically right manner. They refuse to corrupt themselves, to dirty their hands by descending to

us are leaning to this day under the countervailing pressures of Rabbi Eliezer's command and Rabbi Joshua's rebuke, offer a powerful metaphor for the edifice of the law, whose crookedness reflects the countervailing pressures of force and argument, violence and the word.[18]

The sequence of miracles escalates step by step. First, Eliezer displays a single act of power, uprooting and transporting a tree. When this fails to convince the rabbis, he reverses the flow of water—a less gaudy miracle than uprooting the tree, but a more impressive one: he has reversed the course of nature, not simply displayed a single act of might. Then comes the collapsing schoolhouse, with its sinister implication of violence against the other rabbis. But none of these move the rabbis, because, as they observe, you can't prove a point of law with a carob tree or an aqueduct or even the destruction of the schoolhouse.

But what about the *bat kol*? The fact is that even the *bat kol* presents no arguments on the merits of the legal issue—it asserts Eliezer's personal authority by fiat, not reason. ("The law is always as he says.") Of course, one might reply that Eliezer has already offered "all the arguments in the world," and the *bat kol* has no need to repeat them, merely to announce once and for all that they are right. But the fact remains that the *bat kol* has cut the Gordian knot of coiled arguments with a peremptory announcement. This is truth as coercion. As Hannah Arendt observed in a remarkable essay on truth and politics: "Truth carries within itself an element of coercion," because propositions "once perceived as true . . . have in common that they are beyond agreement, dispute, opinion, or consent."[19] That seems to be what Eliezer aims for when he invokes the *bat kol*.

> the level of the lumpenproletariat and to act as the benighted do. However, . . . one can have reasons to abide by the will of another, even when one knows that they are wrong. To loftily stay above the fray can manifest extreme disrespect for one's fellow citizens.

Shapiro, *supra* note 3, at 439. Shapiro's argument differs from the one I offer here, however. He argues that deferring to the majority enhances their autonomy; it "pays respect to the importance that people are allotted a certain control over their lives and the fairness of sharing that power equally." *Id.* at 438.

18. One thinks of Holmes's argument that a judge's job is "to express . . . the resultant . . . of the pressure of the past and the conflicting wills of the present." OLIVER WENDELL HOLMES, JR., *Twenty Years in Retrospect*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 154, 156 (Mark DeWolfe Howe ed., 1962).

19. HANNAH ARENDT, *Truth and Politics*, *in* BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 227, 239–40 (rev. ed. 1968); *see also* Nozick, *supra* note 5.

Stuart Hampshire draws a useful distinction between two forms of human reason. One, modeled on mathematical proof, is "a process in the inner consciousness of the solitary thinker,"[20] and it consists of deductions that logically compel the thinker to specific conclusions. The other is modeled on public debate, the back-and-forth weighing of competing standpoints aiming at persuasion (not compulsion) and culminating in a decision that logic alone cannot dictate. During childhood we learn the practices of debate in family scenes "of asserting, contradicting, deciding, predicting, recalling, approving and disapproving, admiring, blaming, rejecting and accepting, and many more."[21] We learn to internalize these practices, and "[d]iscussions in the inner forum of an individual mind naturally duplicate in form and structure the public adversarial discussions."[22] Hampshire and Arendt are both eager to restore equal dignity to the latter form of rationality, the public-dialogical form, rather than following the Cartesian philosophical tradition by focusing exclusively on mathematical demonstration as the paradigm of reason.[23] The hallmark of public-dialogic reasoning is the recognition of human plurality and of the need to reach conclusions by means other than blowing away the other side with arguments that simply cannot be contradicted. A Midrash (commentary) on the Psalms, celebrating the polyphony inherent in the Law, expresses this point of view as a metaphysical fact about legal texts:

> Rabbi Yannai said: The clauses of the Torah were not given as clear-cut [edicts]. Rather, concerning each clause that the Holy One imparted to Moses, He would impart forty-nine reasons to [rule] "pure" and forty-nine reasons to [rule] "impure."
>
> [Moses] said before Him: Master of the Universe, how long? Let us clarify the matter!
>
> He answered: "Follow the majority!" If the majority rule "impure," it is impure; if the majority rule "pure," it is pure.[24]

In these terms, the rabbis in the Oven of Akhnai parable are engaging in the form of reasoning appropriate to human affairs, the collective give-and-take of argument culminating in a majority decision;

20. STUART HAMPSHIRE, JUSTICE IS CONFLICT 11 (2000).

21. *Id.* at 12.

22. *Id.* at 9.

23. Of course, the distinction cannot be as stark as Hampshire suggests: public debates include logical argumentation, and (conversely) sound arguments anticipate and answer potential objections. But notwithstanding the overlap, I believe that the distinction makes intuitive sense.

24. AUTHORITY, *supra* note 2, at 317 (quoting Midrash Psalms 12).

it is Eliezer who wants to short-circuit and trump human rationality by substituting divine warrant. As Arendt argues,

> The trouble is that . . . truth . . . peremptorily claims to be acknowledged and precludes debate, and debate constitutes the very essence of political life. The modes of thought and communication that deal with truth, if seen from the political perspective, are necessarily domineering; they don't take into account other people's opinions, and taking these into account is the hallmark of all strictly political thinking.[25]

One obvious question arises: why should we accept political thinking about the interpretation of the law rather than insisting on truthful thinking? Implicitly, the Oven of Akhnai story answers this question in Rabbi Joshua's proclamation of the line from Deuteronomy: "It is not in Heaven!" Let us examine the context of this line, which appears during the covenant between the Children of Israel and God at Moab:

> Surely, this Instruction [*mitzvah*] which I enjoin upon you this day is not too baffling for you, nor is it beyond reach. It is not in heaven, that you should say, "Who among us can go up to heaven and get it for us, and impart it to us, that we may observe it?" Neither is it beyond the sea, that you should say, "Who among us can cross to the other side of the sea and get it for us and impart it to us, that we may observe it?" No, the thing is very close to you, in your mouth and in your heart, to observe it.[26]

In effect, Moses is saying that the law is fundamentally transparent. It is not an esoteric teaching meant only for initiates or prophets or experts. (Oddly enough, it's the Bible, not Justice Holmes, that first informs us that the law is not a brooding omnipresence in the sky.) In the Oven of Akhnai story, Joshua reasons in reverse from this passage: any interpretation of the law that cannot persuade the rabbis without the intervention of a *bat kol* cannot be the law as Moses describes it, namely a law that is not in heaven. The law, one might say, cannot be too fancy for ordinary people to grasp, or else it isn't the law.[27] And if a legal proposition cannot persuade the rabbis with-

25. ARENDT, *supra* note 19, at 241.

26. AUTHORITY, *supra* note 2, at 16 (quoting Deuteronomy 30:11–14).

27. This argument has some affinities to Daniel Farber's critique of brilliance in legal theory:

> Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. Who would know better than the average person what the average person has consented to? How can someone have consented

out the intervention of a *bat kol*, it is too fancy for ordinary people to grasp. Ergo, it isn't the law.

D. Jeremiah's Sophism

Jeremiah explicates Joshua's argument differently, and I turn next to his explication.[28] It is really in his further interpretation that the rabbis work their logical trick on God. According to Jeremiah, the reason for ignoring the *bat kol* is that the Torah was already given at Mount Sinai, and the Torah states that one must follow the majority. Hence, even if the *bat kol* states that the majority is wrong, the prior injunction to follow the majority provides an exclusionary reason to disregard the *bat kol*.

