

## Theoretical Pluralism in the Talmud: A Response to Richard Hidary

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Let me begin by expressing thanks in two quarters. First, I wish to thank the editors of *Diné Israel* for allowing me the opportunity to read and respond to Richard Hidary's fine article "Right Answers Revisited: Monism and Pluralism in the Talmud," appearing in the current issue. Second, I wish to thank Richard Hidary himself. Although ultimately I am not persuaded by his argument, his article has greatly helped me to better understand my own position and has brought to my attention certain infelicities of formulation in my original article.<sup>1</sup> In the present response, I will express my views more clearly and with fuller argumentation to show that Hidary's objections aim at a false target, and I will introduce additional arguments against the interpretation of key texts offered by Hidary.

The nub of the disagreement between us lies in the fact that we give different answers to the following question: what theoretical commitment underwrites the practical pluralism attested in the Talmud? Are instances of *practical* pluralism grounded in a *theoretical* pluralism, or not? Hidary focuses on five central cases first advanced as evidence of theoretical pluralism by Hanina Ben-Menahem<sup>2</sup> and argues that in these five cases, the practical pluralism is almost certainly grounded in a theoretical pluralism. He seems to assume that my demurrer on this

- 1 Christine Hayes, "Legal Truth, Right Answers, and Best Answers: Dworkin and the Rabbis," *Diné Israel* 25 (2008): 73\*-121\*.
- 2 See his "Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?" *Jewish Law Annual* 6 (1987): 164-75.

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point means that I hold these texts to be definitely grounded in theoretical monism. In fact, while I agree that these texts are examples of practical pluralism, I think that the theoretical commitments underlying this practical pluralism are an *open question* in the Maimonidean sense of a question for which definitive proof *one way or the other* is lacking. Moreover, since these cases of practical pluralism do not definitively address the issue of theoretical pluralism that concerns us, I suggest we set these cases aside and seek out texts that explicitly address the issue.

This is the disagreement standing on one foot. Now for the details.

### Outline of the Present Response

To a certain extent my original thesis has been misconstrued by Hidary. I must accept some blame for this – a clearer formulation of my thesis would not have been so easily misconstrued. In order to rectify these mistaken understandings, I begin by clarifying the structure of my original argument in as concise a manner as possible, cleaning up an occasional formulation in the original that might have been misleading. I then consider specific instances of misprision of my views, citing statements by Hidary in which he infers or attributes to me views that do not appear in the original article or are actually contradicted by explicit statements in the original article. I then turn to “the famous five” cases that are the subject of our central disagreement. I argue not only that Hidary (misled by a particular term I employ) misunderstands my objection to using these cases as evidence of *theoretical* pluralism but also that the line of reasoning he relies on in interpreting these texts as evidence of theoretical pluralism is both *é silencio* and fallacious. Finally, I consider a series of additional texts advanced by Hidary and argue that these texts, while important for establishing *practical* pluralism, suffer the same fatal weakness as “the famous five” texts and do not make the case for theoretical pluralism *in those specific instances*.

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### Clarification of Terminology and Original Argument

Before clarifying my argument, I must clarify terminology. Hidary (Hidary, “Right Answers,” 229 n. 2) accepts the central terms that I employ in my article (following Bernard Jackson<sup>3</sup>), but I am not sure that the application of these terms to the rabbinic context is entirely clear. This will be very important later on in our discussion of “the famous five” cases and the additional cases presented by Hidary. Therefore, I’d like to clarify the application of these terms to the rabbinic context and in so doing prepare the ground for some of the new argumentation that will appear below.

The terms in question are legitimacy, validity, and authenticity. Legitimacy refers to the acceptability of a norm or decision as law. A particular rule is either legitimate (accepted as law and therefore binding) or not legitimate (not accepted as a law and therefore not binding or respected). To say that a law is legitimate is to say that it meets the legitimacy criteria of the legal system in question. Legal systems can establish diverse legitimacy criteria, but for simplicity of argument let’s outline two basic and very different types of criteria (following Jackson, 19). On the one hand, we can imagine legitimacy as a matter of *validity*, which is to say the production of a norm or decision according to authorized and recognized procedures of norm-creation or decision-making (e.g., act of the legislature) regardless of its character or content (Hayes, 75). We might say that in such cases the norm’s legitimacy turns on its *institutional and procedural validity*. To determine whether a law is legitimate because *valid* one would ask whether it was produced and established according to the recognized procedures and institutions of law-production and establishment that prevail in that society. Is its “pedigree” intact? Confusion or aporia regarding the

3 B. S. Jackson, “Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature,” *Jewish Law Annual* 6 (1987): 19.

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source of a law and the authority of that source will lead to confusion or aporia regarding the *validity* and therefore the legitimacy of that law.

In the rabbinic context, validity criteria include (but are not limited to) promulgation by a recognized/authoritative halakhic expert, a qualified judge, or a court.<sup>4</sup> These are what H. L. A. Hart refers to as “the social sources of the law.”<sup>5</sup> When a law’s legitimacy is a matter of validity, the legitimacy of any given norm is ascertained by investigating the social source from which the norm issues to ensure that the source possesses the requisite authority to make and/or establish the law. Sometimes two different views might be promulgated by two recognized authorities or judges. In such cases a legal system will devise rules, procedures, or strategies to avoid paralysis. There might be a rule establishing which authority prevails in cases of conflict (such as the American doctrine of constitutional supremacy). Legal presumption is a different strategy for avoiding paralysis in cases of conflict, as are negotiated compromises of various sorts. Allowing individuals the freedom to choose which of two recognized authorities they will follow is another strategy for coping with cases of conflicting norms promulgated by persons or institutions whose authority is equal or whose hierarchical ranking is simply unknown. In all such cases, legitimacy is, generally speaking, a question of *validity*: it is about meeting procedural criteria (not content criteria) or *following the rules and strategies that kick in when procedural criteria are unknown, unclear, or otherwise fail to produce a single norm*.

On the other hand, we can imagine systems in which legitimacy is a matter of authenticity (Jackson, 20), which may be understood as conformity to some criterion of character, quality, or content. Under

4 For an exhaustive presentation of the legal (as opposed to literary) sources of Jewish law, see Menahem Elon’s *Jewish Law; History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes; 4 vols. (Philadelphia: Jewish Publication Society, 1994), Vol I, part Two and Vol II, part Two (continued).

5 H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994), 269.

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such a system, an unjust law would not, for example, be a true or legitimate law even if produced by authorized procedures because the system holds that the legitimacy of a norm or ruling turns not on its institutional validity (its pedigree) but on its authenticity. To determine whether a law is legitimate because authentic one would ask whether it conforms to the society's conception of an independently accessed truth. These truths may take the form of moral principles (e.g., the sanctity of life, the equality of all human beings, etc.) or widely accepted factual conditions (e.g., sectarian writings of the Second Temple period evince a legal realism according to which law conforms to and may be confirmed by empirically tested or divinely revealed knowledge of "the ways things really are").<sup>6</sup> A system concerned with authenticity as the criterion of a law's legitimacy will ask, for any given norm, whether the truthfulness and correctness of its *content* is intact. Confusion or aporia regarding a law's conformity to criteria of truth (e.g., moral principles, factual conditions) will lead to confusion and aporia regarding the *authenticity* and therefore the legitimacy of the law.

In the rabbinic context, the fundamental *authenticity* criterion is conformity to the will of God for the conduct of human society. Were a law's legitimacy a matter of authenticity, one would have to ascertain the truthfulness or correctness of the view in terms of its conformity to God's will.<sup>7</sup> Confusion or aporia regarding the extent to which the law represents the word or will of God would lead to confusion or aporia regarding the authenticity of the law.

6 For example, according to the Community Rule 1:14-15, members of the Qumran community took an oath to follow the sectarian calendar so as not to advance or delay (*lo leqaddem ve-lo lehit'aher*) the dates of the festivals – that is, the *real* dates of the festivals as determined by the 52-week pattern fixed by God at the time of creation (a tradition attested in *1 En.* 72-82 and in *Jub.* 2:1, 17-21, 6:17-18, and 15:25-27). For further examples, see my "Legal Realism and Sectarian Self-Fashioning in Jewish Antiquity," forthcoming in a conference volume from the University College, London, 2010.

