

## “ONE MAY COME TO REPAIR MUSICAL INSTRUMENTS” : RABBINIC AUTHORITY AND THE HISTORY OF THE *SHEVUT* LAWS

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He [Moses] told them, ‘These are the words’ (Exodus 35:1) – Rabbi said: This comes to include the thirty-nine principal labors [prohibited on the Sabbath] that Moses told them orally.<sup>1</sup>

Qumranite and Sadducean laws ground themselves in divine revelation, whether through exegesis of the Bible or through other books they considered prophetic, such as the Temple Scroll and the Book of Jubilees.<sup>2</sup> Rabbinic law, on the other hand, distinguishes between *de’oraita* laws that are derived from the Pentateuch, and *derabanan* enactments that are created by the sages themselves.<sup>3</sup> Why did the rabbis construct this new category, and how did they infuse their *derabanan* laws with authoritative status? This article will trace the

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<sup>1</sup> Mekhilta deR. Ishmael, Shabata 1; and see parallels at bShab 70a and 97b, and analysis at Richard Hidary, “Four Ways to Derive the Thirty-Nine Avot Melakhot,” <http://thetorah.com/four-ways-to-derive-the-thirty-nine-melakhot/> (2015).

<sup>2</sup> On the prophetic status of exegesis at Qumran, see Lawrence Schiffman, *The Halakhah at Qumran* (Leiden: Brill, 1975), 32. On the prophetic status of Jubilees and the Temple Scroll, see Hindy Najman, *Seconding Sinai: The Development of Mosaic Discourse in Second Temple Judaism* (Leiden: Brill, 2003); Joseph Baumgarten, “The Unwritten Law in the Pre-Rabbinic Period,” *Journal for the Study of Judaism in the Persian, Hellenistic and Roman Period* 3 (1972), 10; and Yigael Yadin, “The Temple Scroll,” in *New Directions in Biblical Archaeology*, ed. David Noel Freedman and Jonas C. Greenfield (Garden City: Doubleday Anchor Books, 1969).

<sup>3</sup> See Aharon Shemesh, *Halakhah in the Making: The Development of Jewish Law from Qumran to the Rabbis* (Berkeley: University of California Press, 2009), 30–71, 97; Benjamin De Vries, *Studies in the Development of the Talmudic Halakah* (Tel-Aviv: Araham Zioni Publishing House, 1966) (Hebrew), 69–95; and Yitzhak D. Gilat, *Studies in the Development of the Halakha* (Jerusalem: Bar-Ilan University Press, 1992) (Hebrew), 239.

development of one category of laws—those relating to the Sabbath *shevut* activities—in order to shed light on these questions. The *shevut* laws, such as climbing a tree, clapping, and other activities listed at mBets 5:2, aim at maintaining a restful Sabbath atmosphere.<sup>4</sup> As Yitzhak Gilat has shown, Second Temple sources make no distinction between this category of activities and other explicit, biblical Sabbath laws. In contrast, Rabbinic sources—for various reasons that we will examine below—demote the *shevut* laws by first removing penalties from them and then categorizing them as *derabanan*.<sup>5</sup> As we will see, this led to a large degree of leniency in the application of these laws. At the same time, because the *shevut* laws were already widely established—even historically incurring the death penalty—they could in turn help bolster the authority of *derabanan* laws generally.

Before focusing on the specific issue of the *shevut* category, it is necessary to briefly review the history of the Sabbath prohibitions generally, from the Bible down through Second Temple, tannaitic, and amoraic sources.<sup>6</sup> In the Ten Commandments, the Torah issues a general prohibition, “The seventh day is a Sabbath of the Lord your God, you shall not do any work (*melakha*),”<sup>7</sup> on penalty of death.<sup>8</sup> However, the Torah does not systematically define the parameters of such work other than providing a few examples, including: gathering

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<sup>4</sup> See Nathan Barack, *A History of the Sabbath* (New York: Jonathan David, 1965), 55–60, and further below n. 30.

<sup>5</sup> Gilat, *Studies*, 87–108, and see further below.

<sup>6</sup> See also Chris Rowland, “A Summary of Sabbath Observance in Judaism at the Beginning of the Christian Era,” in *From Sabbath to Lord’s Day: A Biblical Historical and Theological Investigation*, ed. D.A. Carson (Grand Rapids: Academic Books, 1982), 43–55; and Gerhard F. Hasel, “The Sabbath in the Pentateuch,” in *The Sabbath in Scripture and History*, eds. Kenneth Albert Strand and Daniel Andre Augsburger, (Washington D.C.: Review and Herald Publishing Association, 1982), 21–43.

<sup>7</sup> Exod. 20:10. All biblical translations are from NJPS.

<sup>8</sup> Ibid. 31:14 and 35:2.

and preparing food,<sup>9</sup> gathering fuel,<sup>10</sup> burning a fire,<sup>11</sup> agricultural work,<sup>12</sup> and working a slave or an animal.<sup>13</sup> The Prophets further mention performing business transactions<sup>14</sup> and carrying wares to the gates for selling.<sup>15</sup> The sages and communities of later generations were left with the responsibility of defining more precisely the parameters of Sabbath observance. mHag 1:8 appropriately comments that “the laws of the Sabbath...are like mountains<sup>16</sup> hanging from a strand.”

In relation to Second Temple times, Jubilees 2:29-31 and 50:6–13 and Damascus Document 10:14–11:18 preserve lists of acts prohibited on the Sabbath. These sources include, without distinction or categorization, both prohibitions mentioned explicitly in the Bible as well as many more acts that the various sects of Jews also considered

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<sup>9</sup> Exod. 16:22–29.

<sup>10</sup> Num. 15:32–36. Interpreters provide various explanations for the precise Sabbath violation involved in this pericope. Philo, *Moses*, 2.220, writes that gathering wood connects to the act of making a fire and furthermore that one may not move wood. See further at Samuel Belkin, *Philo and the Oral Law: The Philonic Interpretation of Biblical Law in Relation to the Palestinian Halakah* (Cambridge: Harvard University Press, 1968), 198; and Schiffman, *The Halakhah at Qumran*, 118. Onkelos translates the prohibited act as binding (*megabeb*) while Targum Pseudo-Jonathan accuses the sinner of uprooting trees. Similarly, bShab 96b records suggestions by various rabbis that the wood gatherer was guilty of detaching the branches from the trees, of carrying the wood in public domain, or of tying them up into bundles. See also Gilat, *Studies*, 33 n. 9; and idem, “Introduction: The Sabbath in the Bible,” in *Yad la-Talmud: Selected Chapters*, ed. E. E. Urbach (Jerusalem: 1984), 47.

<sup>11</sup> Exod. 35:3.

<sup>12</sup> Exod. 34:21.

<sup>13</sup> Exod. 20:10, 23:12 and Deut. 5:14.

<sup>14</sup> Amos 8:5 and Isa. 58:13.

<sup>15</sup> Jer. 17:21–22. Neh. 10:32 and 13:15–23 also mentions buying food and wares as well as pressing wine and loading animals. On the biblical Sabbath prohibitions, see further at Gilat, *Studies*, 33; and idem, “Introduction,” 45–51; Admiel Kosman, “On the History of the Category of ‘Ovadin DeChol’ and Yomtov and its Relationship to the Category of ‘Shevut’ Prohibitions,” (Hebrew; PhD diss., Bar-Ilan University, 1993), 9–12; and Gerhard F. Hasel and W.G.C. Murdoch, “The Sabbath in the Prophetic and Historical Literature of the Old Testament,” in *The Sabbath in Scripture and History*, eds. Kenneth Albert Strand and Daniel Andre Augsburg, (Washington D.C.: Review and Herald Publishing Association, 1982), 44–56.