To complete the argument, one would have to show why the injunction to follow the majority takes priority over the *bat kol*, that is, why it *is* an exclusionary reason, and also why the injunction applies even when the majority is demonstrably wrong. But trouble arises even apart from these worries. The trouble is that Jeremiah's argument rips the words "follow the majority" out of a context that in fact says exactly the opposite. The full passage in the Torah from which he is quoting reads: "You shall not follow the majority to do wrong."[29] It appears, then, as though Jeremiah has not defeated the Master of the World with an ingenious point of logic, but rather that he has prevailed by cheating.

One response to this objection is that Jeremiah's interpretive method—plucking words out of context regardless of its meaning and spinning law out of them—is a traditional technique of Jewish hermeneutics. Rabbi Akiva was said to derive rulings from a single letter of

> to a position that is so novel and clever that only one person on earth has ever thought of it?

Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 925 (1986). Some might say that this argument cannot apply to non-consensual divine commandments—but it is significant that the "not in heaven" passage occurs during the course of a covenant between the Israelites and God, and indeed, Judaism as a covenantal religion locates the binding force of the law in consent, not command. *See* AUTHORITY, *supra* note 2, at 6–46. However, Joshua relies on the "not in heaven" paragraph, not the notion of consent, to demonstrate that legal interpretations unpersuasive to the rabbis absent divine intervention cannot really be the law. His argument is therefore parallel to, not identical with, Farber's.

28. The Artscroll edition interpolates language stating that this explication is Joshua's, not Jeremiah's. Artscroll Talmud, Bava Metzia, *supra* note 2, at 59b[1]. I follow the translation in AUTHORITY, *supra* note 2, at 264, as well as the Soncino Talmud, *supra* note 2, both of which attribute the paragraph to Jeremiah. Follow the majority.

29. *See* AUTHORITY, *supra* note 2, at 264 n.9, 317 (quoting Exodus 23:2).

a single word in the Torah.[30] In effect, the rabbis treated the words and phrases of the Torah not as a text demanding a sympathetic reading, but rather as a repository of language-fragments, a kind of lexicon or even alphabet providing the raw material for legal rulings. Perhaps a better metaphor would be that the phrases of the Torah resemble a set of musical motifs that interpreters weave into their compositions, like Wagner writing his operas or jazz players jamming.

The rabbis would not have described the Torah as a lexicon. They would have said that because the Torah comes directly from God, nothing about it can be contingent or accidental. Every letter of every word is exactly what it must be, every fragment conveys its own truth, and so the interpreter is entitled to whatever inferences can be drawn from the fragments considered singly.[31] The high-water mark of this kind of Torah-mysticism is the peculiar interpretive technique known as *Gematria*, a method used by the medieval kabbalists to discover secret meanings in the Torah. Every letter of the alphabet corresponds with a number, and kabbalistic numerology permitted intersubstitution in the text of the Torah of any word with the same number as a word in the original text. The practice rested on the absolute non-contingency of the Torah—if the word *behemah* (beast) has the numerical value 52, that cannot be an accident according to the kabbalists—and this Torah mysticism likewise provides a metaphysical justification for the rabbis' peculiar hermeneutic practice of wrenching verbal fragments of the Torah (such as "follow the majority") out of their context.[32] I take it that this metaphysical-mystical justification has no secular counterpart, and is therefore of little interest to secular legal theory.

However, there is a less occult justification for Jeremiah's appropriation of the clause "follow the majority" that does indeed have a more universal theoretical significance. The full phrase, "You shall not follow the majority to do wrong," raises the obvious question of how we are to know when the majority is wrong. What standard other than the opinion of the majority do we have for making that determination? In the Book of Exodus, there is an answer to this question, namely that Moses the prophet is in direct communication with God, and transmits the divine word directly to the Israelites. Maimonides

30. AUTHORITY, *supra* note 2, at 262.

31. *See* Stone, *supra* note 1, at 864.

32. *See* GERSHOM SCHOLEM, KABBALAH 168–74, 337–43 (1974) (discussing kabbalistic theory of the Torah and *Gematria*, respectively).

argued that the prophecy of Moses was a unique, epistemically privileged moment in Jewish history, the moment when God's will was made transparent to the Israelites.[33] But the Mosaic period is over, and it will never be replicated. That, at any rate, is the standard reading of the final sentence of the Torah:

> Never again did there arise in Israel a prophet like Moses—whom the Lord singled out, face to face, for the various signs and portents that the Lord sent him to display in the land of Egypt, against Pharaoh and all his courtiers and his whole country, and for all the great might and awesome power that Moses displayed before all Israel.[34]

To be sure, the Bible recognizes other prophets who arose in the land of Israel, but none provided the direct line to God that Moses did, and eventually the line of prophecy petered out.[35] If the Mosaic period represented a kind of epistemic golden age, then the period of the later prophets was an age of silver, and we now dwell in the age of bronze or clay. In the age of bronze, lacking a Moses, or even an Amos or Isaiah, there remains no better guide to right and wrong than the majority opinion of the wisest and most learned sages, the *hakhamim*.

Not that the *hakhamim* regarded their own deliberations as third-rate knowledge. An extraordinary Talmudic passage states explicitly that sages are superior to prophets, and even to the Torah itself.[36] Jeremiah does not go that far, of course, because it is the Torah that he cites as authority for disregarding the *bat kol*; but there seems to be little doubt that Jeremiah is rejecting the claims of prophecy to prevail over the debates of the sages. We may gloss Jeremiah's seemingly-perverse wrenching of "follow the majority" out of its original "do not follow the majority" context as an elliptical argument along the following lines:

33. See the discussion of prophecy in AUTHORITY, *supra* note 2, at 225–31 (quoting Maimonides' Mishneh Torah).

34. THE TORAH: THE FIVE BOOKS OF MOSES 405 (1962) (quoting Deuteronomy 34:10–12).

35. See the passage on the decline of prophecy in AUTHORITY, *supra* note 2, at 257–58 (quoting Tosefta Sotah).

36. On the superiority of the sages to the prophets, see AUTHORITY, *supra* note 2, at 258–59 (translating Babylonian Talmud, Bava Batra *12a–b), and the explication of this passage by the twelfth-century rabbi Joseph ibn Migash, *id.* at 259–60. On the superiority of the sages to the Torah itself, see *id.* at 261–62 (translating Midrash Rabbah: Song of Songs 1:2 and Babylonian Talmud, Menahot *29b) (the latter is a remarkable passage in which God miraculously sets Moses down in Rabbi Akiva's Talmudic academy, and Moses discovers that he lacks the skills to follow the scholars' subtle debates about the meaning of the Torah).

> In Mosaic times, the commandment against following the majority in wrong was perfectly coherent because the prophecy of Moses provided transparent access to knowledge of right and wrong. But without the direct line to the Divine Word provided uniquely by Moses, and never replicated, the negative implication of the rule is that now we have no alternative to following the majority of the sages, because their debates remain the most reliable procedure for determining right and wrong.

On this reading, the *bat kol* has arrived on the scene too late, in an epoch when prophecy no longer counts as the right method of discerning the law.