7 This is a fraught and hotly contested criterion (how is God's will ascertained and by whom?) that simply cannot be explored in the present context.

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However (and this is critically important), some well-known rabbinic texts are widely held to assert that a lack of authenticity *does not necessarily affect the legitimacy of the law*. These texts evince a conceptual distinction between legitimacy based on validity criteria and legitimacy based on authenticity criteria. In some instances, a norm can fail to meet authenticity criteria but because it meets validity criteria, it becomes the legitimate halakhah. We see this in programmatic texts like the famous oven of Akhnai story in which the halakhic view endorsed by God (an indicator of *authenticity*) is rejected by the procedural principle of majority rule (*b.B. Meṣi'a* 59b). We also see it in several practical cases in which a view acknowledged to be the *din* (the formally correct law) is rejected in favor of another view.<sup>8</sup> To sum up: a view deemed “authentic” because it is (a) explicitly endorsed by God, (b) deemed to be logically correct, or (c) in conformity with widely accepted factual conditions<sup>9</sup> is on occasion not established as the halakhah. A different – we may say, inauthentic – view promulgated by a recognized authority or court is established as the legitimate halakhah instead. Though this view fails authenticity criteria, it meets validity criteria (stems from the appropriate social sources of law) and is therefore deemed legitimate.

The following two principles, critical to the argument that will be advanced below, emerge from the foregoing observations:

Principle 1: **Legitimacy (the fact that a norm is established as the halakhah) is proof of validity, but it is not proof of authenticity.** Rabbinic literature contains numerous examples of norms that are held to be legitimate and are established as the halakhah, even

8 I discuss several such cases from the Yerushalmi in “The Abrogation of Torah Law: Rabbinic *Taqqanah* and Praetorian Edict,” in *The Talmud Yerushalmi and Graeco-Roman Culture*, ed. Peter Schäfer (Tübingen: J. C. B. Mohr, 1998), 657-58. I discuss the juxtaposition of *din* and the preferred *lifnim mi-shurat ha-din* in the paper critiqued by Hidary, pp. 111-17. Hidary seems to agree with my assessment of these cases.

9 For examples of rabbinic rulings given in defiance of “the way things really are,” see my “Legal Realism,” *op. cit.*

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though they do not meet authenticity criteria and even when the authentic alternative is known. These norms are promulgated by authorities whose law-making and/or law-establishing authority is recognized and accepted. Thus, they are legitimate because they meet validity criteria, not authenticity criteria. That the rabbis are willing to legitimate a norm that they consciously understand not to be the authentic law is amply and explicitly attested in several sources.

Principle 2: It follows from principle 1 **that simple claims of legitimacy tell us nothing certain about the authenticity – the truth value or correctness – of the norm in question – either positive or negative.** If the legitimacy of a norm turns on the system's procedures of validation and on rules and strategies for coping when validation procedures produce no clear result, then the authenticity or truth of the norm in question is an interesting but – as far as determining the law is concerned – irrelevant point. Thus, knowing that a particular norm is the established halakhah tells us for certain only that it has been validated, but does not tell us for certain whether the norm is also deemed authentic. The norm might be authentic, but it might not be. In the absence of specific declarations of the correctness of the content of a law, its authenticity is an *open question*.

One final terminological consideration is needed in order to generate a third principle critical to the arguments advanced below. Hidary very helpfully introduces the terms practical and theoretical monism/pluralism.<sup>10</sup> Hidary's definitions are as follows:

Practical monism believes that every legal system must contain only one legitimate path for a judge or individual to follow in any given case while practical pluralism finds that even within one jurisdiction there exist multiple overlapping paths of legitimate options from which one may choose. Theoretical monism claims that ... every legal system can produce a single best answer to any case. Even if that single correct answer may not always be found, in which case the

<sup>10</sup> A third term, "philosophical monism/pluralism," is less germane.

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“wrong” answer will be legislated and binding, that single correct answer still exists in theory. Theoretical pluralism, on the other hand, argues that many legitimate theoretical possibilities exist that equally fit the criteria of a given legal system, even if only one must be chosen in practice (Hidary, 230-31).

Hidary himself notes that there is no necessary connection between practical pluralism and theoretical pluralism. He writes that (231 n. 5):

[O]ne does not necessitate the other. One may believe there are many theoretical possibilities but still think that law must decide on only one practical rule for the sake of uniformity. Or, one may be convinced that there is only one theoretically correct law but find that it is not accessible and so many practical possibilities might be recognized as legitimate.

On the basis of Hidary’s own understanding of practical and theoretical pluralism/monism we may establish a third principle:

Principle 3: **Practical pluralism does not automatically entail theoretical pluralism. It is not proof of theoretical pluralism, nor does it even imply theoretical pluralism.**<sup>11</sup> Therefore, cases of practical pluralism cannot be adduced as definitive evidence for theoretical pluralism – or *theoretical monism for that matter*. In the absence of any explanation for the basis of its pluralism, a case of practical pluralism can tell us nothing about the theoretical commitments that underlie it, one way or another. Such cases must be set aside as uninformative.

Now to clarify and sharpen the principles, steps, and claims in my original argument:

Step 1: I frame my paper by asking the following question: “Can Jewish law be understood as accommodating a natural law theory with

<sup>11</sup> Dworkin himself holds a theoretical monism despite acknowledging a surface phenomenon of practical pluralism. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 123-30.



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its concomitant monism and limited judicial discretion, or is talmudic law committed to legal pluralism?” (78). I phrase the question this way because *I do accept the existence of legal pluralism in talmudic law*. (Were it otherwise, I would not have asked whether Jewish law can accommodate monism given evidence of its commitment to pluralism.) It is self-evidently true that the Talmud contains cases of *practical* pluralism (to be discussed below) and it is evident to me that the Talmud contains at least programmatic declarations of theoretical pluralism (sources like *b. Erub.* 13b, *b. Git.* 6b, *b. Sanh.* 34a, *b. Hag.* 3b, though in fairness I acknowledge in footnote 15 of the original article that this interpretation of some of these sources is not universally accepted). Nonetheless, the question arises: is this theoretical pluralism so pervasive that we can assert with certainty that there is no monistic impulse in talmudic law? Isn't it possible that here, as elsewhere, the rabbis might say one thing but sometimes do another, and ought we not investigate their actual praxis? Hidary himself accepts that programmatic statements must be tested against practical cases and rulings if we are to develop a full account of any aspect of rabbinic culture.<sup>12</sup>

Therefore, in an effort to assess the depth and significance of the rabbinic commitment to theoretical pluralism, as articulated especially in programmatic statements, I search for instances of theoretical monism in practical cases. Because Dworkin is a well-known theoretical monist, I ask (like Ben-Menahem before me) whether we can find in rabbinic literature anything akin to Dworkin's monistic conception of “one right answer” to legal questions. For my paper to succeed, I need only find a single clear example of theoretical monism and consider its implications.

Step 2: Before proceeding in my search for a clear case of theoretical monism, I pause to demonstrate that the case for pluralism and the case for monism are often made on the basis of texts that are not at all

12 “I fully agree that programmatic statements do not make a definitive case. These aggadot may reflect only an idealized view of the nature of the prophetic message or may be meant to assuage anxiety created by the tension between the belief in revelation and the existence of a dispute” (233-34).