<sup>16</sup> Or, following ms. Parma, “desert plants.” See analysis at Michal Bar-Asher Siegal, “Mountains Hanging by a Strand? Re-reading Mishnah Hagiga 1:8,” *Journal of Ancient Judaism* 4 (2013), 235–56.

prohibited. Jubilees applies a single punishment for all violations: “The man who does any of these things on the Sabbath shall die” (50:13).<sup>17</sup> Damascus Document 12:3–6, although it does not mention the death penalty, also provides the uniform punishment of exclusion from the community for all violations.<sup>18</sup>

Tannaitic sources provide a more systematic definition of the Sabbath prohibitions. mShab 7:2 lists thirty-nine principal labors (*avot*, singular *av*), including activities relating to agriculture and food preparation, clothing manufacture, preparation of parchment and writing, building, kindling a fire, and carrying. Yitzhak Gilat argues that this list derives from standard lists of work activities,<sup>19</sup> and in fact belongs to a secondary stratum of the Mishnah.<sup>20</sup> Be that as it may, this codification excludes from biblically-sanctioned punishment a host of activities that were considered punishable in Second Temple sources. Many actions that were unqualifiedly prohibited in Jubilees and the Damascus Document are considered only rabbinic violations in

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<sup>17</sup> See further at Lutz Doering, “The Concept of the Sabbath in the Book of Jubilees,” in *Studies in the Book of Jubilees*, ed. Matthias Albani, et al. (Tübingen: Mohr Siebeck, 1997), 179–205.

<sup>18</sup> See Schiffman, *The Halakhah at Qumran*, 78. This does not mean that ideally, the sectarians would not have applied the death penalty had they been in power in the Temple; rather, the Damascus Document legislates for its own time, when they had recourse neither to corporeal punishment nor to sacrifices. See also Sakae Kubo, “The Sabbath in the Intertestamental Period,” in *The Sabbath in Scripture and History*, eds. Kenneth Albert Strand and Daniel Andre Augsburger, (Washington D.C.: Review and Herald Publishing Association, 1982), 57–69; and see Charlotte Hempel, *The Damascus Texts* (Sheffield, 2000) 97–98, for a discussion of the relevant 4Q265 text.

<sup>19</sup> Such lists are found at tBer 6:2 and yShek 5:1, 48c.

<sup>20</sup> Gilat, *Studies*, 39–43; and see Hidary, “Four Ways to Derive the Thirty-Nine Avot Melakhot.”

rabbinic sources, e.g., *muktseh*,<sup>21</sup> working before sunset,<sup>22</sup> speaking about business,<sup>23</sup> and setting a non-Jew to work.<sup>24</sup> Other actions listed in the Second Temple sources are permitted (with some restriction) or

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<sup>21</sup> See Schiffman, *The Halakhah at Qumran*, 117-19. The Damascus Document 11:10-11, Josephus, *War*, 2.147, and Philo, *Moses*, 2.219-220, mention prohibitions on handling stone, earth, wood, and perhaps even any unusable vessel. mShab 17:6 and mBets 1:2 include similar examples but do not include *muktseh* in the thirty-nine *avot* and do not say that one is liable for handling these objects (although see bPes 47b). In a rare acknowledgment of an express desire to legislate towards leniency, the rabbis trace the development of the laws of *muktseh* from the original law that prohibited all but three types of utensils until their own time, when only two types of utensils were forbidden: see tShab 14:1; yShab 17:1, 16a; and bShab 123b. Significantly, only the Bavli explains *muktseh* in terms of a safeguard against carrying: see bShab 124a and bBets 37a. Rabbi Meir Simcha of Dvinsk (1843-1926) in his *Or Sameah* commentary to Mishneh Torah, Hilkhot Shabbat 24:12 explains the Bavli's permission to move a prohibited object in order to use the space where it lies as being based on its view of these laws as a safeguard against carrying. However, there is no textual evidence for such a connection and this permission is in any case already present in yShab 17:4, 16b. Interestingly, Maimonides in *Mishneh Torah*, Hilkhot Shabbat 24:12-13, ignores the explanation of the Bavli for the laws of *muktseh* as safeguards against carrying, and instead bases them on Deut. 5:14 and the need to create a restful experience. One wonders whether Maimonides might have been influenced by the sectarian view of *muktseh*, either directly by reading the Damascus Document or indirectly from contact with the Karaites in Cairo who had a copy of the Damascus Document. See further at Ben-Zion Wacholder, *The New Damascus Document: The Midrash on the Eschatological Torah of the Dead Sea Scrolls: Reconstruction, Translation and Commentary* (Leiden: Brill, 2007), 8.

<sup>22</sup> See Schiffman, *The Halakhah at Qumran*, 84-87; and Gilat, *Studies*, 258-61. Steven Fraade, "Looking for Legal Midrash at Qumran," in *Biblical Perspectives: Early Use and Interpretation of the Bible in Light of the Dead Sea Scrolls*, ed. Michael E. Stone and Esther Chazon (Leiden: Brill, 1998), 70-72.

<sup>23</sup> See Schiffman, *The Halakhah at Qumran*, 87-90; Gilat, *Studies*, 255-58; and Alex Jassen, *Scripture and Law in the Dead Sea Scrolls and Ancient Judaism* (Cambridge: Cambridge University Press, 2014).

<sup>24</sup> See Schiffman, *ibid.*, 104-06; Gilat, *ibid.*, 106-8; and Jacob Katz, *The "Shabbes Goy": A Study in Halakhic Flexibility* (New York: The Jewish Publication Society, 1989), 9-13.

even encouraged by the rabbis, such as making war,<sup>25</sup> sailing,<sup>26</sup> and sexual relations.<sup>27</sup> Limiting the principal prohibitions to these thirty-nine labors leaves room for the rabbis to legislate leniencies regarding various other activities.<sup>28</sup> At the same time, many activities that the rabbis consider biblically punishable besides the thirty-nine *avot* are bundled together with these principal labors as *toladot* (derived labors).<sup>29</sup> Additionally, in order to account for other activities that are neither *avot* nor *toladot* but are nevertheless prohibited, tannaitic sources provide alternative categories, the most significant being the *shevut* laws.

### **Palestinian Sources for *Shevut* Laws**

The *shevut* laws are listed at mBets 5:2:

Anything for which one is liable as a restful act (*shevut*), as an optional act, or as a meritorious act on the Sabbath,<sup>30</sup> one is also liable [for them] on a festival.

These are restful acts: one may not climb a tree, one may not ride on an animal, one may not float on the water, one may not clap, one may not slap, and one may not dance.

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<sup>25</sup> Shlomo Goren, *Torat ha-Shabbat v'ha-mo'ed* (Jerusalem: Ha-histadrut ha-Zionit ha-'Olamit, 1982), 36–105; Shmuel Safrai and Ze'ev Safrai, *Mishnat Eretz Israel* (Jerusalem: E.M. Liphshitz College Publishing House, 2008), Shabbat, 1:21–22, and further references there.

<sup>26</sup> See Jub. 50:12 and Sifre Deut. 203.

<sup>27</sup> See bKet 62b; bBQ 82a; and Etan Levin, *Marital Relations in Ancient Judaism* (Weisbaden: Harrassowitz, 2009), 228. Most talmudic sages even permit sexual relations on the Sabbath with a virgin on her wedding night even though the act will cause bleeding; see yKet 1:1, 24d; yBer 2:6, 5b; bKet 5b–7a.

<sup>28</sup> This tendency towards leniency is further evident in their legislation regarding *'eruv hatserot* in order to ease the prohibition of carrying, *'eruv tehumin* in order to ease the limit on Sabbath travel, and *'eruv tavshilin* to permit cooking on the festival in preparation for the Sabbath.

<sup>29</sup> See Noah Aminoah, “Avot ve-toladot bi-mlakhot Shabbat,” *Sidra* 24-25 (2010): 273–90; and Gilat, *Studies*, 43-47.

<sup>30</sup> On the distinction between restful, optional and meritorious, see Hanoch Albeck, *Six Orders of Mishnah*, 6 vols. (Hebrew; Jerusalem: Mossad Bialik, 1959), Mo'ed, 484; and Gedaliah Alon, *Mehkarim be-toldot Yisrael bime bayit sheni uvi-tekufat ha-Mishnah v'ha-Talmud* (Tev Aviv: Ha-qibus Ha-me'uhad, 1957), 111–119.

These are optional actions: one may not judge, one may not betroth, one may not perform *ḥalitsah*, and one may not perform a levirate marriage.

These are meritorious acts: one may not dedicate anything to the Temple, one may not dedicate one's value to the Temple, one may not make a vow devoting something to the Temple, one may not separate *terumah* or tithes.<sup>31</sup>

The term *shevut* originally refers to acts that are not work but are nevertheless biblically prohibited because they disrupt Sabbath restfulness.<sup>32</sup> Early midrashim anchor these prohibitions in biblical verses:

I know that “work” (Exod 16:12) includes acts for which one is liable to bring a sin offering. But concerning an act for which one is not liable to bring a sin offering, how do I know that one may not climb a tree, that one may not ride an animal, that one may not float on the water, that one may not clap nor slap one's thigh, nor dance? Scripture therefore teaches, “any work” (Exod 16:12).<sup>33</sup>

Gilat and other scholars contend that this biblical proof reflects an earlier view of *shevut* laws as having biblical status.<sup>34</sup> Another midrash similarly derives the same conclusion from the word “complete rest (*shabbaton*)” at Lev 23:3.<sup>35</sup> Significantly, several of the actions listed

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<sup>31</sup> All translations of rabbinic texts are my own.