One other aspect of the Oven of Akhnai story reinforces this reading. Rabbi Eliezer's sequence of miracles seems rather clearly modeled on the series of miracles that God commands Moses to perform in Egypt to persuade the Israelites of his authenticity (Exodus 4:1–9). But, the story intimates, Eliezer is no Moses. So the point of the parallel is that we don't live in Deuteronomic times, but rather in times when God's will is hidden and we must make do with purely human forms of legal reasoning. Even though the law is divine, we must behave as though we are secular interpreters, not miracle-workers or seers.

It might be objected that Eliezer's miracles *do* offer evidence that his interpretation of the law is correct. Human beings cannot uproot carob trees, reverse the flow of water, collapse the walls of a house, or summon up divine voices merely by their say-so. Hence, Eliezer must be assisted by supernatural forces, and when he says, "If the law agrees with me, these miracles will prove it," God evidently answers his prayers and validates his claims.

But not only does the Oven of Akhnai story explicitly state that miracles don't prove points of law, it subtly casts doubt on the power of miracles to prove anything. Consider the peculiar aside that appears, almost tongue in cheek, when the Talmud recounts Eliezer's first miracle. "The carob jumped a hundred cubits. (Some say: four hundred cubits.)" Why the second sentence? One answer is surely that by means of this literary device the narrator of the story (the *stam*, the anonymous teacher in the Talmud) makes it clear that he wasn't there, and that the story has come down to us in multiple versions. It is a distancing device, a device to remind the reader that the story is, after all, just a story. In addition, though, the disagreement over how far the carob tree jumped suggests that the perceptions of the eye-witnesses diverged. It reminds us that tales of miracles are

themselves infected by human fallibility in perception and memory. In effect, it reminds us that the proof-power of miracles cannot rise higher than the fallible perceptions of the observers. As Hume argued, precisely because a miracle is an interruption of the ordinary course of nature, it is always just as probable that my own perception has inexplicably failed as it is that the course of nature has inexplicably failed; and so miracles can never carry their own epistemic warrant.[37] It follows (as both Hume and Kierkegaard argue) that the interpretation of any observational evidence as a miracle, a divine intervention, is a matter of faith and not of fact, and that will be equally true for eyewitnesses and for those who receive their testimony second- or third-hand.[38] The facts of human fallibility and human disagreement cannot be evaded except by a leap of faith that undermines the power of the miracle to prove anything at all.

These arguments, unlike the metaphysical-mystical justification for "follow the majority," do have importance and resonance for legal theorists. On this way of reading the Oven of Akhnai story, its point seems to be that fallible human beings have no more reliable guide to the correct interpretation of law than their own collective deliberations and votes—even under the strong assumption that in God's eyes every question arising under the law has exactly one right answer. Jeremy Waldron has argued precisely this point (convincingly, to my mind) in connection with the view of some natural lawyers that law has to do with objective moral truth. Waldron points out that the objectivity of moral truth is largely beside the point because no agreed-upon method exists for determining moral truth.[39] Dworkin's right-answer thesis, even if true, settles nothing. As Arendt puts it, truth appears in the market place under the guise of opinion.[40] That is, even if morality is a matter of objective truth and not opinion, the lack of methods for ascertaining the truth means that we will never do better than debating different people's opinions about what the objective truth is, then settling the matter by some non-truth-related method like voting. If it is not in heaven, "follow the majority" seems more reliable than the rule "follow the objective truth," because what I

37. DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 114–16 (L. A. Selby Bigge ed., 1902).

38. SØREN KIERKEGAARD, PHILOSOPHICAL FRAGMENTS 126–32 (David Swenson trans. 1962).

39. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY 158, 171–77 (Robert P. George ed., 1992).

40. ARENDT, *supra* note 19, at 238.

take to be the objective truth may simply be my own mistaken opinion.[41]

IV. THE POWER INTERPRETATION

A. The Rabbis as Grand Inquisitors

There is another way to look at the story, however, which comes to the fore when we read its continuation. What happens next after God smiles and says "My children have defeated me"? The story continues:

> It is related that on that day the rabbis collected everything that Rabbi Eli'ezer had pronounced pure and burned it in a fire. Then they voted on him and placed him under the ban [i.e., excommunicated him].[42]

So much for the feel-good, humanistic *cheder*. The rabbis are playing hardball. After the vote to excommunicate Eliezer, Rabbi Akiva insists on communicating the news to him personally, in order to put it in the gentlest, most delicate way.

> They said: who will go and inform him? R'Akiva said to them: I will go, for I am concerned that perhaps an unfit person will go and inform him and bring about the destruction of the entire world. What did R'Akiva do to inform R'Eliezer? He dressed in black clothing, and cloaked himself in black, and sat before [R'Eliezer] at a distance of four *amos*. R'Eliezer said to him: Akiva, why is today different from other days? Why are you sitting so far away from me today? [R'Akiva] replied to him: My teacher, it seems to me that your colleagues are removed from you.[43]

Rather than, "you are excommunicated by your colleagues." A nice touch, perhaps, but the effect is nevertheless devastating.

> [Rabbi Eli'ezer] tore his clothes and took off his shoes and sat down on the ground. Tears fell from his eyes; then the world was afflicted: one third of the olives, one third of the wheat, one third of

41. This is a different argument than that implicit in the Midrash on the Psalms, *supra* note 24, which is a metaphysical claim that there is no objectively right answer to any legal question, because "the clauses of the Torah were not given as clear-cut edicts." Waldron's is an argument about the inherent inability of human beings to agree on objective moral truths; the Midrash's is an argument about the inherent plurality of moral truth.

42. AUTHORITY, *supra* note 2, at 264 (translating Bava Metzia, *59b).

43. Artscroll Talmud, *supra* note 2, at 59b[2] (translating Bava Metzi, *59b). (I have switched translations here because the passage in question was elided from the translation I have used for the rest of the story.)

> the barley.... It is said: "There was great woe that day, for every spot toward which Rabbi Eli'ezer directed his eyes was burned."[44]

The affront against divine truth is not so easily dispensed with; the world itself is diminished. The imagery of the affliction is remarkable. The first image, of the destruction of olives, wheat, and barley, seems to respond to the prophecy of Deuteronomy 11:13–17: If you disobey the divine law, "the Lord's anger will flare up against you, and He will shut up the skies so that there will be no rain and the ground will not yield its produce; and you will soon perish from the good land that the Lord is assigning you."[45] By overruling the Torah in its correct meaning, the rabbis have diminished it, and the sustenance of the people diminishes correspondingly.

As for the image of Eliezer's fatal gaze, his excommunication emphasizes once again Eliezer's role as truth-finder and truth-keeper. The law follows Eliezer, and, correspondingly, the world mirrors Eliezer. His inner devastation is total, and everywhere he looks he perceives only devastation. The outer world mirrors his inner world; wherever his eyes rest is incinerated, because Eliezer's inner world has itself gone up in flames.

The paradox of authority, the naked assertion by authorities of their right to be wrong, has returned with a vengeance. Only now the issue is not the truth-versus-opinion, few-versus-many tensions in the Platonic interpretation. Now we confront the nasty, political side of authority, the infliction of real punishments on those who choose to defy the authorities. Eliezer's pain and humiliation are real, and it emphasizes how ruthlessly the rabbis suppress dissent. The story says that they gathered every object that Eliezer has declared pure and burned it—an image uncomfortably like the book-burnings of the Inquisition. The rabbis burn these objects knowing full well that the *bat kol* has declared them pure, so there is no need for the bonfire other than the need to assert their authority and extinguish Eliezer's.