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probative. I target three sets of data that I believe do not prove what scholars have claimed they prove, so that we might finally lay these data to rest as unilluminating. The first two sets of data are adduced by scholars as evidence of theoretical pluralism but are not in fact instructive one way or the other; the third set of data is sometimes assumed to be evidence of theoretical monism but does not in fact attest to monism at all.<sup>13</sup>

(a) Data Set 1: I argue that a set of cases cited by Hanina Ben-Menahem in which the incompatible views of two halakhic authorities are both granted legitimacy, attests only to practical pluralism. In line with principle 1, the legitimacy of the two views is a function of their validity but not their authenticity. In line with principle 2, the legitimacy of the two views provides no certain information about their authenticity.<sup>14</sup> And in line with principle 3 above, practical pluralism does not automatically entail theoretical pluralism. Therefore, these cases are not proof of theoretical pluralism, and do not even imply theoretical pluralism. Neither do they prove theoretical monism. These cases simply do not illuminate the issue at all.

(b) Data Set 2: I argue that the texts advanced by David Kraemer as evidence that the rabbis have a compromised view of truth indicative of pluralism, do not *all* provide certain proof of theoretical pluralism.<sup>15</sup>

13 Thus, Hidary is mistaken when he writes, “Hayes discusses three arguments made by contemporary writers in favor of the view that the Rabbis were theoretical pluralists.” In fact, only two are arguments made by contemporary writers in favor of the view that the rabbis were theoretical pluralists. The third is an argument, assumed by pre-modern authors also, in favor of the view that the rabbis were theoretical monists. This should make it clear that my goal is not to discredit pluralism, but to discredit recourse to certain kinds of texts because they simply do not provide support for either theoretical pluralism or monism.

14 More precisely, it is proof that they have satisfied validity criteria *or* the rules and procedures that kick in when validity procedures lead to an impasse.

15 See David Kraemer, *The Mind of the Talmud: An Intellectual History of the Bavli* (New York: Oxford University Press, 1990).

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While many of his texts are suggestive, Kraemer is often guilty of over-reading. Kraemer elides the distinction between halakhah and truth, in the philosophical sense of “the way things really are,” with the result that texts dealing with halakhic legitimacy are (mis)read as texts about truth. I argue that many of the texts cited by Kraemer do not allow us to move beyond the surface phenomenon of practical pluralism to the deeper question of theoretical pluralism and as such do not illuminate the issue that concerns us at all.<sup>16</sup>

(c) Data Set 3: I argue against the view that the Hebrew term *emet* (truth) applied to a given law or teaching signals the theoretically correct law (or monism). I demonstrate that the term *emet* in the vast majority of legal and judicial contexts in rabbinic sources does not signify truth in the sense of authenticity, but rather procedural correctness or lack of corruption. These sources cannot be admitted as evidence for legal monism.

To be clear: my goal in Step 2 of the paper is not to argue for or against theoretical pluralism or monism but to “clear the decks” of irrelevant texts that shed no light on the question of theoretical pluralism or monism. I argue that those who rely on these texts (the texts cited by Hanina Ben-Menahem, many of those cited by Kraemer, and those employing the term *emet*) have been looking for information on the rabbinic attitude to truth – pluralistic or monistic – in all the wrong places. As I wrote in the original article, these approaches use the wrong body of evidence to arrive at an assessment of the place of

<sup>16</sup> In this context, as in the original paper, I cannot pretend to do justice to the richness and subtlety of Kraemer’s argument which is, after all, book-length. Kraemer includes some programmatic statements of theoretical pluralism that I do not contest, but he also includes a great deal of material that in my view is simply not conclusive evidence of theoretical pluralism (or more specifically a moderated pluralism). In a fuller discussion, I would carefully differentiate those of Kraemer’s texts that I accept as relevant and probative and those I do not, but that is not the purpose of my limited reference to his work here.

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monism (and, I might equally have said, pluralism) in talmudic legal thought (Hayes, 87).

With these sets of data largely disqualified as proof of any kind, we are left with some cases of *practical* pluralism and some explicit programmatic statements of *theoretical* pluralism and so we return to the questions with which we began: Can Jewish law be understood as accommodating a natural law theory with its concomitant monism or is talmudic law committed to legal pluralism? Is the theoretical pluralism attested in some programmatic statements so pervasive that we can assert with certainty that there is no monistic impulse in talmudic law or can we find in rabbinic literature something akin to Dworkin's monistic conception of "one right answer" to legal questions?

Step 3: In the last section of the article, I describe a family of cases in which the identification of a single correct answer (labeled "*din*") is explicit. Hidary himself acknowledges that these cases appear to be theoretically monistic in approach (Hidary, 230). However, of far greater interest to my mind is the fact that the monism in these texts is hardly Dworkinian. For Dworkin, the right answer is by definition the best answer. For the rabbis, it is not. In these cases, the right answer is subjected to a critique (on pragmatic or moral grounds, for example).<sup>17</sup> If as a result of this critique, the right answer is found wanting, it is subordinated to a "better" answer. In short, the monism in these texts is complex and, in many respects, quite un-Dworkinian.<sup>18</sup>

17 In the original paper I consider only cases in which the formally correct law is subjected to a moral critique but there are other examples in which the formally correct law is set aside on other, pragmatic grounds (e.g., in *b.'Abod. Zar. 26a*, *b.'Abod. Zar. 6b*, *b.B. Meši'a 32b* certain prohibitions are set aside for fear of creating enmity among non-Jews).

18 Dworkin includes a moral critique in the process of arriving at the right answer, so for him the right answer is *ipso facto* the best answer. For the rabbis, the two are separate processes in the specific subset of cases I identify and analyze.

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So what have I proved? That the rabbis are theoretical monists? No. I have proved that despite programmatic statements of theoretical pluralism and concrete cases of practical pluralism, there are some very clear cases of theoretical monism in rabbinic literature and that should give us pause. Certainly, the Talmud contains instances of *practical* pluralism and some programmatic statements of theoretical pluralism – but it would be a mistake to think these tell the whole story. A complete account of rabbinic legal theory must acknowledge clear instances of both practical monism (which, as Hidary himself notes, far outnumber cases of practical pluralism) and theoretical monism (such as the cases identified in step 3 of my paper). But by the same token, a complete account of rabbinic legal theory would note that in the cases I identify, the rabbis' theoretical monism is hardly robust: for even when they explicitly identify the formally right answer, the rabbis do not necessarily feel bound to follow it. Surely there will be more to say on this topic as more relevant cases are brought to bear, but the central point is this: we must resist the temptation to paint the rabbis as robust theoretical pluralists or robust theoretical monists. We would do well to consider how strains of both theoretical pluralism and theoretical monism might have worked upon one another to create attenuated versions of each.

## Misconstruals of the Original Thesis

At several points in his article, Hidary appears to have misconstrued my argument. In what follows, I attempt to correct these misprisions.

1. "...Hayes compares Ronald Dworkin's notion of "one right answer" with the idea of truth in talmudic law. She finds that the rabbis share the view of legal monism with Dworkin that there exists only one correct answer in a given case, which rabbinic literature terms "*din*"... While Hayes' conclusion that the rabbis sometimes distinguish between various levels of legal legitimacy is, I believe, evidently correct, I disagree with her starting position that the rabbis, like Dworkin, were legal monists" (Hidary, 229-30).

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**Response:** This statement oversimplifies my thesis. It is neither my starting nor my ending position that the rabbis, like Dworkin, were everywhere and always legal monists. Indeed, I open my article by *asking* whether talmudic law can even accommodate a Dworkinian monism given the existence of what I take to be clear statements of theoretical pluralism (Hayes, 79). I ultimately describe a small family of cases that explicitly identify a single correct answer in a manner reminiscent of Dworkin but I go on to argue that even these texts accord the correct answer rather less respect than might be expected (Hayes, 74) – a most *un*-Dworkinian characteristic. I write: “[I]t is often the case that the formally correct norm or ruling is not recommended or followed ... [I]t takes more than theoretical correctness or legitimacy for a teaching or a ruling to be declared the operative halakhah. That is because in rabbinic legal thought, the right answer is not always the best answer. And this is where the rabbis diverge from Dworkin...” (Hayes, 88). In short, my position was and is that despite textual evidence for practical pluralism, and programmatic statements indicative of theoretical pluralism, rabbinic literature contains some halakhic cases explicitly informed by a (weak and un-Dworkinian) theoretical monism. Because I recognize the diversity of the evidence in our sources I do not draw a blanket conclusion to the effect that the rabbis are legal monists, as suggested by Hidary’s phrasing.