<sup>32</sup> The first line of mBets 5:2 applies the term “liable” in reference to the category of *shevut*, implying that it is also punishable. In fact, yShab 2:7, 5b, refers to the prohibition against lighting a fire as a *shevut*. Thus, perhaps *shevut* in some cases may refer to a biblical prohibition, even one for which one would be liable to punishment. See Alon, *ibid.*, 111–112. See also parallels at Avot de-Rabbi Natan A 25 and bSan 68a and analysis at Gilat, *Studies*, 98, who explains that R. Eliezer calls *muktseh* a *shevut* and considers it biblically liable to punishment.

<sup>33</sup> Mekhilta de-R. Shimon bar Yohai, 12:16.

<sup>34</sup> Gilat, *Studies*, 92.

<sup>35</sup> Sifra, Aḥare Mot 5. See also Midrash ha-gadol to Exod. 35:2 citing biblical sources for prohibitions such as doing business, judging and betrothal; and Mekhilta de R. Ishmael, *kaspa*, 20, regarding the entire category of *shevut* laws. See further at Benjamin De Vries, *Studies*, 90–94; and Admiel Kosman, “On the History of the Category of ‘Ovadin De’chol’ and Yom-tov and its Relationship

in mBets 5:2 are also prohibited in the Second Temple sources mentioned above.<sup>36</sup> The Tannaim thus continue the Second Temple view that these various actions are prohibited by biblical sanction. However, the tannaitic midrashim also clearly distinguish between work (*melakha*) that is punishable and the *shevut* activities that are not, unlike the Second Temple sects who deem all such activities to be punishable.<sup>37</sup> We see here already that tannaitic law is both more systematic and generally more lenient than sectarian law.<sup>38</sup> R. Shimon, in fact, goes further than any of his contemporaries in regarding *shevut* as merely a rabbinic prohibition.<sup>39</sup>

When we come to amoraic sources, the Talmud Yerushalmi generally continues the tannaitic view that the various *shevut* laws are biblically sanctioned but carry no punishment.<sup>40</sup> However, there are also voices in the Yerushalmi interpreting these laws towards leniency.<sup>41</sup> Apparently, this tendency towards leniency reached far enough that R. Yoḥanan needed to declare, “Let not a *shevut* be light in your eyes for behold, laying down hands upon a sacrifice is only prohibited as a *shevut*; yet the patriarchs of the world were divided over it.”<sup>42</sup>

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to the Category of ‘Shevut’ Prohibitions,” (PhD diss., Bar-Ilan University, 1993) (Hebrew), 117–30.

<sup>36</sup> For example Damascus Document 10:18 prohibits judging in court and Jub. 50:12 proscribes riding an animal, as does mBets 5:2.

<sup>37</sup> Hanoch Albeck, *Six Orders of Mishnah*, 6 vols. (Jerusalem: Mossad Bialik, 1959), Mo`ed (Hebrew), 9–11.

<sup>38</sup> On sectarian stringency in general, see Yaakov Sussman, “The History of Halakha and the Dead Sea Scrolls: Preliminary Observations on *Miqsat Ma`ase Ha-Torah* (4QMMT),” *Tarbiz* 59 (1990) (Hebrew): 11–76; Shemesh, *Halakhah in the Making*, 129–33; Vered Noam, “Stringency in Qumran: A Reassessment,” *Journal for the Study of Judaism* 40 (2009): 1–14; and eadem, “‘Choosing the Path of Lenience’: Qumranic Stringency or Tannaitic Leniency?” (Hebrew), *Megillot* 8–9 (2010): 211–26. On rabbinic leniency in the area of Sabbath laws, see Schiffman, *The Halakhah at Qumran*, 84–90, 104–6, 117–9; Jassen, *Scripture and Law*; and above nn. 21–28.

<sup>39</sup> See mEruv 10:3 and 15 and Gilat, *Studies*, 104, for other Tannaim who may have shared this view. R. Shimon also takes a lenient stances regarding *muktseh*; see Efraim Yishaki, “Muktseh,” *Sidra* 16 (2000): 81–104.

<sup>40</sup> *ibid.*, 89–92.

<sup>41</sup> *ibid.*, 105, citing yPes 3:3, 30a–b.

<sup>42</sup> yHag 2:2, 77d = bHag 16b. See also Gilat, *ibid.*, 93, and Boaz Cohen, *Law and Tradition in Judaism* (New York: The Jewish Theological Seminary of America, 1969), 134.

### Systematization of the *Shevut* Laws in the Bavli Leads to Leniency

The Bavli departs radically from Palestinian sources in its interpretation of the *shevut* laws. Commenting on mBets 5:2, bBets 36b explains:

“One may not climb a tree” – this is a safeguard lest one pluck fruit. “One may not ride on an animal” – this is a safeguard lest one travel past the Sabbath boundary. Can we thus derive that Sabbath boundaries are biblical? Rather, this is a safeguard lest one cut a branch. “One may not float on water” – this is a safeguard lest one make a bottle for use as a flotation device. “One may not clap, one may not dance, and one may not slap one’s thigh” – this is a safeguard lest one repair musical instruments.

“These are optional acts: One may not judge...” – what is the reason for all of these? It is a safeguard lest one write.

“These are meritorious acts: One may not dedicate...” – what is the reason? This is a safeguard lest one buy and sell.<sup>43</sup>

There are two significant developments here. First, the Bavli considers all of the *shevut* laws to be only rabbinically mandated. While R. Shimon and perhaps other minor voices in the Yerushalmi may have first adopted this view, only in the Bavli is it applied universally. Secondly, the Bavli considers each item listed in mBets 5:2 to be a mere rabbinic preventative measure meant to keep one from inadvertently violating a more serious biblical prohibition. How can we explain the Bavli’s interpretation? Why does the Bavli demote the status of *shevut* laws to merely *derabanan* status, and why does it attribute to them a reason based on *gezerah*, which is not their original reason? Let us take each question in turn.

The Bavli’s view of *shevut* laws as merely rabbinic reflects the Bavli’s general tendency to systematize and conceptualize *halakha*.<sup>44</sup> While most Tannaim considered the *shevut* laws to be biblical but not punishable, the Bavli may have found the existence of such a state of limbo to be untidy and confusing. Gilat explains that in the view of the Bavli, if the *shevut* laws are biblical, then they should be punishable; if

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<sup>43</sup> Follows ms. Oxford-Bodl. Heb. e. 52 (2678).

<sup>44</sup> See Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Tübingen: Mohr Siebeck, 2002).

they are not punishable, then they must be rabbinic.<sup>45</sup> The Bavli embraces the Palestinian minority voices that already considered these laws to be rabbinic and endorses them as the standard view.

The systematic re-explanation by the Bavli of the *shevut* laws as safeguards against violation of biblical prohibitions must be understood within a larger context of similar activity. Avraham Goldberg compiles a long list of prohibitions that later Babylonian rabbis consider to be safeguards but are not explained as such in any earlier source.<sup>46</sup> He explains that the motivation in these cases is to provide a firm basis for these rabbinic laws by linking them to a biblical law, thereby bolstering their authority.<sup>47</sup> Here too, once the *shevut* laws were demoted to rabbinic status, the rabbis decided to formulate them as safeguards for punishable biblical prohibitions. People would take them more seriously knowing that even though the act *per se* is *derabanan*, it can easily lead to violating a *de'oraita* precept.<sup>48</sup>

However, we know that it is always dangerous to give a reason for a law, for if the reason for the law does not apply in certain circumstances, then people may permit the prohibited act in such cases.<sup>49</sup> The rabbis may have intended to buttress the *shevut* laws by defining them as safeguards, but this interpretation also runs the risk of limiting the laws to cases to which the safeguard relates. This in fact occurs in at least some cases, and may also have been part of the motivation of the Bavli. Benjamin de Vries documents many examples in which the Bavli changes various biblical laws to rabbinic status, and suggests that it

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<sup>45</sup> Gilat, *Studies*, 93, finds expression for this reasoning at yEruv 3:4, 21a = yPes 6:2, 33b, where R. Hiyah Rabbah wonders how a Sabbath prohibition can incur lashes when the designated punishment is stoning or *karet*. However, this is not quite the same and is in any case found in the Yerushalmi, which does not have a problem with the *shevut* category being biblical.