Striking parallels exist between the Oven of Akhnai parable and one of the deepest reflections on Christianity, Dostoevsky's "Grand Inquisitor" story in *The Brothers Karamazov*. In this story, Christ returns to Earth in Spain during the time of the Inquisition. He works miracles and "rays of Light, Enlightenment, and Power stream from

44. AUTHORITY, *supra* note 2, at 264 (translating Bava Metzia, *59b).

45. Deuteronomy 11:13–17, The Torah 357 (Jewish Publication Society trans.). These verses are recited by observant Jews three times a day, as part of the *shema*, the basic affirmation of faith.

his eyes and, pouring over the people, shake their hearts with responding love."[46] The Grand Inquisitor orders Christ arrested. That night, the Inquisitor visits Christ in his cell. He admonishes Christ to be silent.

> [Y]ou have no right to add anything to what you already said once. Why, then, have you come to interfere with us? For you have come to interfere with us and you know it yourself. But do you know what will happen tomorrow?... [T]omorrow I shall condemn you and burn you at the stake as the most evil of heretics, and the very people who today kissed your feet, tomorrow, at a nod from me, will rush to heap the coals up around your stake....[47]

Ivan Karamazov, who recounts the story of the Grand Inquisitor, imagines how his soliloquy continues.

> "Everything," they say, "has been handed over by you [i.e., by Christ] to the pope, and you may as well not come at all now, or at least don't interfere with us [the Church] for the time being.... Have you the right to proclaim to us even one of the mysteries of that world from which you have come?... No, you have not, so as not to add to what has already been said once.... [F]ortunately, on your departure, you handed the work over to us. You promised, you established with your word, you gave us the right to bind and loose, and surely you cannot even think of taking this right away from us now. Why, then, have you come to interfere with us?"[48]

The parallels to the Oven of Akhnai are obvious: once God has laid down His law, and created temporal authorities to administer it, He is not permitted to interfere with them. If He speaks through Rabbi Eliezer, Eliezer must be excommunicated. If He sends His own Son a second time, the priests must burn Him at the stake. The Grand Inquisitor story makes manifest the political authoritarianism that is latent in the Oven of Akhnai. For the Inquisitor makes it perfectly clear that in his view the ultimate issue is the need for authoritarianism: "nothing has ever been more insufferable for man and for human society than freedom,"[49] which Jesus advocated and the Church, after centuries of effort, was finally able to suppress. It is well-known that Dostoevsky's inspiration for the Grand Inquisitor was the remarkable right-wing French publicist Joseph de Maistre, an extreme ultramontanist (that is, a proponent of absolute Church authority over tempo-

46. FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 249 (Richard Pevear & Larissa Volokhonsky trans., 1990).

47. *Id.* at 250.

48. *Id.* at 251.

49. *Id.* at 252. The Inquisitor adds, "There is no more ceaseless or tormenting care for man, as long as he remains free, than to find someone to bow down to as soon as possible." *Id.* at 254.

ral as well as religious matters), and perhaps the ultimate nineteenth-century authoritarian, who exulted in authoritarian government as an antidote to human willfulness.[50]

It is obvious that the Inquisitor represents only one extreme strand of Catholicism, even conservative Catholicism; and of course there are obvious differences between the hierarchical structure of Catholicism, with one centralized authority, and the radically dispersed structure of rabbinic Judaism, with its endless collegial debates in hundreds of communities and schools. But there is no denying that traditional rabbis were and are fanatically jealous of their own authority and ruthless in their efforts to defend it. This is glaringly obvious in the religious politics of modern Israel, where the ultra-orthodox rabbis have fought with every political tool at their command to suppress other strands of Judaism (and sometimes to battle each other).[51]

It is a mistake to equate authoritarianism with traditionalism. Rather, the debate over authoritarianism recurs throughout the history of the tradition; it is a debate within traditionalism itself. To take a particularly stark example, at one point the Jerusalem Talmud takes the anti-authoritarian stance: "Can it be the case that if they [the court] say to you that right is left and left is right, you should obey them? Scripture therefore teaches us 'to the right or to the left' (Deut. 17:11)—that . . . right is right and left is left."[52] But Rashi, in the eleventh century, takes the authoritarian side: "'To the right or to the left' (Deut. 17:11). Even if they tell you that right is left and left is right, obey them."[53] Two centuries later, Nahmanides, an equally celebrated sage, defended Rashi's authoritarian dictum on the grounds that without court-imposed unanimity "the Torah will become several

50. Maistre is most remembered for his paean to executioners: "[A]ll grandeur, all power, all subordination rests on the executioner: he is the horror and the bond of human association. Remove this incomprehensible agent from the world, and at that very moment order gives way to chaos, thrones topple, and society disappears." JOSEPH DE MAISTRE, *The Saint Petersburg Dialogues: First Dialogue*, *in* THE WORKS OF JOSEPH DE MAISTRE 183, 192 (Jack Lively trans., 1971).

51. I recall walking past the main school of reform Judaism in Jerusalem; the front gate had the word *Shatan* (Satan) spray-painted across it by ultra-orthodox vandals. A reform rabbi remarked to me in Jerusalem that Israel is the only country in the world where it is legal to discriminate against Jews—for the ultra-orthodox parties have succeeded in building their own preeminence into the laws of the state.

52. AUTHORITY, *supra* note 2, at 322 (translating Jerusalem Talmud Horayot *45d).

53. *Id.* at 333 (translating Rashi, Sifre Deuteronomy 154).

Torahs."[54] But in the year 930, an anti-rabbinite wrote: "When they say, 'Rabbi So-and-so said thus-and-so,' I answer and say, I, too, am the learned So-and-so."[55] These striking examples represent a longstanding debate within traditional Judaism over the legitimacy of dissent and pluralism.[56] (This is not the same as the equally longstanding debate over the legitimacy of legal innovation; indeed, the two debates run perpendicular to each other. Anti-authoritarians sometimes criticize innovation because the power to innovate rests solely with the rabbinical courts: Leone Modena, writing in the early seventeenth century, asks "how [else] would the sages and Patriarchs lord it over their generation if there were no innovation and casuistry. . .?"[57] Two hundred years later, Moses Sofer, a rabbinic authoritarian, counterattacks against the innovations of the *haskalah*, the anti-authoritarian Jewish Enlightenment, by insisting, "The principle is, Anything new is everywhere forbidden by the Torah."[58] Both innovation and conservatism—a secular American reader might substitute dichotomies like judicial activism/judicial restraint or living-constitution/strict construction—can be given either authoritarian or anti-authoritarian polarities.)

B. Coercive Logic

The Oven of Akhnai story, on the current reading, represents a defense of rabbinic authoritarianism, even against God Himself. It seems especially noteworthy that Rabbis Joshua and Jeremiah use a logical trick to compel God to leave their authority intact—in effect, they use logic to neutralize God. Earlier I gave an example of a logic puzzle by Raymond Smullyan, the trick by which Scheherazade forced the king not to execute her. Reflecting on the puzzle, Smullyan writes: "The question Scheherazade had asked the king had an almost magical quality in that it forced him to do something he wouldn't oth-

54. *Id.* at 334 (translating Nahmanides (Moses ben Nahman), Commentary on the Torah, Deuteronomy 17:11).