I believe Hidary may have been misled by focusing on one particular statement in my article that should have been better phrased. On p. 87 I wrote, “Despite some programmatic pronouncements that celebrate pluralism, talmudic texts that deal directly with norm-creation and adjudication are generally committed to the notion of a single ‘correct’ or right answer (legal monism).” While I stand by the basic thrust of this statement in its context, I would now replace “generally” with “sometimes” because the commitment to the notion of a single right answer is *explicit* in only some cases, leaving us in the dark regarding other cases. Nevertheless, even this passage from my article does not claim that the rabbis are everywhere and always monistic and

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acknowledges programmatic pronouncements of theoretical pluralism. My goal in this passage was to highlight the distinction between thematization and praxis.<sup>19</sup> Programmatic texts may express one commitment but in praxis we can sometimes see another commitment at work. Not always, and probably not even generally. In any event, I clearly do not make the strong claim for Dworkinian monism attributed to me in the opening paragraph of Hidary's article.

2. In reference to the oft-cited programmatic statements that assert multiple halakhic truths, Hidary writes: "Hayes finds these statements to be inconclusive, first because they can be interpreted in different ways, although she only discusses the first two examples on this short list. I doubt, however, that one could interpret all such statements as reflecting monism, and certainly the sum total of them makes a strong case for pluralism" (233).

**Response:** As indicated in the original article, I actually subscribe to the view that there *are* programmatic statements of theoretical pluralism in rabbinic literature<sup>20</sup> (just as there are programmatic statements of theoretical monism). In observing that these statements – the "poster children" of talmudic pluralism according to Steven Fraade (Hidary, 232) – are inconclusive, I meant two distinct things. On the one hand, I was being entirely descriptive: it is a simple fact that the texts *are* interpreted differently by different scholars and therefore they have not – as a matter of fact, not opinion – served as conclusive evidence for theoretical pluralism *or* monism. As Moshe

19 I borrow these terms from Steven Fraade, "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization," *AJS Review* 31 (2007): 1-40. In reference to the question of polysemy and pluralism, Fraade uses the term praxis to refer to the rabbinic textual practice of creating arrays of multiple interpretations or legal pronouncements, and the term thematization to refer to "passages, often narrativized, which portray rabbinic polysemy or pluralism not just as textual practices, but as ideologically upheld ... values, even if simultaneously problematized" (p. 4).

20 See Step 1, above.

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Halbortal demonstrates,<sup>21</sup> commentators from the medieval period on have disagreed on whether some of these “poster children” express a theoretical/philosophical pluralism or monism. It therefore seems to me to be uncontroversially true to say that these texts are inconclusive. The very fact that scholars like Boyarin, Na’eh, Fraade, Hidary and *myself as it happens* interpret many of them as expressing theoretical pluralism while other scholars like Ben-Menahem (ironically enough) and Elman interpret some of the same texts as expressing theoretical monism means that *by definition* they are not conclusive texts.

I refer to these texts as inconclusive in another sense: they are not definitive because they are not the entirety of the data available to us. Methodologically speaking, we must be wary of basing our assessments of rabbinic concepts solely or even primarily on self-consciously ideological texts of this kind. A “more reliable way to approach the question of whether rabbinic law is committed *in practice* to the notion of one right answer is to examine cases and rulings rather than (or at least in conversation with) programmatic declarations” (Hayes, 80). I would probably now emend this statement by deleting “rather than” because as it stands, it implies a denigration of programmatic statements vis-à-vis practical cases and rulings, and that is too strong. But I stand by the claim that we must consider programmatic statements in conversation with texts that deal with practical cases and rulings and it is in this sense that programmatic texts taken alone are inconclusive.

This point is acknowledged by Hidary himself in the sentence immediately following the sentence quoted above: “Hayes argues that programmatic statements may not represent how the rabbis actually view the law when legislating and deciding cases. I fully agree that programmatic statements do not make a definitive case ... certainly one must analyze halakhic texts that relate to pluralism in order to get a full picture” (Hidary, 233-34). So far then we are in complete agreement,

21 Halbortal, *People of the Book: Canon, Meaning and Authority* (Cambridge, Mass.: Harvard University Press, 1997), 54-71.



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but Hidary continues, “nevertheless, these statements do provide a context within which we can read halakhic texts. Knowing that the rabbis thought about the issue of pluralism and made broad claims for that position makes it at least plausible that they would apply it in halakhic matters as well.” Plausible, yes, but no more plausible than the alternative claim that they did *not* apply it in halakhic matters. Why? Because the relationship between thematization and praxis in rabbinic literature is complex. One example must suffice: The Babylonian Talmud contains a number of aggadic traditions of a programmatic nature that praise the wildly creative midrashic techniques of early rabbinic authorities. It would be easy to conclude on the basis of these texts (and indeed, for generations it *was* concluded) that rabbis of the classical talmudic period embraced and employed such techniques wholeheartedly, feeling none of the apologetic self-consciousness that would arise in the post-talmudic period. However, a close look at actual cases of scriptural exegesis in the amoraic period reveals that midrashic pyrotechnics were all but abandoned, suggesting a negative view of such exegetical excesses despite a rhetoric of praise.<sup>22</sup> This is not the only instance in which thematization and praxis do not align, and we must gather both kinds of evidence if we are to arrive at a full – albeit complex and conflicted – understanding of the topic at hand. In short, programmatic statements should not predispose us to read particular cases in a particular way. Each text or family of texts must be interpreted according to the evidence internal to it.

3. Hidary misconstrues my objections to David Kraemer’s work.<sup>23</sup>

22 For a discussion of this phenomenon see my “Displaced Self-Perceptions: The Deployment of *Minim* and Romans in Bavli Sanhedrin 90b-91a,” in *Religious and Ethnic Communities in Later Roman Palestine*, ed. Hayim Lapin (College Park, Md.: University of Maryland Press, 1998), 249-89. For a discussion of other cases of divergence between thematization and practice see my “Rabbinic Contestations of Authority,” *Cardozo Law Review* 28 (2006): 123-41.

23 Kraemer, *Mind of the Talmud*.

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As a first example, he writes that my arguments “are insufficient to divorce the Talmud from all forms of pluralism” (235-36).

**Response:** It should be clear from the foregoing that I have no interest in, and am not seeking to divorce the Talmud from, all forms of pluralism. I have acknowledged that the Talmud contains cases of practical pluralism (indeed to deny what is so uncontroversially true would be absurd) and I have further acknowledged the existence of programmatic statements that many (including myself) see as evidence of theoretical pluralism (Hayes, 79, 87; though in fairness I note that some scholars do not interpret some of these texts as evidence of theoretical pluralism). So again, I have no interest in divorcing, and would disagree with the very attempt to try to divorce, the Talmud from all forms of pluralism.

Nevertheless, Hidary (236-37) rehearses standard scholarly descriptions of the Talmud’s dialectical and argumentative character (quoting Halivni, Kraemer, Rubenstein, and Boyarin) to counter the view that no form of pluralism exists in the Talmud. He might have cited my own work in this connection. In 1997, I wrote: “The Talmuds (particularly the Bavli) are not law codes (i.e., registers listing the practical halakhah) so much as they are works of legal argumentation and analysis which tend to open up rather than to foreclose halakhic possibilities.”<sup>24</sup> Thus far then, we agree: The Talmud contains a good deal of dialectic

24 See Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah* (New York: Oxford University Press, 1997), 25. See also p. 20 (“Not only does the Babylonian Talmud contain the teachings of amoraim extending over a much longer period of time than that covered in the Palestinian Talmud, but the later amoraic material is of an entirely new character: dynamic argumentation, more precise legal and rhetorical terminology, and more extensive and rigorous dialectic”), and p. 21 (“earlier traditions were more fully embedded in the complex rhetorical and dialectical framework so characteristic of the Bavli” and “for the Bavli ... the Mishnah is but a point of departure for lengthy and involved debates and dialectical discussions that take on a life of their own in the later layers of material”).