<sup>46</sup> Abraham Goldberg, "Le-hitpathut ha-sugya be-Talmud ha-Bavli (ha-shimush be-bituyim 'gezerat shema,' 'gezerat dilma,' u-'gezerah mishum,'" in *Sefer ha-yovel le-Rabbi Hanoah Albeck* (Jerusalem: Mosad ha-Rav Kook, 1963), 101–13. See also Leib Moscovitz, "Le-heqer ha-'gezera shema' ba-Yerushalmi," *Sidra* 24-25 (2010): 215–35, who largely agrees with Goldberg that the Bavli innovates reasons based on safeguards but adds further examples of the Yerushalmi using similar safeguards in more limited applications.

<sup>47</sup> Goldberg, *ibid.*, 107-08. See similarly Gilat, *Studies*, 93-94.

<sup>48</sup> In addition, the term *gezerah*, by which the Bavli calls these safeguards, itself connotes a stringent law that may not be questioned. See bYom 67b.

<sup>49</sup> See bSan 21b.

does so in order to be lenient.<sup>50</sup> Thus, by categorizing the *shevut* laws as rabbinic safeguards, the Bavli acquires great control over how to direct and define these prohibitions, whether towards stringency or leniency. Let us focus on the examples of making noise and drawing water on the Sabbath.

mBets 5:2 lists clapping, slapping, and dancing among the *shevut* prohibitions. It is not clear, however, whether the problem involves making noise in general, or specifically beating to a musical rhythm. A number of early sources indicate that the former is the primary issue. tShab 17:25 rules: “One who is guarding seeds from birds and gourds from animals may guard them on the Sabbath as he normally does, as long as he does not clap, dance, or slap as he does on a weekday.”<sup>51</sup> Presumably, the issue here is making disturbing noises, as opposed to being musical. tShab 2:7 teaches: “One may raise water with a siphon, and allow it to drip from a perforated vessel for a sick person on the Sabbath.”<sup>52</sup> Here too, this vessel makes noise, not music.<sup>53</sup> R. Eleazar in the Yerushalmi explicitly states, “Anything that produces sound is prohibited on the Sabbath.”<sup>54</sup> The Yerushalmi proceeds to cite precedents of various sages who would not knock on a door or on a cup to get someone’s attention. Similarly, `Ula cursed someone who knocked on the door on the Sabbath because he thereby made too much noise.<sup>55</sup> Commenting on Isa. 58:13, “nor speak a word,” Lev. Rabbah comments: “When the mother of R. Shimon bar Yoḥai talked too much on the Sabbath, he would tell her, ‘It is the Sabbath!’ and she would be quiet.”<sup>56</sup> Collectively, these Palestinian sources stem from a prohibition against making excessive noise on the Sabbath in order to maintain a restful and peaceful environment.<sup>57</sup>

<sup>50</sup> Benjamin De Vries, *Studies in the Development of the Talmudic Halakah* (Tel-Aviv: Araham Zioni Publishing House, 1966), 67-95 (Hebrew).

<sup>51</sup> Ms. Vienna.

<sup>52</sup> Ms. Vienna. See analysis at Saul Lieberman, *Tosefta ki-fshutah* (New York: The Jewish Theological Seminary of America, 1955-1988), Shabbat, 3:32.

<sup>53</sup> This is also the reason for the law at tShab 12:13 as well as the last law of tShab 1:23 as explained at yShab 1:5, 4a, and bShab 18a. See analysis at Lieberman, *ibid.*, Shabbat 3:22–23.

<sup>54</sup> yBets 5:2, 63a.

<sup>55</sup> bEruv 104a quoted below.

<sup>56</sup> Lev. Rabbah 34. However, the problem here might relate specifically to talking, based on Isa. 58:13, rather than a general prohibition against making noise.

<sup>57</sup> See further at David Henschke, “Teki`at shofar be-Shabbat,” *Sidra* 8 (1992): 31–34.

In the Bavli, however, Rava states categorically that only musical sound is prohibited.<sup>58</sup> Bavli Eruvin 104a proceeds to question Rava's stance, based on the above-mentioned sources from the Tosefta.<sup>59</sup>

ʿUla once happened to come to Rav Menashe's house. Someone came and knocked on the door. He [ʿUla] said, "Who's there? May the body of that person be desecrated for he desecrates the Sabbath."

Rava<sup>60</sup> said to him [ʿUla]:<sup>61</sup> They only prohibited a musical sound.

Abaye challenged him: "One may raise water with a siphon, and allow water to drip from a perforated vessel for a sick person on the Sabbath."<sup>62</sup> For a sick person it is permitted but not for a healthy person. What is the case? Is it not that he is sleeping and he wants to wake him up and<sup>63</sup> making any<sup>64</sup> sound is prohibited? No, he is awake and he wants him to sleep and so it sounds like a humming sound.

He<sup>65</sup> challenged him: "One who is guarding his fruit<sup>66</sup> from birds and his gourds from animals may guard them on the Sabbath as he normally does as long as he does not<sup>67</sup> clap, dance, or slap as

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<sup>58</sup> On the possibility that this prohibition against playing music dates back to the Dead Sea Scrolls, see Vered Noam and Elisha Qimron, "A Qumran Composition of Sabbath Laws and Its Contribution to the Study of Early Halakah," *Dead Sea Discoveries* 16 (2009), 55–96, and a rejoinder at Richard Hidary, "Revisiting the Sabbath Laws in 4Q264a and Their Contribution to Early Halakhah," *Dead Sea Discoveries* (2014): 68-92.

<sup>59</sup> Follows Geniza fragment T–S F2(2).23, unless otherwise noted. Only major variants are recorded.

<sup>60</sup> The Geniza fragment reads "Rava" but is changed to "Rabbah" above the word. Pisaro and Venice editions read "Rabbah," but mss. Oxford and Munich, the Fez edition, as well as the vast majority of Rishonim read "Rava." See *Dikduke soferim* ad loc. and Shamma Friedman, "Ketiv ha-shemot 'Rabbah' ve-'Rava' ba-Talmud ha-Bavli," *Sinai* 110 (1992): 140–64.

<sup>61</sup> Ms. Munich omits, "to him."

<sup>62</sup> tShab 2:7.

<sup>63</sup> Ms. Oxford and printed editions add, "we can conclude from this."

<sup>64</sup> Ms. Oxford and printed editions omit, "any," but it is present in ms. Munich.

<sup>65</sup> Ms. Oxford reads, "They."

<sup>66</sup> Ms. Oxford reads, "seeds."

<sup>67</sup> Ms. Oxford omits, "may guard them on the Sabbath as he normally does as long as he does not," and reads instead, "behold he may not."

he does on a weekday.”<sup>68</sup> What is the reason? Is it not because he is making a sound and making any<sup>69</sup> sound is prohibited?

Rav Aḥa bar Jacob said: It is a safeguard lest he come to pick up a pebble...

Come and learn:<sup>70</sup> “One may draw water<sup>71</sup> from the great cistern<sup>72</sup> using a wheel on the Sabbath.”<sup>73</sup> In the Temple it is permitted<sup>74</sup> but in the country it is not. What is the reason? Is it not because<sup>75</sup> he is making a sound?<sup>76</sup>

No, it is a safeguard lest he draw water for his garden or for his ruin.

Amemar permitted one to draw water with a wheel<sup>77</sup> in Maḥoza. He<sup>78</sup> said, “Why is it prohibited?<sup>79</sup> Lest he come to draw water for his garden or for his ruin. Here there is neither a garden nor a ruin.” Once he saw that people were soaking flax in it, he prohibited it.

By limiting the law to musical sounds only, Rava introduces a significant leniency in the law of making noise as compared with his Palestinian colleagues and predecessors.<sup>80</sup> The Talmud deflects the first

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<sup>68</sup> tShab 17:25.

<sup>69</sup> Ms. Oxford omits, “any.”

<sup>70</sup> Ms. Oxford and printed editions read, “We learned,” indicating that this source is a Mishnah. Ms. Munich reads with the Geniza, as translated.