55. *Id.* at 348 (translating Salmon ben Jeroham, Book of the Wars of the Lord, Cantos I–II).

56. See the many selections on this subject in AUTHORITY, *supra* note 2, at 244–378. If it has not already become apparent, this is a suitable moment for me to acknowledge that it would have been impossible to write this paper without this magnificent book, the first of four projected volumes surveying the Jewish political tradition, with newly translated selections and commentaries by distinguished political philosophers.

57. *Id.* at 289 (translating Leone Modena (attrib.), Kol Sakhal, Second Essay, Chapter 5).

58. *Id.* at 295 (translating Moses Sofer, Responsa Hatam Sofer, Orah Hayyim I:28).

erwise have done—namely, to spare her life."[59] Smullyan labels statements and questions that force people to do things *coercive logic*,[60] and he offers many amusing examples.[61] The name "coercive logic" seems entirely apt, and it suggests that in the Oven of Akhnai the two rabbis are trying to coerce God Himself, in order to free the field of action for their own exertion of authority over Eliezer and the rest of the community.

How can logic coerce God? All coercive logic puzzles share the same underlying structure: the target promises to abide by a seemingly-innocuous verbal rule (like "answer a yes-no question truthfully" in Scheherezade's stratagem), and then the coercer embeds a description of an action (the one the coercer wants the target to take) in a sentence cleverly constructed so that logical deduction applied to the sentence, under the rules the target has agreed to, yields the act-description as a consequence. The mechanism of coercion is also the same in all coercive logic puzzles: the moral compulsion of the victim's promise joins with the logical compulsion of the inference to force the victim's hand. Obviously, logic alone cannot compel action—but logic together with a promise can compel action provided that the victim is willing to speak consistently and keep his promise. The entire practice of courtroom argumentation, to the extent that it employs logical argument rather than rhetoric, amounts to little more than an extended exercise in coercive logic. Without coercive logic, the rule of law would have no essential connection with reason, at least in its deductive form.

59. SMULLYAN, *supra* note 15, at 85.

60. *Id.*

61. Here are two. Smullyan tells us that in his logic classes he used to lay a penny and a quarter on the desk in front of him. He would then call on a student to say something. If it were true, the student would receive one of the coins (Smullyan would decide which one); otherwise, the student would receive nothing. Smullyan observes that there is a statement the student can utter that will force Smullyan to give him or her the quarter; apparently, the point of the lesson is to get students to discover that statement. However, he eventually decided to abandon this teaching trick when he suddenly realized that a truly clever student could, with an appropriate statement, force Smullyan to give the student a million dollars. What are the two statements? (Try working it out before looking at the answers in the next paragraph.) *Id.* at 89–90.

The first statement: "You will not give me the penny." It can't be false, because then the truth must be that Smullyan will give the student the penny, which he would only do if the statement were true, not false. Because the statement cannot be false, it must be true, so Smullyan must give the student a coin, and—because the statement is true—it cannot be the penny. Ergo, Smullyan has to give the student the quarter. The second statement: "You will give me neither the penny, nor the quarter, nor a million dollars." Work out for yourself why Smullyan must then give the student a million dollars. *Id.* at 93.

In the Oven of Akhnai, God's promise is clear. It appears in God's covenant with Israel, or rather in the series of covenants by which the Israelites bound themselves to the Torah and, reciprocally, God promised to be their God and allow them to thrive if they hewed to the Torah but to punish them if they deviated. Hence the priority that the two rabbis assign to the Torah and its injunction to follow the majority over the *bat kol*. And the logical trick is equally clear: to obey God speaking through the *bat kol* is to disobey the Torah, and thus they can obey God only by disregarding the *bat kol*. The result is a case of coercive logic: Jeremiah's point is that God has promised to reward them for hewing to the Torah, and the Torah says, in effect, "Follow the majority and disregard anything that contradicts the majority—including a *bat kol*." And the net outcome of the story is a pair of stratagems by which the rabbis secure their authority by neutralizing God through coercive logic and excommunicating the dissident Eliezer.

Alongside the Platonic interpretation and the humanistic interpretation, we now have the *power interpretation* of the Oven of Akhnai. Rather than a reflection on truth and opinion, or a vindication of deliberative processes, the story represents a vindication of rabbinic power through craft and compulsion. It is a political story, one might almost say a public-choice story, and not a very nice one. In this connection, we may reflect that the Talmud is itself the product of rabbinic Judaism, and the fact that the authors and redactors of the Talmud included a story that aims to secure the preeminence of rabbinic courts over dissidents, and even over God, should scarcely be surprising. Earlier I noted that a Talmudic passage asserts that sages—rabbinical scholars—are superior to prophets and even to the Torah itself.[62] Of course, the assertion was written by (who else?) rabbinical scholars. In *Marbury v. Madison*, the power of judicial review was established by (who else?) judges. Once we begin reflecting on the politics contained within the Oven of Akhnai story, it is only a small step to reflecting on the politics of those who wrote the story and placed it in an authoritative text. The Grand Inquisitor is nothing if not subtle, and he is sometimes indistinguishable from a rabbi or a judge.

Earlier I noted a disturbing feature of Joshua's and Jeremiah's dismissal of the *bat kol*, namely that their authority rests entirely on

62. *See supra* note 36 and accompanying text.

their claim to be faithful expositors of the truth that they now insist they don't want to hear. To understand just how outrageous their argument is, notice once again that they immediately confiscate objects that they know are ritually pure—because the *bat kol* has told them so—and burn them as if they are impure. And henceforth they will require the community that follows their edicts to perform ritual acts that they (and perhaps they alone) know are ritually incorrect. And yet they will claim to govern the community on the ground that they are masters of ritual, and they will excommunicate anyone who disagrees with them. They are like the Grand Inquisitor, who burns Christ to prevent His words from interfering with the Church's political supremacy, which has no basis other than the word of Christ. To call this hypocrisy seems like a grotesque understatement. It is a power-play grounded in a tissue of lies—power pursued, one might say, for its own sake.

The Grand Inquisitor, at least, has a theological explanation for the cynicism and violence of his rule. He tells Christ that mankind is too weak and flawed for the freedom that Christ's teaching promises; and he freely confesses that centuries ago the Church secretly went over to the side of the Tempter in the Wilderness, who knows better than Christ that what humanity truly needs for its happiness is not absolute freedom but absolute submission. Dostoevsky's analysis of the Temptation in the Wilderness story, with its tortured reflection on the agony of human freedom, is a masterpiece of existentialist blasphemy. The Talmud, unsurprisingly, contains nothing like this, no indication that the rabbis are secretly at war with the God they pretend to serve in order to lord it over other men and women. (If they were, it is hard to imagine God smiling at them.) But what is their claim to authority, once they have rejected the heavenly voice?