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and argumentation. But the question is – what is the meaning of the dialectical and argumentative form? Does it bespeak a commitment to theoretical pluralism? Hidary (234) suggests that it does and endorses Kraemer’s claim that “if they are willing to debate the issue, they must agree that there are at least two possible answers or solutions.”<sup>25</sup> Similarly, Hidary adduces the well-known dispute form so characteristic of the Mishnah as “suggestive” of theoretical pluralism (237).

First, let me invoke against these claims principle 3, which applies to argumentation, dialectics, and dispute formulae as much as it applies to practical pluralism: if the legitimation of two distinct views (practical pluralism) does not automatically entail theoretical pluralism, then certainly the mere investigation of two distinct views through argumentation and dialectic cannot be adduced as evidence for theoretical pluralism without further ado. Argumentation is engaged in, dialectical pursuit of rejected opinions is undertaken, and disputes are preserved *not only* by persons committed to theoretical pluralism, but also by persons seeking to gain greater certainty about a single correct answer. To paraphrase the medieval talmudist, R. Isaac Campanton: the truth is reached by raising doubts and objections. Thorough consideration and rejection of not-X brings greater certainty regarding X, a goal that would appeal to a monist. So there is no *necessary* connection between argumentation and a commitment to theoretical pluralism any more than there is a necessary connection between argumentation and a commitment to theoretical monism.<sup>26</sup> The *form* of rabbinic literature is inconclusive either way.

25 Kraemer, *Mind of the Talmud*, 102.

26 Hidary himself seems to recognize that there is no necessary connection between characteristic features of rabbinic literature and theoretical pluralism since he often frames his conclusions in tentative terms. So for example, the presence of multiple named opinions in the Mishnah only “suggests” the pluralistic attitude “that all of these opinions are authentic parts of the canon” (237).

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Second, there is a fallacy in Kraemer's claim: agreeing that there are two *possible* answers or solutions is not necessarily the same as agreeing that there are two *correct* answers or solutions (in the sense of authentic, not merely valid). It can simply indicate that one believes there are two *candidates* for the title of "correct" answer and that by engaging in argumentation one might soon be able to disqualify one of the candidates and discover the single correct answer. (Of course, one's arguments may fall short.) Again, the phenomenon of argument does not entail a commitment to either theoretical pluralism or theoretical monism.

A similar leap of logic occurs in Hidary's description of *m. Ed. 1:5*, a famous passage that "explains why the Mishnah includes minority opinions that have been rejected for halakhah" (237-38). He writes: "The majority opinion there states that a future court could agree with the minority opinion and overturn the current decision. According to this explanation, the minority opinion also has truth value. It has been rejected normatively for the time being but is still true at the theoretical level. This reveals an attitude of theoretical pluralism" (238). Hidary tells us that the opinion is preserved because it is true, but there is no reference in this passage to the authenticity or "truth" value of the rejected view (e.g., terms like "*din*" or "words of the living God" do not appear here). Strictly speaking, the text says only that an opinion rejected as the valid halakhah by one court should be preserved in case a later court wishes to validate it as the established halakhah instead. That's it. We don't know why. Hidary assumes that a court would only adopt an opinion it deemed to be authentic. Against this, we may invoke principle 1: Legitimacy (the fact that a norm is established as the halakhah) is proof of validity, but it is not proof of authenticity. That the rabbis are willing on occasion to legitimate a norm that they consciously understand not to be the authentic or formally correct law is amply and explicitly attested in several sources. Pragmatic considerations, moral concerns, or new circumstances may lead a court to favor the institution of a rejected opinion, without regard for its authenticity, and so we can

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infer nothing about either theoretical pluralism or *theoretical monism* from the preservation (and later resurrection) of rejected court rulings.

In his footnote 25, Hidary writes: “It is ironic that Hayes should criticize Kraemer for citing texts that do not use the word ‘*emet*’ considering that Hayes herself ... shows that ‘*emet*’ in talmudic literature generally does not relate to the truth value of a law but only to its procedural validity.” Evidently the structure of my argument at this point in the article was obscure. My argument is this: Kraemer claims that the rabbis are concerned with questions of truth. I point out that in making this claim, Kraemer relies on numerous texts that contain no *linguistic* markers of theoretical truth – so for example, the word “*emet*” and its derivatives do not appear at all. I then go on *in the immediately following section* to point out that even “*emet*” and its derivatives cannot always be relied upon as indicating a single correct (authentic) ruling. I show that many “*emet*” phrases that have been construed as references to authenticity, refer only to a lack of corruption. Nevertheless, I submit, there are a few contexts in which “*emet*” terms seem to indicate truth in the sense intended by Kraemer – and in those cases a single theoretical truth rather than multiple truths appears to be indicated. I devote a few pages of discussion to these suggestive texts, before demonstrating that another term – *din* – even more certainly and consistently points to a single theoretically correct answer.

In short, it should not be imagined that I was *recommending* to Kraemer that he focus on texts employing the term “*emet*” without further ado, as should be apparent from the fact that in the very next paragraph I go on to assert that the term is not reliably used to indicate correctness in all but a few cases (and in those cases, by the way, it is used rather monistically). As I note on p. 107, n. 63, I see only seven cases in which “*emet*” terms *point towards* a correct answer rather than a non-corrupt procedure. This is a simple linguistic observation: in most judicial contexts “*emet*” means non-corrupt (a true judge, for example, is one who does not take bribes) but in a few it does not. Interestingly, the common denominator in these few exceptional texts is that they

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contrast a true judgment with some other process or behavior (arbitration/compromise, acting *lifnim mi-shurat ha-din*) that refrains from declaring the innocent to be innocent and the guilty to be guilty. This would imply that a true judgment is one that declares the innocent to be innocent and the guilty to be guilty rather than seeking a compromise that keeps the peace, or acting mercifully. This use of “true” is closer to “correct” than to “non-corrupt” so my original assertion is, I believe, justified: in these texts, the term “*emet*” is used differently from the way it is used in most other judicial contexts. It veers much more sharply towards indicating a correct answer of some kind, in contrast to compromises or acts of kindness that are less concerned with giving plaintiffs their proper due (see *t.Sanh.* 1:3).<sup>27</sup>

27 In the remainder of his footnote 25, Hidary dismisses my claim that in these few cases the term “*emet*” moves away from simply meaning “non-corrupt” and begins to signal a correct answer. His objections are not persuasive. Regarding *Sifre Deut.* 17 he says that I point out that “*emet*,” or truth, “refers to arbitration, which is surely not the correct judgment but only a compromise agreement.” This is a misreading not only of me but of the original source. I do not say that arbitration is what is meant by true judgment; rather, I say that arbitration is what is meant by *true judgment when it is balanced by peace*. I wrote that the “reference to **peace and truth** in judgment is interpreted as referring to the non-judicial process of arbitration” – *peace and truth* as opposed to truth alone. The original source makes this distinction very clear. The source is reflecting on Zech. 8:16’s demand for a “judgment of truth and peace” and wonders what such a judgment might be: “what kind of peace includes a judgment of truth?” The answer helps us to understand the difference between a judgment of truth *simplicitur* and a “judgment of truth *and* peace” (i.e., truth combined with peace). The text teaches that the former (a true judgment) is rendered by regular judicial proceedings, while the latter (truth combined with peace) is arbitration or compromise. The same argument is made in *t.Sanh.* 1:3, but again Hidary seems to misread the text. The second part of the text does not equate a “judgment of truth” with arbitration, as he asserts. On the contrary, it explicitly understands arbitration to be a judgment of truth *moderated by or combined with considerations of peace* (“if so, then what is the judgment of truth *that also contains peace*? Say: it is arbitration”). This text is even more explicit in setting up truth (whereby one party is declared to be right and the other wrong) and peace as seemingly irreconcilable extremes.