<sup>71</sup> All other witnesses add, “from the cistern of the exiles and.”

<sup>72</sup> Ms. Munich and the Pisaro edition omit, “and from the great cistern.”

<sup>73</sup> mEruv 10:14. Ms. Oxford adds “from the Hakar cistern on a festival,” following the text of the Mishnah. For variant readings and analysis of the Mishnah, see: Safrai and Safrai, *Mishnat Eretz Israel*, Eruvin, 352–58; and Abraham Goldberg, *The Mishna Treatise Eruvin* (Jerusalem: Magnes Press, 1986) (Hebrew), 310–12.

<sup>74</sup> The Geniza fragment adds, “on the Sabb[ath ],” with a lacuna. I have omitted these words following all other witnesses.

<sup>75</sup> Geniza omits, “because,” but I provide it based on all other witnesses.

<sup>76</sup> Ms. Oxford adds, “and making a sound is prohibited.” Ms. Munich and printed editions add only, “and is prohibited.”

<sup>77</sup> Mss. Oxford and Munich insert a comment here, which I have omitted. See *Diqduqe soferim*.

<sup>78</sup> Following printed editions. Ms. Oxford reads, “They said.”

<sup>79</sup> Other witnesses read, “What is the reason that the rabbis prohibited this?”

<sup>80</sup> `Ula is a Palestinian *amora* who often visited Babylonia. Even within the Bavli, we find the original law against making noise as late as Rabbah (following mss. St. Petersburg, and Oxford; mss. Munich 95, Vatican 127, London, and ed.

challenge to Rava's ruling from tShab 2:7 by deeming the soothing white noise created by the perforated vessel to be musical. The Talmud next presents a second objection from tShab 17:25 but deflects this source, too, by explaining that the reason one may not make noise to scare away birds is only because one may then come to pick up a pebble to throw at the birds, which would violate the biblical prohibition of carrying in the public domain. By explaining the Tosefta not as a prohibition of making noise *per se* but rather as a safeguard for the biblical prohibition of carrying, the Talmud limits the law against clapping to cases in which such action may lead to a biblical violation.

The Talmud here does not discuss the related law at mBets 5:2, which categorically prohibits clapping, slapping, and dancing. However, bBets 36a, which explains these prohibitions as safeguards lest one come to fix a musical instrument, also in fact assumes Rava's limitation. If the reason for not clapping and dancing is because it will lead to playing, and consequently repairing, musical instruments, then obviously only clapping and dancing to a rhythm would be prohibited, while other types of noise would be permitted. bBets 36a does not state explicitly that the Talmud's goal in introducing the safeguard reason is to limit the law; that may just be a convenient aftereffect. But it does seem that the Bavli's Stam (anonymous redactors) there had Rava's limitation in mind when they linked the prohibition against clapping with the fixing of musical instruments. Ironically, then, the Bavli's presentation of the Mishnah as a safeguard for a biblical prohibition, which, as we saw above, was meant to bolster its authority, at the same time also serves to limit the law's application.

Returning to bEruv 104a, the introduction of the safeguard reason here as an answer to the second challenge succeeds in confining the prohibition to cases in which one may pick up a pebble, but not any other cases of making noise.<sup>81</sup> We thus see that, at least in this case, the Bavli utilizes the strategy of explaining a law as a safeguard in order to limit its application and thus explain it away. This lends support to the possibility the Bavli explains the *shevut* laws at mBets 5:2 as safeguards for similar reasons, at least in part.

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Soncino read "Rava") who explains that one may not use a water mill on the Sabbath "because it makes noise" (bShab. 18a). The prohibition against music is absent not only from Palestinian sources but also from the earlier strata of the Bavli prior to Rava.

<sup>81</sup> It is also possible that Rav Aḥa bar Jacob expressed his comment independently from this *sugya*, but there is no parallel attestation to it and so I am reading his statement as presented within the *sugya*.

The next challenge from mEruv 10:14 provides yet another example of this phenomenon. The Mishnah names two cisterns as exceptional in that it is permitted to draw water from them using a wheel on the Sabbath. This implies that drawing water using a wheel<sup>82</sup> from all other cisterns is prohibited. The Mishnah does not provide any reason for this prohibition. However, Second Temple sources can help fill in the background. Both Jubilees and the Damascus Document specifically prohibit drawing water on the Sabbath.<sup>83</sup> In these sources, the prohibition is not a safeguard against something else but rather an independent law. The Bavli's initial assumption that drawing water causes a problem of excess noise and commotion that is inappropriate on the Sabbath is probably very close to the Second Temple and Mishnaic conception of the law.<sup>84</sup> The Talmud solves the problem by explaining the law as a safeguard lest one come to use the drawn water to water one's garden or ruin and not because of making noise. This explanation of the Mishnah then opens the door for a person to act leniently in cases in which the reason does not apply. Amemar here makes exactly this logical deduction: since in Maḥoza there were no gardens or ruins, the safeguard does not apply and drawing water is permitted. Only after people began using the water for other prohibited activities did Amemar reintroduce a prohibition.<sup>85</sup>

These examples should suffice to show that the Bavli's explanations of various *shevut* laws as rabbinic safeguards often served to limit the application of those prohibitions and thus to open up areas of leniency. In some cases, seeking leniencies prompted these explanations from the

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<sup>82</sup> Some textual witnesses omit "with a wheel" from the Mishnah; see Safrai, *ibid.*, 353. This could possibly indicate that drawing water in any fashion is prohibited in all places besides the two mentioned in the Mishnah. This would accord with the categorical language found in Jub. 2:29 and 50:8 and is also close to the formulation in the Damascus Document 11:1–2, which prohibits drawing water with a vessel. According to versions that do include "wheel," only drawing with a wheel would be prohibited in other places, while drawing without such a mechanism would be permitted. Even manuscripts that omit "wheel" most likely assume it and should be interpreted as if it were there. According to this reading, the mishnaic prohibition is much more limited than that of the Second Temple sources. Nevertheless, the various prohibitions on water drawing most likely share some common ancestry.

<sup>83</sup> See the previous note and further at Schiffman, *The Halakhah at Qumran*, 102–04. A prohibition against drawing water is also mentioned in 4Q421 11:3.

<sup>84</sup> See commentaries cited above, n. 73. See also tEruv 8:21:22 and Lieberman, *Tosefta ki-fshutah*, 467–68.

<sup>85</sup> See the further leniency in Tosafot to bEruv 104a, s.v. *gezera*.

outset. In other cases, the safeguards were originally formulated in order to add legitimacy to *shevut* laws that were no longer considered biblical and would not be taken seriously unless formulated as preventative measures against biblical violations; but even in the latter cases, once the reason for the prohibition was only due to a specific safeguard and not a problematic act in itself, later authorities sometimes took advantage of the loopholes made available in cases where the safeguard does not apply.

Let us now analyze one more related example in which the rabbinic status of the prohibition against clapping allows for leniency. Daniel Sperber and Shaye Cohen cite evidence that the Sabbath was celebrated by many Jews as a day of joy, expressed by clapping and dancing.<sup>86</sup> Ignatius, the bishop of Antioch during the reign of Trajan, polemicizes against the Judaizing tendencies in his territory and specifically against the legal and carnal aspects of Jewish Sabbath observance:

But let every one of you keep the Sabbath after a spiritual manner, rejoicing in meditation on the law, not in relaxation of the body, admiring the workmanship of God, and not eating things prepared the day before, nor using lukewarm drinks, and walking within a prescribed space, nor finding delight in dancing and plaudits which have no sense in them.<sup>87</sup>

Writing three centuries later in North Africa, Augustine similarly complains of the Jews: “They abstain from labors, and give themselves up to trifles; and though God ordained the Sabbath, they spend it in actions which God forbids. Our rest is from evil works, theirs from good; for it is better to plough than to dance.”<sup>88</sup> Along the same lines,

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<sup>86</sup> See Daniel Sperber, “Al ha-rikud be-Shabbat,” *Sinai* 53 (1965): 122–126; Shaye Cohen, “Dancing, Clapping, Meditating: Jewish and Christian Observance of the Sabbath in Pseudo-Ignatius,” in *Judaea-Palaestina, Babylon and Rome*, ed. Benjamin Isaac and Yuval Shahar (Tübingen: Mohr Siebeck, 2012), 29–51; Cohen, *Law and Tradition in Judaism*, 136 n. 24; Semuele Bacchiocchi, *From Sabbath to Sunday: A Historical Investigation of the Rise of Sunday Observance in Early Christianity* (Rome: The Pontifical Gregorian University Press, 1977), 213–18 and Gilat, *Studies*, 90 n. 12.