C. The Need for Artificial Unanimity

The Oven of Akhnai story continues:

> Furthermore, Rabban Gamaliel [head of the academy] was in a ship; a great wave threatened to sink him. He said: "I suppose this is on account of Rabbi Eli'ezer." He stood up and said: "Master of the world, it is manifest and known to you that I have not done this for my honor nor for the honor of my father's house, but for Your honor, so that controversies should not abound in Israel." Then the sea ceased to rage.[63]

63. AUTHORITY, *supra* note 2, at 264 (translating Bava Metzia *59b).

Rashi explains that Rabbi Gamaliel, as president (*Nasi*) of the court, had authorized Eliezer's excommunication. He adds that the reason was "to deter others from continually disputing the majority opinion."[64] As we saw earlier, Rashi defends an extreme form of rabbinic authority: even if the rabbis say right is left and left is right you must obey them. Apparently, his concern was simply that without finality in the majority opinion, the entire system of dispute-resolution embodied in the rabbinic courts would unravel. In essence, Rashi fears that without a principle of res judicata that upholds even wrong opinions, disputes within the community will never be settled. A wrong opinion that settles the dispute is better than no opinion, and a dissenter like Eliezer who refuses to give up his dissent threatens to unsettle decisions that the community urgently needs to remain settled. Provided that most of the court's opinions are well-reasoned and valid, the erroneous ones should be upheld just as stringently as the correct ones, for the entire system depends on compliance, and there is no reliable way to settle which decisions are the right ones except through the system itself. The overall utility of the system compensates for its occasional errors, and if the system acknowledged its errors its overall utility would drop. In baseball, if you argue the umpire's calls, he will eject you from the game even when he knows you are right.

What saves this view from pure powermongering is the judge's public-regarding motive: Gamaliel excommunicated Eliezer neither for his own benefit nor for that of his family, but solely to meet a community need. Philip Soper has argued for an obligation to obey the law provided that the lawgiver is legislating in the good faith belief that his rules are in the best interest even of those they disadvantage.[65] According to Soper, the obligation arises from the fact that some decision, even if it is wrong, is better for the community than no decision at all. He analogizes the enterprise of government to a lifeboat, where someone must take charge. Provided that the lifeboat commander acts in good faith, even someone he enslaves and forces to row has an obligation to obey.[66]

This argument has some force, but it is far from decisive. Soper must show that the state is a lifeboat, that the only alternatives are

64. Artscroll Talmud, *supra* note 2, at 59b[2] n.14–15 (translating Rashi's commentary on Bava Metzia *59b).

65. PHILIP SOPER, A THEORY OF LAW 79 (1984).

66. *Id.* at 88, 121.

unconditional obedience and pure anarchy, and that a false good-faith belief is better than nothing. I have my doubts that it is possible to show any of these things.[67] In the same way, Rashi must show that the community cannot tolerate dissent and that if the rabbinic court lets Eliezer get away with dissent the community will be ruined. The power interpretation turns on precisely these issues. It seems pretty clear where the Oven of Akhnai story comes out on these issues: the moment that Rabbi Gamaliel reminds God that he excommunicated Eliezer in good faith, the wave that threatened to engulf Gamaliel subsides.

V. THE INJURY INTERPRETATION

A. The Tort of Wronging With Words

But the power interpretation is not the end of the story, and Rabbi Gamaliel's argument does not save him forever. Let us conclude the tale of the Oven of Akhnai:

> Ima Shalom, the wife of R'Eliezer, was the sister of Rabban Gamliel. From that incident [in which Rabban Gamliel excommunicated R'Eliezer] onwards, she did not let R'Eliezer fall on his face, i.e., recite the *tachanun* supplication.[68]

The *tachanun* is the most somber prayer in the morning service—a recollection of the persecution and humiliation of the Jews, a confession that it results from our own sinfulness, and a prayer for God to "turn back from Your flaring anger and relent from the evil meant for Your people."[69] Its images are powerful: "I am wearied with my sigh, every night I drench my bed, with my tears I soak my couch. My eye is dimmed because of anger, aged by my tormentors. . . . Look from heaven and perceive that we have become an object of scorn and derision among the nations; we are regarded as the sheep led to slaughter, to be killed, destroyed, beaten, and humiliated."[70] As the Oven of Akhnai story indicates, the *tachanun* is recited with covered face. The reason that Ima Shalom will not permit Eliezer to recite the *tachanun* is that she fears the consequences if Eliezer reminds God of his misery and humiliation by reciting this abject prayer.

67. I criticize Soper's argument in David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 806–09 (1991).

68. ARTSCROLL TALMUD, *supra* note 2, at 59b[2] (translating Bava Metzia *59b).

69. THE COMPLETE ARTSCROLL SIDDUR 135 (Rabbi Nosson Scherman trans., 1990).

70. *Id.* at 133, 135.

We learn this because the story relates that one day Ima Shalom made a mistake and failed to stop Eliezer from reciting the *tachanun*. She

> found [R'Eliezer] falling on his face in the recitation of *tachanun*. She said to him: Get up! You are killing my brother! Meanwhile, an announcement went forth from the house of Rabban Gamliel stating that he had died. [R'Eliezer] said to his wife: How did you know about Rabban Gamliel's death? She said to him: I have received such a tradition from the house of my grandfather, King David: All the gates of Heaven are locked, except for the gates of wrongdoing.[71]

Oddly enough, this enigmatic ending to the story contains the core of its legal significance (and points us to our fourth way of reading the Oven of Akhnai).

I have mentioned that the Talmud's literary form is simply an extended commentary on the Mishnah, the earliest codification of the law. The Oven of Akhnai story appears in a section dealing with tort law, and, more specifically, in a subsection on injuries done to others with words: the entire discussion concerns the Mishnaic injunction, "Just as there is wronging in buying and selling, so there is wronging with words."[72] Ima Shalom's final cryptic statement about her grandfather King David is a reference back to the discussion of the tort of wronging with words immediately preceding the Oven of Akhnai story. There the rabbis cite a psalm of David to support their assertions "that God metes out strict retribution to someone who wrongs his fellow," and that punishment follows soon after the tearful prayers of the victim.[73] The Oven of Akhnai story is then offered as an illustration of this point of tort law. Gamaliel has wronged Eliezer. The moment that Eliezer recites the tearful *tachanun* prayer, which laments his humiliation and calls on God to help him, Gamaliel's punishment becomes inescapable.

In the pages preceding the Oven of Akhnai, the Talmud analyzes the prohibition on wronging with words as a prohibition on humiliating others, and the rabbis condemn the humiliation of others in the strongest possible terms: "If anyone makes his friend's face turn white from shame in public it is as if he has spilled blood."[74] "It is better that

71. ARTSCROLL TALMUD, *supra* note 2, at $59b^2$–$59b^3$ (translating Bava Metzia *59b).

72. *Id.* at $58b^1$ (translating Bava Metzia *58b). Stone notes this point about the story's context in Stone, *supra* note 1, at 857.

73. *Id.* at $59a^2$ (translating Bava Metzia *59a).

74. *Id.* at $58b^3$ (translating Bava Metzia *58b).

a person should cast himself into a fiery furnace than that he should shame his fellow in public."[75] (In light of these passages, the innumerable daily humiliations that Israel inflicts on the Palestinians may be seen as a direct affront to core precepts of traditional Jewish ethics; and it is perhaps with this tradition in mind that the distinguished Israeli philosopher Avishai Margalit has defined a decent society as one the institutions of which do not humiliate people—a definition, as he makes clear, that he arrived at by reflecting on the Occupation.[76]) The rabbis next discuss a number of special cases of humiliation, and conclude the section with the Oven of Akhnai story. Viewed through the lens of its Talmudic context, the focal point of the Oven of Akhnai fable is not the nature of legal authority, but rather the humiliation of Eliezer.