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It does so as part of a rhetorical strategy to underscore the ostensible impossibility of Zech. 8:16's demand that we execute "the judgment of truth *and* peace." The process that combines both truth and peace, it turns out, is arbitration, a process in which judgment is moderated by or subordinated to considerations of peace, mercy, etc. This particular understanding of a "judgment of truth and peace" is contested by other sages. Some see arbitration as a perversion of strict justice. Others offer a different understanding of Zech. 8:13's requirement of a "judgment of truth *and* peace," arguing that the two should not be understood as being combined in a single moment of arbitration. Rather, we fulfill the demands of both truth and peace in successive stages. First one gives a judgment of truth by engaging in the regular judicial process that declares the innocent to be innocent and the guilty to be guilty (a turn of phrase that implies one declares what is theoretically true, not merely legally true). After that, one looks at the human impact of the judgment and acts to address the hardship that may be created by the "true" or "authentic" ruling. (This two-step process of determining the theoretically correct law and then subjecting it to a moral critique is very similar to the attenuated monistic "*din*" cases I identify at the end of the original paper.) Other sources that juxtapose truth and peace in the context of judgment (like *m.'Abot* 1:18 and 6:6) are probably relying on this same distinction (which we may paraphrase as the distinction between being correct and being kind).

Hidary objects to my analysis of *b.'Abod. Zar.* 4b in which God's rendering a true judgment (applying the law strictly and fully) is contrasted with his judging in a manner that is *lifnim mi-shurat ha-din* (a term used elsewhere to indicate that one waives one's right to apply the law fully). From the text, it is clear that true judgment would result in the judged party receiving his proper or correct due, while a judgment *lifnim mi-shurat ha-din* would not. Again, I make the simple linguistic claim that the term "*emet*" here signals a ruling that is correct in so far as it is in accordance with the unadulterated law, as distinct from a ruling motivated by or mixed with considerations of mercy. Hidary, however, argues that *lifnim mi-shurat ha-din* refers to settling for a compromise position. This is not the meaning of the phrase *lifnim mi-shurat ha-din*; it is not a compromise but a merciful and pious waiving of what is one's true legal rights or proper due, and we cannot simply assimilate this case to the discussions of arbitration in the sources cited above. The opposition of a true judgment and a judgment *lifnim mi-shurat ha-din* seems to parallel the opposition between a judgment that follows *shurat ha-din* and a judgment *lifnim mi-shurat ha-din*, i.e., a judgment that is correct in so far as it follows the law vs. a judgment that deviates from the strict and formally correct law out of mercy, piety, etc.

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5. Finally, on p. 237, Hidary writes, “Hayes harps on Kraemer’s definition of truth as ‘the way things really are,’ thus setting up a dichotomy between the extremes of philosophical truth and practical legislation.”

**Response:** What Hidary rightly senses here is that I refuse to abandon a conceptual distinction that Kraemer insists can be elided – the distinction between validity and authenticity, between law and philosophy. In Kraemer’s book, rabbinic assertions of valid law are taken without sufficient textual support to be assertions of authenticity in the strong sense of metaphysical truth – an elision which, *pace* Hidary, is simply posited (rather than argued) and “harped on” not by me but by Kraemer throughout his book. So, for example, adjectives like “sharp” applied to legal views are assumed to mean “true” even

Hidary also objects to my citation (p. 120 n. 87) of *Sifre Num.* 134 as one of seven cases in which the term “*emet*” points towards an answer that is correct and not merely non-corrupt. Hidary may disagree with my interpretation of what is happening in the passage, but the linguistic point remains – the term “*emet*” is more a measure of correctness than non-corruption in this text. The text explores what it is for God to give a true judgment and, like *b.‘Abod. Zar.* 4b, sets up a dichotomy between God’s attribute of justice and his attribute of mercy. The surprise in this text (deviating from *b.‘Abod. Zar.* 4b) is that the judgment rendered according to God’s *mercy* is deemed the “true judgment.” This is the only text I mention that approaches Dworkin’s model, according to which the (morally) best answer is by definition the right answer. But again, one need not accept my interpretation of the text to accept that the term “*emet*” is used in a manner that differs from its standard usage in judicial contexts.

Thus, I stand by my initial *linguistic* observation concerning these few exceptional “*emet*” cases: by contrasting a judgment of truth (an ordinary determination of right and wrong) with (a) a judgment that opts not to adopt the strictly or theoretically correct law (*lifnim mi-shurat ha-din*, *b.‘Abod. Zar.* 4b), or (b) a judgment of *truth mixed with peace* (arbitration or compromise without concern for right and wrong, *Sifre Deut.* 17 and *t.Sanh.* 1:3), or by proposing a two-stage process of declaring first what the law strictly requires and then doing what is kind (*t.Sanh.* 1:13), these sources use “truth” language to signal a correct ruling. *In this sense, they differ from many other sources that employ truth language in a judicial context to refer only to a lack of corruption.* However, a more certain and enlightening indicator of the theoretically correct or true law, I go on to argue, is the term “*din*.”



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when they demonstrably mean only “sharp” and are connected with views that are false! I see no evidence that the rabbis, *in their halakhic discussions*, understand themselves to be uncovering ontological or metaphysical truths about the world and Kraemer does not convince me that the rabbis should be viewed as philosophers rather than lawyers, simply by asserting (rather than showing) that they were engaged in the pursuit of metaphysical truth. A full treatment of Kraemer’s book was not possible in the original article and is not possible here. But neither is it necessary, for I adduced Kraemer’s work in order to make a simple and general observation: in many instances, Kraemer, like Ben-Menahem, looks for rabbinic attitudes to truth in the wrong places, sometimes advancing texts that deal only with validity and not with authenticity, with practical pluralism and not with theoretical pluralism.

### The famous five

We now arrive at the heart of the matter. The bulk of Hidary’s article is an attempt to rescue Data Set 1 – the five Bavli texts cited by Hanina Ben-Menahem – as evidence of theoretical pluralism. Hidary’s important criticisms and insightful arguments have greatly helped me to better understand my own position and its implications. I hope that a fuller and more careful articulation of my argument will make my position clearer and more persuasive.

As noted in my original article (Hayes, 79), the cases cited by Ben-Menahem all involve the use of a particular phrase (with some variation) in either Aramaic or Hebrew: *de-avad keX/haki avad, de-avad keY/haki avad* (Aramaic) = *asah keX asah, she-asah keY asah* (Hebrew) = “he who has acted in accordance with Rabbi X [or thus], has acted; he who has acted in accordance with Rabbi Y [or thus], has acted.” The phrase appears in the Babylonian Talmud five times (*b.Ber.* 11a, 27a, *b.B. Bat.* 124a, *b.Šabb.* 61a, and *b.Šebu.* 48b) in contexts of controversy for which no clear resolution is found. In each case, a stalemate is reached, evidently because neither side has managed to persuade the other of its

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opinion. In three of the five cases we read that *since the halakhah has not been stated* (=established) in accordance with one view (as opposed to the other), a third authority (twice a named tradent, once the anonymous voice of the Talmud) rules that anyone who has acted in accordance with Rabbi X, has acted, and anyone who has acted in accordance with Rabbi Y, has acted. (The other two cases employ slightly more abbreviated formulations.)

Ben-Menahem holds that these cases are evidence of theoretical pluralism because a single ruling advances two incompatible norms without any hierarchical ordering between them.<sup>28</sup> He concludes that in these few instances, talmudic law “grants judges full autonomy to make a choice between conflicting and incompatible norms and that consequently in those instances no one uniquely correct answer exists.”<sup>29</sup> Hidary endorses this reading and argues that these five cases “project a view of pluralism at both the practical and theoretical levels” (241).