<sup>87</sup> The Epistle of Ignatius to the Magnesians, long form, ch 9, translation from Philip Schaff and Henry Wace, eds., *The Apostolic Fathers with Justin Martyr and Irenaeus; Volume 1 of A Select Library of Nicene and Post-Nicene Fathers of the Christian Church* (Grand Rapids: W.B. Eerdmans, 1995), 62–63.

<sup>88</sup> *Enarrationes*, Ps. 92:2. Translation from Philip Schaff and Henry Wace, eds., *St. Augustine: Expositions on the Book of Psalms, Volume 8 of A Select Library*

he writes elsewhere: “Their women would do better to spin wool on the Shabbat rather than dancing indecently the whole day in their galleries.”<sup>89</sup>

Augustine’s contemporary in Antioch, John Chrysostom, writes of Jews dancing on the Day of Atonement:

In Isaiah's day they quarreled and squabbled when they fasted; now when they fast, they go in for excesses and the ultimate licentiousness, dancing with bare feet in the marketplace. The pretext is that they are fasting, but they act like men who are drunk.<sup>90</sup>

Indeed, rabbinic sources describe in glowing terms how women would dance on the Day of Atonement in order to attract mates.<sup>91</sup> Rava’s prohibition in bEruv 104b against making music must have clashed with the widespread practice of dancing and clapping on the Sabbath, if indeed it continued into amoraic Babylonia.<sup>92</sup> In fact, bBets 30a addresses this very concern over such widespread violation of Jewish law:<sup>93</sup>

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*of Nicene and Post-Nicene Fathers of the Christian Church* (Grand Rapids: W.B. Eerdmans, 1995), 453.

<sup>89</sup> Sermon 9. Translation from Guisepppe Veltri, “Magic, Sex and Politics: The Media Power of Theatre Amusements in the Mirror of Rabbinic Literature,” in “*The Words of a Wise Man’s Mouth are Gracious*” (Qoh 10,10): *Festschrift for Günter Stemberger on the Occasion of His 65th Birthday*, ed. Mauro Perani (Berlin: Walter de Gruyter, 2005), 243.

<sup>90</sup> *Adversus Judaeos* 1.2.7. Translation from John Chrysostom, *Discourses Against Judaizing Christians*, trans. Paul Harkins (Washington D.C.: Catholic University of America Press, 1979), 9.

<sup>91</sup> mTa’ 4:8.

<sup>92</sup> If indeed clapping and dancing to music was originally permitted before Rava, then it is worth raising the possibility that Rava’s innovative legislation in redirecting the ancient prohibition against noise to making music was intended precisely against the common practice of dancing on the Sabbath. That is, perhaps Rava agreed with the criticism directed against the Jews by Christians and sought to stamp out this practice.

<sup>93</sup> Follows Ms. Goettingen with major variants noted. See parallel at bShab 148b.

Rabbah<sup>94</sup> the son of Rav Ḥanin said to Abaye: “We learned, one may not slap, clap or dance. Today we see that people are performing these acts yet we do not tell them anything at all.”

He replied... “Leave<sup>95</sup> Israel alone; it is better that they should sin inadvertently and not sin intentionally.”

This applies only to a rabbinic law but not to a biblical law [in which case one must tell them].

We see first of all that Jews were accustomed to dance on the Sabbath not only in Antioch and North Africa, but in Babylonia as well.<sup>96</sup> Abaye decides that rebuking the people over this would not be effective in uprooting this longstanding practice. Therefore, he deems it better not to tell the people anything so that they would sin only out of ignorance, rather than teach them the law and cause them to sin knowingly. The Talmud next comments that this strategy may be applied only to a rabbinic law, which is less stringent, but not to a biblical law, of which the rabbis could not tolerate such blatant transgression.<sup>97</sup> We thus see that, according to this Stammaitic comment, it is precisely the determination that dancing and clapping on the Sabbath is only a *derabanan* law that allows the rabbis to turn a blind eye to its widespread contravention. As discussed above, the primary reason for the Bavli’s considering the *shevut* laws to be rabbinic is most probably a push towards greater systematization and a clear differentiation between the biblical thirty-nine categories of work and everything else, which must be only rabbinic. Nevertheless, a consequence of treating

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<sup>94</sup> A minority of mss. read, “Rava.”

<sup>95</sup> Ms. Goettingen adds here, “the daughters of,” and reads the rest of the line in the feminine gender. I have omitted this based on all other witnesses.

<sup>96</sup> Cohen, “Dancing,” analyzes these texts and judges them to accurately reflect the historical practice of these Jewish communities.

<sup>97</sup> The final line of the *sugya* reverses the previous position stating: “This is not so. It makes no difference whether the law is biblical or rabbinic. In either case we do not say anything. For the requirement to add time to the Day of Atonement is biblical yet we see that people eat and drink until nightfall and we do not say anything at all.” However, this must be a later layer of the Stam that disagreed with the earlier layer. In ms. London and in bShab 148b according to ms. Oxford Opp. Add. fol. 23 and printed editions, the two voices are harmonized into a single question and answer with the addition of: “if you should say” or “we reasoned from here that.” Other manuscripts of bShab 148a (before the additions of later glossators) and all other witnesses to bBets 30a read two distinct layers.

these laws as rabbinic safeguards also opens up the possibility of legislating towards leniency when the rabbis felt it to be warranted.

The custom to dance on the Sabbath continued for generations into medieval times, when it was once again discussed by the Tosafists, who sought a way to reconcile the law with the general practice:

One may not slap nor dance – Rashi explained this as a safeguard lest one come to fix a musical instrument. However, for us, this is permitted for it is only in their time when they were proficient in making instruments that it was pertinent to apply this safeguard. However, for us who are not proficient in making instruments, it is not pertinent to apply this safeguard.<sup>98</sup>

Tosafot here are able to permit unreservedly all forms of clapping and dancing on the Sabbath, since the reason given by the Bavli no longer applies in their culture.<sup>99</sup> Thus the original reason the Bavli gave for this law in order to bolster its authority once again serves to limit it; but this time it is not only clapping to make noise that is permitted, but even clapping to music.

### **The Role of the Bavli's Shevut Laws in Bolstering the Authority of Rabbinic Legislation**

Having seen a few examples of how the Bavli's reasons for the *shevut* laws as safeguards led to leniency in some cases, whether this was the Bavli's goal or just an aftereffect, I would like to explore one further consequence of the Bavli's reinterpretation of these laws. The Bavli's safeguards serve to bolster not only the authority of these specific *shevut* laws but also the authority of all rabbinic legislation. The *shevut* laws were already in place and probably were widely practiced (with the exception of clapping and dancing) long before the Bavli gave its reasons for them. Therefore, once the sages of the Bavli taught their students that the reason for their practice is a rabbinic safeguard, these students were likely to view other rabbinic safeguards—even those that the rabbis did actually newly legislate—with greater legitimacy. If they

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<sup>98</sup> Tosafot to bBets 30a, s.v. *tenan*. See also R. Moshe Isserles to Shulhan Arukh, Orah Hayim 339:3.

<sup>99</sup> For further analysis of this and related examples, see José Faur, “The Legal Thinking of the Tosafot: A Historical Approach,” *Dine Israel* 6 (1975): xliii–lxxii.

keep the *shevut* laws because they are rabbinic safeguards, they should be consistent and follow all of the rabbis' safeguards.