B. The Problem of Dirty Hands

But of course the Oven of Akhnai story is not simply a peculiar footnote to a discussion of the tort of humiliation. It is that, but it is also all the other things we have seen. One peculiar contradiction in the story is that God spares Rabbi Gamaliel from drowning when Gamaliel offers his utilitarian argument for excommunicating Eliezer, but in the end strikes Gamaliel down in punishment when Eliezer recites the *tachanun*. The former passage suggests that God accepts the utilitarian argument for ruthless rabbinic power, while the latter suggests that God does not. How can we explain this anomaly? Apparently, the story contemplates an interesting possibility: that an exercise of power like Gamaliel's can simultaneously be justified on grounds of political morality, and condemned for the wrong it does to an innocent.

In 1973, Michael Walzer published a famous essay, *Political Action: The Problem of Dirty Hands*,[77] which explores the dilemma of politicians who must inevitably get their hands dirty in order to govern. "[A] particular act of government . . . may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong."[78] Evidently, that precisely describes the situation of Rabbi Gamaliel in the Oven of Akhnai. Walzer offers no

75. *Id.* at 59a[1] (translating Bava Metzia *59a).

76. AVISHAI MARGALIT, THE DECENT SOCIETY xi–1 (Naomi Goldblum trans., 1996).

77. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160–80 (1973).

78. *Id.* at 161.

resolution to the paradox inherent in the problem of dirty hands (the paradox is that the same act can be at once the right thing to do and morally wrong), but he considers several approaches to it that in his view seem partly right.[79] One, the Machiavellian approach, simply acknowledges that the successful prince's actions are sometimes morally wrong. Without denying wrongdoing or making excuses for it, Machiavelli nonetheless commends the actions on the ground that they will win eternal glory for the prince who succeeds at government.[80] The problem, Walzer observes, is that Machiavelli's solution simply leaves the paradox unresolved. A second strategy, found in Max Weber, insists that the political actor must pay a price for his wrongdoing, by suffering qualms of conscience for it: he is to be a suffering servant.[81] Walzer thinks this is closer to the right track than Machiavelli's commendation of glory, but he observes that few of us will be satisfied knowing that the ruthless politician's conscience is troubled. Only the politician decides how troubled his conscience will be, and whether he is easy or harsh on himself, the performance seems a trifle pointless. "We suspect the suffering servant of either masochism or hypocrisy or both. . . ."[82]

The third position Walzer illustrates with Camus's *The Just Assassins*, a play in which anarchist murderers rejoice in their own hanging, because they find their crime incomplete until they have been hanged for it. While Walzer is bemused by Camus's melodramatic moral extremism, he agrees that when a politician "lies, manipulates, and kills . . . we must make sure he pays the price."[83] He adds: "We won't be able to do that, however, without getting our own hands dirty, and then we must find some way of paying the price ourselves."[84] I am far from sure that Walzer's solution makes sense. The problem is not just that the final sentence I quoted toys with the prospect of an endless cycle of bloodshed and retribution. The problem is also that making sure the politician undergoes punishment for his wrongdoing may deter him from doing it, and that fails to take seriously the other half of the paradox, that getting his hands dirty is the right thing to do, indeed the thing we count on him for.

79. *Id.* at 175–80.
80. *Id.* at 175–76.
81. *Id.* at 176–78. Dostoevsky's Grand Inquisitor may fall into this category.
82. *Id.* at 177.
83. *Id.* at 180.
84. *Id.*

Satisfactory or not, it seems clear that the Oven of Akhnai story represents the third strand of Walzer's argument, with an intriguing twist. Gamaliel suffers no punishment for the wrong he does Eliezer until Eliezer himself calls on God through the recitation of the *tachanun*. God, apparently, is willing to leave Gamaliel's dirty hands well enough alone as long as Eliezer does not complain. When he complains, God acts.

There is no doubt something to be said for this as a law enforcement strategy—it is a way of ensuring that the rigors of punishment are reserved for vindicating the victims who feel the wrong most keenly, permitting social healing for those who do not. It is also a way of conserving scarce enforcement resources, although of course scarce resources are not a problem for omnipotence. At the same time, we well understand that sometimes the most downtrodden victims are the ones that do not complain, precisely because they are downtrodden—and we should not be oblivious to the perverse lesson that ruthless powerholders might draw from Gamaliel's punishment, namely that they will be better off killing dissidents before they complain rather than merely excommunicating them.

Perhaps there is a simpler lesson that the ending of the Oven of Akhnai intends to teach. Even though it offers a vindication of rabbinic authority on political grounds—the need for artificial unanimity—in the final paragraphs the story seems to assert the primacy of the personal. It says that there are good reasons for court authoritarianism—reasons good enough that God merely smiles at being tricked, and spares the ruthless judicial politician Gamaliel when He is reassured that Gamaliel's ruthlessness was not merely a personal power-grab. But regardless of how good the reasons are, humiliating the innocent to maintain authority is always and fundamentally a rupture of human relations. It is, in the last analysis, always wrong, and no utilitarian justification can make the wrong go away.

VI. ANTI-CONCLUSION

There is no such thing as an innocent act of reading—no "reading degree zero" in which the reader simply plumbs a text without importing an agenda of questions and an array of conceivable answers. I would have liked to conclude this Article by writing that the Oven of Akhnai story sounds universally-interesting themes about authority and law—as we have seen, at least four such themes. But I cannot write that conclusion.

The fact is that the issues explored here may not be universal, and, more importantly, the underlying assumption that universality matters is not universal. To those who insist upon their own cultural particularity, a question is dangerous and threatening precisely to the extent that it claims to be of universal interest. The questions I bring to the Oven of Akhnai come from a source entirely external to the Talmud, as a glance at my footnotes reveals: they come from a tradition of modern philosophy and English-language legal theory featuring names like Arendt, Cohen, Dworkin, Farber, Hampshire, Holmes, Hume, Kierkegaard, Margalit, Shapiro, Soper, Stone, Waldron, and Walzer. All these writers are, in an important sense, children of the Enlightenment. A perceptive reader will also notice that most of them are Jews, and that my own Jewishness (perhaps theirs as well) is hardly incidental to the essay. It is nevertheless a Jewishness that has passed into an entirely different world than that of the Talmudic academies. All Jews today are children of the Enlightenment—the *haskalah*, the reform movement with roots in the secular Enlightenment. That is true even of the ultra-Orthodox, who represent a self-conscious return to tradition rather than its unmediated continuation.

And so I cannot say that the Oven of Akhnai story implicates universally interesting issues about authority and law. Furthermore, I am brought up short by the thought that in an important sense I cannot understand the Oven of Akhnai story at all.

I cannot understand the Oven of Akhnai story at all. It is not written for me. It is written for readers within a tradition that I merely peer at from outside. I never studied Gemara or experienced the intellectual rigors of the *cheder*. I do not govern my life by the commandments, and, except as an exercise in sympathetic projection, I cannot take seriously the legal question that Eliezer and the other rabbis debated—whether an oven made of sections cemented together with sand might be *tahor* (pure) even though it has come into the vicinity of *tumah* (religious pollutions inherent in certain people or objects).[85] I barely know who Rabbis Eliezer, Gamaliel, Joshua,

85. For the record, the conflict derives from several texts in the Mishnah. The Mishnah section entitled *Kelim* enumerates twenty sources of uncleanness (*tumah*), and states, "Lo, these render man and vessels unclean by contact, and earthenware vessels by [presence within the vessels' contained] airspace." MISHNAH NEW TRANSLATION, *supra* note 9, at 893 (translating *Kelim* 1:1). Another text declares that an oven becomes susceptible to *tumah* from the moment its manufacture is complete, and goes on to specify that its manufacture is complete when it has been baked at a temperature hot enough to bake a sponge cake. *Id.* at 900 (translating *Kelim* 5:1). Thus, the question becomes whether the oven cut into sections and reassembled with unbaked mortar satisfies this condition. The Mishnah raises this question in a cryptic passage

and Jeremiah were supposed to be (other than second-century sages), and I am wholly incapable of the method of argument within the tradition—pulling together prooftexts scattered throughout the Gemara and the Tanakh (the Hebrew bible).