Let me state my view clearly, since I believe it may have been misconstrued. I understand these cases to be excellent examples of *practical* pluralism, in which alternative legal positions are deemed legitimate. But as we know from principle 3, practical pluralism does not automatically entail, prove, or even imply theoretical pluralism. Two views *can* be legitimated because both are deemed authentic (theoretical pluralism). However, two views can be legitimated because, although we believe there is only one authentic answer (theoretical monism), we don’t know which, *or even whether*, one of these is the authentic answer, *or* because we sometimes find it necessary or even desirable to legitimate an inauthentic view rather than a known authentic view (principle 2). My point is this: in the absence of any explanatory information, a case of practical pluralism can tell us nothing about the theoretical commitments that underlie it, one way or the other.

28 Ben-Menahem, “Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?” 168.

29 *Ibid.*, 165.

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Interestingly, three of the five cases *do* provide an explanation for their practical pluralism and that explanation makes no mention of the authenticity or correctness of both views. In three of the five cases the decision to legitimate two different halakhic views is explicitly attributed to a breakdown in the validation procedure. Two different views are promulgated by two persons or schools empowered to teach halakhah, but the hierarchical ranking or relative authority of the two is either unknown or in dispute.<sup>30</sup> Because of this procedural aporia, so the texts tell us, no final determination of the halakhah can be made.

As noted above, legal systems will devise additional rules or strategies to resolve procedural impasses and avoid paralysis in such situations. Declaring both positions legitimate and allowing individuals the freedom to choose which of two recognized authorities they will follow (i.e., adopting a practical pluralism) is just one strategy for coping with cases of conflicting norms promulgated by persons or institutions whose authority is equal or whose hierarchical ranking is unknown or in dispute. The legitimacy granted in these two cases is a legitimacy deriving from the validation process (and its “repair”) rather than authenticity. The texts do not say that one may follow either view *because both are correct*; the texts say that one may follow either view because we are ignorant or uncertain which view prevails in the case of a conflict between these two social sources of the law. By invoking a strategy that “patches” the breakdown in the validation procedure, the views of two authorities of equal or unknown authority can be upheld as legitimate, as halakhah.<sup>31</sup>

30 “Since the halakhah has not been stated [established] either like Rav and Shmuel or like R. Elazar...” (*b.Šebu.* 48b); “Since the halakhah has not been stated either like this master or like that master...” (*b.Ber.* 27a); “He was in doubt whether the halakhah follows Rabbi [when in dispute] with his colleague but not his colleagues or whether the halakhah follows Rabbi [when in dispute] with his colleague and even with his colleagues” (*b.B. Bat.* 124a-b).

31 I use the term “legitimate” here only provisionally. As will become clear below, these cases likely grant an attenuated form of legitimacy that amounts to permission but lacks a full-fledged endorsement.

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This view was expressed somewhat imperfectly in my original article as follows (83-84):

These observations suggest that the five examples cited by Ben-Menahem are not best understood as endorsing incompatible norms as equally correct answers to a legal question. On the contrary, these passages address a situation in which the mechanisms for determining the halakhah or validating one view as the correct halakhah in cases of conflicting teachings have failed. This is not to say that there are two valid answers (*pace* Ben-Menahem), but rather that there are two candidates for the title of “right answer” between whom we lack the means to choose. The implication is that there is indeed a single right answer ... but we have no means available to determine which view should prevail as the halakhah. Without prescribing one view or the other as the halakhah to be followed, amoraic authorities declare that actions taken in accordance with either view are – *ex post facto* – allowed to stand without challenge. This should not be construed as a declaration that both views are correct and carry an equal endorsement as the course of action to be taken. Thus the “*de-avad keX/haki avad*” cases are not evidence for a pluralistic view of law in the Talmud.

Hidary is misled by some of the poor phrasing in this paragraph so I will gloss key phrases susceptible to misconstrual before addressing his claims directly.

(1) Hayes: “...the five examples ... are not best understood as endorsing incompatible norms as equally correct answers.”

This line means that it is certainly *possible* to read these texts as asserting the authenticity or truth value of both positions, but given the complete absence of any assessment of the views as the “*din*,” as “words of the living God,” etc., we lack any textual support for so doing. *While the Ben-Menahem/Hidary explanation is not impossible, a better explanation is that incompatible views are recognized in order to avoid paralysis in the face of a procedural breakdown.* This explanation

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is better because it finds *explicit textual support in three of the five cases*. I did not say my reading is certain – I said it was better. I did not say that it is *wrong* to claim that the views are authentic, but only that we simply *do not know* and cannot ascertain the authenticity of the two views in question due to a lack of information in these texts – they are *inconclusive* on that point one way or the other. On the other hand, while we do not know whether both views are deemed to be *authentic*, we *do* know that both views are granted a degree of legitimacy (see below). Of course, in line with principle 1, legitimacy is not proof of authenticity.

(2) My statement that “This is not to say that there are two valid answers (*pace* Ben-Menahem), but rather that there are two candidates for the title of ‘right answer’ between whom we lack the means to choose” was poorly formulated. Ben-Menahem’s claim is, of course, that there are two *authentic* answers (not simply valid answers), but I hope the parenthetical insertion “(*pace* Ben-Menahem)” helped to make clear that I was denying Ben-Menahem’s central claim that these texts assert authenticity. Also, I put scare quotes around “right answer” to indicate that in this context “right” does not mean authentic, but merely legitimate. Doing so may have placed too great a burden on the reader to accurately assess my meaning. The sentence would have been clearer if written this way: “This is not to say that there are two *authentic* answers (*pace* Ben-Menahem), but rather that there are two candidates for the title of legitimate halakhah, between whom we lack the means to choose.” Despite the weakness of the original sentence, I believe the surrounding sentences make it clear that in my view these five cases are not concerned with the relative authenticity of the two views but with their relative validity and due to a procedural aporia adopt a strategy of double legitimation to avoid paralysis.

(3) Hayes: “The implication is that there is indeed a single right answer ... but we have no means available to determine which view should prevail as the halakhah.” This sentence again uses “right” not to mean authentic but to mean legitimate halakhah, as may be seen by the alternation between “right answer” in the first part of the sentence and

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“halakhah” in the second part of the sentence. Here again, I have probably placed too great a burden on the reader to accurately assess my meaning. The sentence should have been written this way: “The implication is that there is indeed a single legitimate answer (which would be practical monism) ... but we have no means available to determine which view should prevail as the halakhah.” By this I mean that the discourse of procedural impasse and the explicit reference to a failure to determine the halakhah in three of these five cases *implies* very strongly that a single *legitimate* answer (practical pluralism) would have been possible were it not for the uncertainty over the hierarchical ranking of those who promulgated the two views in question. Thus, when we read in *b.B. Bat.* 124a-b that “[R. Ḥiyya] was in doubt whether the halakhah follows Rabbi [when in dispute] with his colleague *but not* his colleagues, or whether the halakhah follows Rabbi [when in dispute] with his colleague *and even with* his colleagues,” the very clear implication is that *were we certain of the authority of Rabbi relative to his colleagues we would declare a single halakhah.*<sup>32</sup> Since the means for declaring the single halakhah (practical monism) are not available to us, we must have recourse to an alternative strategy in order to avoid paralysis – the strategy of double legitimation.

(4) Hayes (84): “Without prescribing one view or the other as the halakhah to be followed, amoraic authorities declare that actions taken in accordance with either view are – *ex post facto* – allowed to stand without challenge.” Unfortunately, this sentence generated a misunderstanding of my view, leading Hidary to adopt a line of argument that was unnecessary on the one hand and, while illuminating in an important way, failed to prove what he believes it proves on the other hand. Let me be clear about what I was and was *not* saying in this sentence before considering Hidary’s argument in detail.

32 Even the more abbreviated statement in *b.Šebu.* 48b and *b.Ber.* 27a to the effect that the halakhah hasn’t been established in accordance with authority X or authority Y, points to an unusual procedural impasse that is a striking exception to the norm, in which one view is ranked above another.