Once again, I cannot be sure whether this consequence of the rabbinic decrees was intended by the Bavli, but there is some textual evidence that this was, in fact, at least an aftereffect. One case where this effect is evident relates to blowing shofar on Rosh Hashanah that falls on the Sabbath—a subject related to playing musical instruments. mRH 4:1 rules that if Rosh Hashana falls on the Sabbath, one only blows the shofar in the Temple but not anywhere else. yRH 4:1, 59b, provides a biblical source for this. The Torah includes two verses commanding the blowing of the shofar on Rosh Hashanah: Num. 29:1 calls it “a day of blasting” the shofar, while Lev. 23:24 calls it, “a remembrance of blasting” the shofar; the former applies to blowing the shofar when Rosh Hashana falls on a weekday while the latter teaches that one only mentions but does not actually blow the shofar when Rosh Hashana falls on the Sabbath. The juxtaposition of the latter verse with what follows it in Lev. 23:25, which permits one to offer sacrifices on this day in the Temple, teaches that the shofar may be blown in the Temple even on the Sabbath.<sup>100</sup>

bRH 29b rejects the reasoning presented in the Yerushalmi, since it considers the prohibition against blowing shofar to be only rabbinic in the first place; hence no biblical verse would be needed to permit it. Rather, Rabbah explains:

Everyone is obligated to blow the shofar but not everyone is an expert in blowing shofar. [The rabbis thus prohibit blowing on the Sabbath as] a safeguard lest one carry it in his hand and go to an expert to learn and he will carry it four *amot* in the public domain.<sup>101</sup>

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<sup>100</sup> See also Sifra, Behar, *parasha* 2:5, which arrives at the same conclusion from a different set of verses and similarly assumes that the prohibition against blowing the shofar on the Sabbath is biblical. See also Lieberman, *Tosefta kifshutah*, Rosh Hashanah, 1061; Henshke, “Teki`at shofar be-Shabbat,” 22–31; and Kosman, “History,” 144–54, who show that there are also some Palestinian sources that do not consider blowing the shofar to be a biblical prohibition—but even those sources do not explain the prohibition as a rabbinic safeguard as the Bavli does.

<sup>101</sup> Hanoch Albeck, *Mavo la-Talmudim* (Tel-Aviv: Dvir, 1987), 639–40, argues that Rabbah actually applied this safeguard originally to the cases in bBets 17b and bPes 69a and it was Rava who transferred his words to bRH 29b. Presumably, then, the Stam transfers it also at bMeg 4b and bSuk 42b. If this is true, it would render utterly fanciful the already improbable conjecture of Noam

This safeguard would not, however, apply in the Temple, where rabbinic safeguards are always permitted.<sup>102</sup> So far, these sources follow the trend we have already witnessed. Palestinian sources consider making sounds on the Sabbath to be biblically prohibited and therefore require a biblical source for an exception on the Sabbath in the Temple, while the Bavli does not consider these *shevut* laws to be biblical, but rather explains them as rabbinic safeguards.

What is new in this example is how this case is cited at bYev 90a. The Talmud there questions whether the rabbis have the power to make legislation that would uproot a biblical law.<sup>103</sup> It establishes that even if the rabbis do not have the power to uproot a negative commandment, they can require a person to passively refrain from performing a biblical obligation.<sup>104</sup> As proof, the Talmud cites this case whereby the Bible commands one to blow the shofar even on the Sabbath in all places, but the rabbis uproot this law and prohibit blowing the shofar in any place except for the Temple. In fact, the practice of not blowing the shofar outside the Temple was already widespread long before the Bavli explained this as a rabbinic safeguard.<sup>105</sup> But once the Bavli justifies the

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and Qimron, "Qumran Composition," 66 n. 25, that "Rabbah transmitted echoes of an early Palestinian rationale." See further at Hidary, "Revisiting the Sabbath Laws in 4Q264a."

<sup>102</sup> See bPes 65a and Gilat, *Studies*, 105-06.

<sup>103</sup> See analysis of the entire pericope at Shamma Friedman, "Perek ha-isha rabah ba-Bavli, be-seruf mavo kelali `al derekh heker ha-sugya," in *Mehkarim u-mekorot*, ed. H. Z. Dimitrovsky (New York: Jewish Theological Seminary, 1977), 346-57. See an analysis of this general topic at Gilat, *Studies*, 191-204.

<sup>104</sup> For other related examples of the rabbis denying one the opportunity to fulfill a positive biblical commandment in order to uphold that very commandment, see mBer 1:1, mPes 10:9 and analysis at Richard Hidary, *Dispute for the Sake of Heaven: Legal Pluralism in the Talmud* (Providence: Brown University, 2010), 244 and 249 n. 31; and Louis Ginzberg, *A Commentary on the Palestinian Talmud*, 4 vols. (New York: Jewish Theological Seminary of America, 1941), 1:85 n. 5, 94.

<sup>105</sup> Other items on the list there also fall into this same pattern. For example, according to Bet Hillel at mPes 8:8, one who converts just before Passover and wants to offer the Passover sacrifice must purify himself as if he received corpse impurity. yPes 8:8, 35c, bases this on a verse, while bPes 92b introduces a reason: because he might not realize the following year that he does have to remove his corpse impurity. This requirement to purify the convert continues to supersede the biblical requirement to offer the Passover sacrifice even after the Bavli transfers the basis for this law from biblical to rabbinic, thereby bolstering the authority of rabbinic enactments.

practice as a rabbinic enactment, it can then serve as a precedent for rabbinic authority, even over biblical laws.<sup>106</sup>

The same Talmudic pericope continues to prove that the rabbis have the power to legislate even that a person actively violate a negative biblical commandment, if their goal is to keep people from sinning. The following story exemplifies this power:

R. Eleazar ben Jacob said: I heard that a court may whip and punish even when not sanctioned in the Torah—not in order to transgress the words of the Torah but rather to make a fence for the Torah.

There was a case of a person who rode on a horse on the Sabbath in the days of the Greeks and they brought him to court and they stoned him—not because that was what he deserved but because the exigencies of the hour demanded it.<sup>107</sup>

Historical analysis of this story reveals that the explanation provided here for putting this horse-rider to death may not have been the original reason. The Torah prohibits working an animal at Exod. 20:10, 23:12 and Deut. 5:14. Jub. 50:12-13 legislates that one who “rides on any beast” is liable to death. mBets 5:2, however, states that riding an animal is only prohibited because of *shevut*, and incurs no

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Similarly, mSuk 4:1 legislates that the four species be taken for seven days but only the taking on the first day supersedes the Sabbath. ySuk 3:11, 44a, derives this from Lev. 23:40, which specifies that the four species be taken on the first day, and then continues to add that one celebrate with them for seven days. The first day is singled out because only on that day do the four species supersede the Sabbath but not on the other six days. Bavli Sukkah 42b, on the other hand, explains that this is a safeguard lest one carry the four species through public property to an expert in order to learn. See further at Albeck, *Mishnah*, Mo`ed, 254 and 489–90. Albeck proposes that the rabbis wanted to emphasize the importance of Sabbath observance by showing that it trumps all festival rituals. The rabbis then found verses to back up their legislation, as seen in the Yerushalmi. If this is true, then Rabbah’s safeguards actually extend the rabbis’ goal of strengthening Sabbath observance in general and the prohibition against carrying in particular. If people see that even the off chance that one may come to carry suffices to cancel a biblical festival ritual, then they will be convinced of the severity and gravity of that prohibition all year round.

<sup>106</sup> On the limits of this authority, see Azzan Yadin, “The Chain Novel and the Problem of Self-undermining Interpretation,” *Dine Israel* 25 (2008): 43–71.

<sup>107</sup> bYev 90b.

punishment.<sup>108</sup> As noted above, tannaitic midrashim consider this category of prohibitions to be biblically prohibited. *yBets* 5:2, 63a, discusses the reason for this law and concludes: “A person is commanded to let his animal rest just as himself, ‘that your ox and your ass may rest’ ‘as you do.’”<sup>109</sup> The Bavli then categorizes this law as rabbinic and explains that it is a safeguard lest one come to cut off a branch to whip the animal. Assuming that the above story is based on some historical event and indeed dates accurately to the Hellenistic period,<sup>110</sup> it is most likely that the horse rider was killed not as a rabbinic fence but because at that point in time, the prohibition on riding a horse was considered a biblical and punishable law, as in the book of Jubilees.<sup>111</sup>

As this story was transmitted by the rabbis, who ruled that these actions are not punishable, they had to provide a different explanation for the rider’s execution. They therefore cited this as an example of extra-judicial punishment. The story cited above from the Bavli appears also in *Megilat Ta’anit* and the *Yerushalmi*, with subtle but significant differences.<sup>112</sup> The version in *Megilat Ta’anit* explains that the court may mete out punishments even beyond the letter of the law as set forth in the Torah, in order to “purge evil from amongst you.”<sup>113</sup> The Bavli, however, omits this phrase and instead inserts, “in order to make a fence around the Torah.” While the Palestinian sources already provide the court with the leeway to mete out punishments beyond those prescribed in the Torah, the Bavli connects this leeway specifically to the rabbinic penchant to make safeguards to the Torah, and cites it at the end of its

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<sup>108</sup> Several other sources similarly suggest that riding an animal is biblically prohibited; see Safrai and Safrai, *Mishnat Eretz Israel*, *Besah*, 5:2; Albeck, *Mishnah*, *Mo’ed*, 484; Lieberman, *Tosefta ki-fshutah*, *Shabbat*, 3:300; and Gilat, *Studies*, 191 n. 4.