The tradition itself locates the authority of scholars in a chain extending back to Moses.[86] As I indicated earlier, one part of that tradition ascribes superiority to the Oral Law over the Torah itself—"The teachings of the Scribes [rabbis] are more cherished than those of the Torah."[87] From that standpoint, no one who is not steeped in the Oral Law can really understand the basic texts of Judaism, any more than someone who has studied every line of the U.S. Constitution but knows nothing of Supreme Court cases can really understand constitutional law. Unable to trace the lineage of my reading back in an unbroken chain to Moses, I am not really a reader in the only sense the tradition takes seriously.

Of course, within religious traditions themselves we invariably find strands that insist on the possibility of unmediated readings of sacred texts—innocent readings, readings degree zero. Protestants broke with Roman Catholicism by insisting that Scripture belongs to everyone, and Luther's translation of the Bible into German was a deeply subversive act. Within Judaism, a sect known as the Karaites, dating back to eighth-century Babylonia, decried rabbinic interpretation and the Oral Law and insisted on reading the Torah directly.[88] As Sanford Levinson and Thomas Grey have pointed out, this dispute has counterparts in American constitutionalism.[89]

The history of the Counterreformation makes obvious that such teachings invite violent responses. Early Protestants, like Jews, faced the Grand Inquisitor and the auto da fé. But Karaites received no less hostile reception from the rabbis. A group of Spanish and Portuguese Jews, practicing their religion secretly during the time of the Inquisi-

that originates our story: "[If] he cut it up [breadthwise] into pieces and put dirt between each ring—R. Eliezer declares [it] clean. And sages declare [it] unclean. This is the oven of Akhnai." *Id.* at 902 (translating *Kelim* 5:10). These three lines are the entire source of our story.

86. "Moses received Torah from Sinai and passed it on to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets passed it on to the Men of the Great Assembly." AUTHORITY, *supra* note 2, at 254 (translating Mishnah Avot 1:1).

87. *Id.* at 261 (translating Midrash Rabbah: Song of Songs 1:2).

88. *See id.* at 281–89, 536. The Karaites were also textual literalists, but for present purposes that is not as relevant as the fact that they insisted on an unmediated encounter between reader and text. Such an encounter need not imply textual literalism.

89. SANFORD LEVINSON, CONSTITUTIONAL FAITH 18–53 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

tion, finally gave up their double life and emigrated to Amsterdam. During their closeted years, they had lost their knowledge of rabbinic Judaism and practiced their faith simply by reading the Torah; they became, in effect, involuntary Karaites. The Amsterdam synagogue, thriving in the tolerant atmosphere of Holland, proved that it was not so tolerant itself: it excommunicated them, just as Joshua and Gamaliel excommunicated the de facto Karaite Eliezer.[90] Karaism is the ultimate heresy, a threat to rabbinical authority.

The thoughts in the last paragraph obviously reflect the power interpretation, and no doubt the power interpretation reassures Karaites that those who condemn them are merely playing politics. But matters are not that simple, for in an important way Karaites misunderstand what it means to read a legal text. Wittgenstein wrote: "To imagine a language is to imagine a form of life."[91] By definition—one might say by self-definition—Karaites cannot participate in the conversation, the form of life, that makes up the Talmud. And in this respect, an outsider reader of the Oven of Akhnai is like a Karaite, someone who thinks it is possible to read a section of the Talmud simply by reading its words. That assumption inevitably begs the question, because the words alone are like a *bat kol*, and the Oven of Akhnai tells us to disregard the *bat kol* and follow the majority. Those within the tradition understand that the story's real meaning is for members only. It does not disclose itself to modernist readers who privilege their own one-on-one relationship to the printed text over the many-on-many relationship between text and readers that makes up the form of life the text itself celebrates.

There is a kind of vertigo that comes from reading a story that insists on its own unreadability. Of all writers, Borges is perhaps the one who most often takes metaphysical vertigo of this sort as his theme. Borges's heroes are mystics, antiquarians, theologians, and scholars of arcane doctrines whose research leads them into textual labyrinths (and who sometimes find real minotaurs inside them). In "Averroës' Search," Borges tells the story of a defeat inflicted on Averroës, the great medieval Islamic commentator on Aristotle. Aristotle's *Poetics* deals with the nature of tragic and comic drama, but Averroës labored under the disadvantage that theater was unknown

90. *See* YIRMIYAHU YOVEL, SPINOZA AND OTHER HERETICS: THE MARRANO OF REASON ch. 3 (1989).

91. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §19 8e (G.E.M. Anscombe trans., 3d ed. 1958).

in the Islamic world. In Borges's ironic story, Averroës dines with a famous traveler who unsuccessfully attempts to describe a stage-play he witnessed in China. No one understands what he is talking about, and one dinner guest explains why such a thing is impossible. After the dinner, the philosopher returns to his study and at last thinks he grasps what Aristotle's peculiar words "tragedy" and "comedy" mean.

> With firm, painstaking calligraphy, he added these lines to the manuscript: Aristu [Aristotle] gives the name "tragedy" to panegyrics and the name "comedy" to satires and anathemas. There are many admirable tragedies and comedies in the Qur'an and the mu'allaqat of the mosque.[92]

Of course, Averroës was completely mistaken. In the epilogue to his story, Borges offers the following reflection on the peculiar case of "a man who sets himself a goal that is not forbidden to other men, but is forbidden to him":

> I recalled Averroës, who, bounded within the circle of Islam, could never know the meaning of the words *tragedy* and *comedy*. I told his story; as I went on . . . I felt that the work mocked me, foiled me, thwarted me. I felt that Averroës, trying to imagine what a play is without ever having suspected what a theater is, was no more absurd than I, trying to imagine Averroës. . . . I felt, on the last page, that my story was a symbol of the man I had been as I was writing it, and that in order to write that story I had had to be that man, and that in order to be that man I had had to write that story, and so on, *ad infinitum*. (And just when I stop believing in him, "Averroës" disappears.)[93]

And therefore (but Borges cannot really say it), "Borges" disappears as well.

The modernist reader approaching the Oven of Akhnai is like Borges approaching Averroës approaching Aristotle. To grasp the story is to realize that it concerns the impossibility of grasping it merely through reading. This may be true of all written law. The Oven of Akhnai is a labyrinth of meanings that would no doubt please Borges immensely. To recognize it as a labyrinth is already to know that you are lost in one of its innumerable dead ends.

92. JORGE LUIS BORGES, *Averroës' Search*, *in* COLLECTED FICTIONS 235, 241 (Andrew Hurley trans., 1998).

93. *Id.*

STUDENT NOTES AND COMMENTS