<sup>109</sup> This is a combination of *Exod.* 23:12 and *Deut.* 5:14.

<sup>110</sup> “In the days of the Greeks,” does not appear in all versions; see Gilat, *Studies*, 191 n. 3. However, Moti Ard, *Mehalel Shabbat be-farhesia* (New York: Bet Hamidrash Le-Rabbanim Be-Amerika, 2008), 271 n. 43 argues that all of the sources assume this time frame.

<sup>111</sup> *Ibid.*, 264. Ard further demonstrates that riding a horse in public (παρρησία) was considered a formal act of Jewish apostasy in Roman times.

<sup>112</sup> See Vered Noam, *Megillat Ta’anit: Versions, Interpretation, History with a Critical Edition* (Hebrew; Jerusalem: Yad Ben-Zvi Press, 2003), 92–93 and 233–34 (Hebrew); and *yHag* 2:2, 78a.

<sup>113</sup> *Deut.* 13:6, 17:7, 19:19, 21:21, 22:21, 22:24, and 24:7. *Megilat Ta’anit* later on cites the continuation of *Deut.* 21:21: “and all of Israel will hear and be afraid.”

long discussion about the power of the rabbis to uproot a biblical law. The Bavli thus completes the transfer of the biblical authority to the rabbis. The Bavli uses the very story that was once an example of applying the biblical punishment as a proof that the rabbis can impose even the death penalty for violation of rabbinic law.

Interestingly, bShab 30a presents Moses as a rabbi who legislated safeguards and enactments that will last forever in the form of the Torah.<sup>114</sup> This has the effect of raising all rabbinic safeguards to a level near that of the Torah itself. In fact, the Talmud thematizes the superiority of rabbinic law over biblical law in many places.<sup>115</sup> Regarding the law of the rebellious elder who teaches laws in contradiction to the ruling of the supreme court in Jerusalem, mSan 11:3 states: “There is a greater stringency regarding teachings of the scribes than regarding teachings of the Torah. If one says, there is no precept of *tefillin*, such that a biblical law would be transgressed, he is exempt. [But if he rules that the *tefillin* must contain] five compartments, thus adding to the words of the scribes, he is liable.” The midrash transforms the biblical law at Deut. 17:8-13 providing ultimate authority of the national high court to decide civil lawsuits into an institution designed specifically to uphold rabbinic law.<sup>116</sup> More than once, the Tosefta rules more stringently regarding rabbinic laws than regarding biblical laws, with the rationale that – “[T]his is from the words of the Torah and the words of the Torah do not need strengthening; this is from the words of the scribes and the words of the scribes do need strengthening.”<sup>117</sup>

While in those cases, the Talmud is very explicit about its drive to extend authority to rabbinic laws, in the examples of the shofar and riding a horse this motivation is only implicit, perhaps even subconscious. Training the Jewish population to accept the authority of rabbinic legislation was accomplished by many and various means,<sup>118</sup> but the ability to take long-standing, widespread practices and teach

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<sup>114</sup> See bYev 79a, which refers to Deut. 29:10 as a safeguard of Moses, and see Maharsha on bShab 30a, contra Rashi ad loc. I thank Tzvi Novick for this insight.

<sup>115</sup> See yMeg 4:1, 74a; and bGit 60b.

<sup>116</sup> See analysis at Hidary, *Dispute*, 297-333.

<sup>117</sup> tTa` 2:6 and tYev 2:4 and parallels at yTa` 2:12, 66a; yMeg 1:4, 70c; yYev 9:5, 10b; yKet 11:7, 34c; bRH 19a; bTa` 17b; and bYev 85b. See also yBer 1:4, 3b; bEruv 21b; and Hidary, *Dispute*, 316 n. 63.

<sup>118</sup> Richard Hidary, “The Rhetoric of Rabbinic Authority: Making the Transition from Priest to Sage,” in *Jewish Rhetorics: History, Theory, Practice*, ed. Michael Bernard-Donals and Janice Fernheimer (Lebanon, NH: Brandeis University Press, 2014), 16–45.

them as rabbinic laws must have contributed to the perception that rabbinic legislation in general should be taken seriously. Even if this was not part of the motivation of the Bavli in providing its explanations, it would certainly have been a welcome side effect that was in fact utilized in bYev.

In sum, this analysis reveals that the reasons for the *shevut* laws listed in the Bavli are not the original reasons for these laws, which in fact have a much more ancient basis in Second Temple practice. Jewish law as reflected in Second Temple sources does not differentiate between various types of prohibited activity, but rather considers the various activities called *shevut* by the rabbis to be on par with all other types of work that are similarly punishable. The Tannaim, in their effort to systematize the prohibited activities of the Sabbath into thirty-nine categories, designate a category of *shevut* activities that are biblically prohibited but not punishable. While the Yerushalmi generally continues the tannaitic model, the Bavli, in its penchant for greater systematization and conceptualization, relegates this indeterminate category of *shevut* laws to the status of rabbinic prohibitions. However, this shift also bolsters their authority by explaining them as safeguards for biblical prohibitions. This has two major effects. First, it opens up room for further leniency in the application of these safeguards, especially when the reason no longer applies. Second, the transfer of these widespread laws from biblical to rabbinic status ends up serving to bolster the authority of rabbinic law in general.

We began this article with the commonly expressed and generally correct distinction between sectarian law, which grounds all legislation and interpretation in prophetic revelation, and rabbinic law, which maintains two categories of prophetic Pentateuchal law and man-made rabbinic law. However, the fluidity of the *shevut* law categorization and the way the Talmud uses these newly-minted rabbinic laws to bolster rabbinic authority in general serves to deconstruct such over-generalized distinctions. In fact, the Talmud audaciously confers prophetic ability on the rabbis: “From the day the Temple was destroyed, prophecy was taken from the prophets and given to the sages.”<sup>119</sup> The midrash furthermore includes all of the oral law, even rabbinic pronouncements, within prophetic revelation: “Scripture,

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<sup>119</sup> bBB 12b. The Talmud continues to prove that a sage outranks a prophet. yBer 1:4, 3b, similarly explains that a prophet is compared to a king’s messenger who must first show his credentials in order to be validated, whereas a sage can be trusted even without performing any acts of validation. See further at Gilat, *Studies*, 199.

Mishnah, Talmud, and Aggadah—even whatever a distinguished student will decide before his master—were all already told to Moses at Sinai.”<sup>120</sup> Rabbinic legislation, at least according to these sources, also derives from revelation and prophetically-inspired interpretation, and as such may not be that different from the Qumranite view after all.<sup>121</sup>

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<sup>120</sup> yPe'ah 2:1, 17a; See also Sifra, Behuqotai 2; Sifra, Behar 1; Sifre Deut. 351; Gen. Rabbah 64:5; bBer 5a; and bMeg 19b; and discussion at E. E. Urbach, “Halakha u-Nevu'ah,” *Tarbiz* 18 (1946), 1–27; and Michael S. Berger, *Rabbinic Authority* (New York: Oxford University Press, 1998), 83–96. See also the epigram to this article on the Sabbath laws in particular.

<sup>121</sup> Shemesh, *Halakhah in the Making*, 30, argues for a clear distinction between the two legal systems: “The Qumran scrolls present the exegesis of the Torah and consequently the halakhic decisions that stem from it as a product of divine inspiration, while the rabbinic writings treat it as an open-ended process of human exegetical activity.” Shemesh does cite the article by Urbach mentioned in the previous note and also points out that R. Eliezer held a view similar to that of the Qumranites. However, Shemesh still does not take full account of the many sources discussed by Urbach that reflect divine inspiration within rabbinic teachings as well—both *de'oraita* and *derabanan*. See similarly Aharon Shemesh, “Halakha ve-nevu'ah: nevi sheqer ve-zaqen mamre,” in *Renewing Jewish Commitment: The Work and Thought of David Hartman*, ed. Avi Sagi and Zvi Zohar (Jerusalem: Shalom Hartman Institute and Hakibbutz Hameuchad, 2001), 923–941.