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In this sentence I make a very simple observation about the *form* of the phrase used to legitimate the two incompatible norms. To understand this purely *formal* observation, we need to understand the three basic forms that halakhic statements can take and the way in which *all three* forms function to provide guidance both prior to a case, decision, or act and subsequent to a case, decision, or act (i.e., both *ante factum* and *post factum*).<sup>33</sup>

Form 1. A single *ante factum* clause employing participles or infinitive phrases. The basic form of such a clause is: “For situation X – one does/does not do A” or “it is permitted/prohibited to do A.”

This is the basic and most classic form of halakhic statements. *Formally* speaking, the clause is phrased in *ante factum* terms: prescriptively, one “does” or “may do” A in any given case of X that one encounters. Nevertheless, the locution conveys *post factum* information by clear implication, because of the way statements of law work. To permit something legally is precisely to say that it will not be subject to challenge or dispute as a point of law but *will be recognized post factum* (meaning *after the act is performed or the case decided*). So a clause granting *ante factum* permission functions also as a grant of *post factum* legitimacy. The latter need not be stated explicitly, because legal statements would be nonsense without our ability to know that *ante factum* permission guarantees *post factum* legitimacy.

33 What follows is, I believe, fairly intuitive for those who have spent some time with halakhic texts. I make no pretense of having investigated this matter scientifically – such an investigation would certainly be a worthwhile undertaking but it falls beyond anything I can do in preparing this already too lengthy response. In all likelihood there are some interesting exceptions that deviate from the general description I am about to present. Nevertheless, I present this rough but common sense categorization of the forms of halakhic statements despite the lack of statistics and detailed illustration, because I believe it is the most effective way to illuminate the sense in which I employed the term “*ex post facto*.”

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Form 2. A single *post factum* clause employing perfects. The basic form of such a clause is: “For situation X – if one did A it is accepted/permitted.”

This form is more rarely employed. *Formally* speaking, the clause is phrased in *post factum* terms: assuming that one did X, X is accepted. Nevertheless, it conveys *ante factum* information by clear implication, again because of the way statements of law work. To say that a completed act (whether in the temporal past or future) is deemed legitimate is precisely to say that the act was permissible, if not fully legitimated, from the outset.<sup>34</sup> (Exceptions to this default assumption are signaled by form 3, considered below). So a clause granting *post factum* permission is effectively also a grant of *ante factum* permissibility. The latter need not be stated explicitly, because legal statements would be nonsense without our ability to know that unqualified *post factum* legitimacy guarantees *ante factum* permission. To make this point more concretely, I can say “For the purposes of determining American citizenship – if you were born in the United States, you are a citizen.” The formal structure happens to be *post factum* because the clause employs a grammatical form that indicates a *past* act – the act of having been born. Formally speaking, it tells me that *having been born* in the United States, I am a citizen. However, unless and until I am told otherwise, I can infer the *ante factum* rule that a child yet to be born in the United States will be permitted to claim American citizenship.

Form 3. A double *ante factum* and *post factum* clause employing a participle and a perfect. The basic form of such a clause is: “For situation X – one does not do A, but if one did already do A, it is accepted.”

This form is employed on the few occasions when we must intervene to overturn the default assumptions operative in functioning legal systems

34 That this permission falls short of the full legitimation granted by form 1 will be discussed below.



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and draw a distinction between the status of an act or ruling *ante factum* and its status *post factum*. For as our discussion of forms 1 and 2 suggests, it is the default assumption of most functioning legal systems that the permissibility of an act or ruling is the same both *ante factum* and *post factum* and that statements of legitimacy – whether phrased formally as an *ante factum* or a *post factum* clause – grant permission to acts or rulings both *ante factum* and *post factum*.<sup>35</sup> In most legal systems, exceptions to this default assumption will need to be explicitly signaled by a complex statement that distinguishes the *ante factum* situation and the *post factum* situation. In general, where no distinction is made we may assume that *ante factum* permission entails *post factum* legitimacy, and *post factum* legitimacy entails *ante factum* permission.

*Formally* speaking, form 3 employs two clauses. The first clause, phrased in *ante factum* terms and employing a participle or infinitive phrase, prohibits an act (or at least does not fully permit it). The second clause, phrased in *post factum* terms and employing a perfect, states that if the act is performed it will, after the fact of its having been performed, be deemed legitimate (or at least not invoke punishment for violation) despite its *ante factum* illegitimacy. While the *post factum* clause does not technically cancel the *ante factum* prohibition, it weakens its force and *in effect* “permits” it. Form 3, like forms 1 and 2, gives me information about both the *ante factum* and *post factum* situation. This time the information for both situations must be explicitly spelled out because the two differ. I cannot infer one from the other.

The halakhic statement in the famous five cases cited by Ben-Menahem and Hidary employs the second of the three basic forms

35 Again, this is common sense. It would be nonsensical to say that one is permitted to do X but after one does it, it will not be deemed legitimate. To grant *ante factum* legitimacy is precisely to guarantee *post factum* recognition of the act as legitimate. As for a statement of *post factum* legitimacy, such a statement would not be nonsensical but a certain degree of chaos would ensue if I could not infer *ante factum* legitimacy from the *post factum* legitimacy of an act.

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described here. It is a single *post factum* clause employing perfect verb forms.<sup>36</sup> What I meant when I wrote that the formula declares that actions taken in accordance with either view are – *ex post facto* – allowed to stand without challenge is this: *formally* speaking, the clause is phrased in *post factum* terms. There is no explicit *ante factum* clause, but that doesn't matter. The formula still conveys *ante factum* information by default because of the way statements of law work. In the absence of any notification to the contrary, we may assume that an action or ruling legitimate in the *post factum* situation is permitted *ante factum*.

This then is my understanding of these texts: These five cases employ a *post factum* clause that states explicitly that both of two acts or rulings will be recognized as legitimate *after the fact* of their having been performed or decided. Like all single *post factum* legal clauses (form 2), the formula communicates (without ever explicitly addressing) the permissibility of both views *ante factum*, merely by guaranteeing their legitimacy *post factum*, and so paralysis is avoided.

It should be clear now that I have no objection to characterizing these cases as *having the effect of* permitting a choice of two acts or rulings even *ante factum*. Therefore, following Hidary's own definitions, these texts are all examples of *practical pluralism*, which is the idea that "there exist multiple overlapping paths of legitimate options from which one may choose" (Hidary, 230). But this is as far as we can go, for as we know from principle 3, practical pluralism does not automatically entail or prove theoretical pluralism. There are other possible explanations for practical pluralism than the belief that both ideas are authentic. Given the absence of language reflecting on the truth value of the views in question, and the presence of language pointing to procedural aporia, I maintain that the practical pluralism in these cases is

36 Printed editions and manuscripts attest to the use of perfect forms in these five cases, with the exception of the Oxford ms. for *b.Ber. 27a*, which contains a participle indicated by the presence of a *yod*.

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*better* understood as a strategy for coping with procedural aporia – entailing no judgment as to the authenticity of the views in question.

I will now directly address Hidary’s argument regarding these texts, including some misconstruals of my view:

- (1) Hidary attributes to me the belief that “these statements endorse two opposing opinions not because they are both correct but rather because we have no means to determine which is correct and so we throw up our hands and accept the legitimacy of both even though one of them is wrong” (240).

**Response:** Actually, a more accurate paraphrase of my view is that these statements endorse two opposing opinions not *necessarily* because they are both authentic (that is possible but nowhere indicated) but rather because we have no means to determine which is *the valid halakhah* and so we must have recourse to a strategy that enables us to avoid paralysis and declare both permissible even though some procedural rule unknown or unclear to us might determine that only one of the views should be validated as the legitimate halakhah. As for an assessment of the two views as authentic (correct) or inauthentic (wrong) – that is a matter of pure speculation. It may be that a commitment to theoretical pluralism and a belief in the authenticity of both views underlies this practical pluralism but it is at least equally likely that a commitment to theoretical monism and an acceptance of the phenomenon of practical pluralism regardless of the actual authenticity of the views in question informs these statements. That’s why these statements are *inconclusive* either way.

- (2) Hidary, 241: “That these statements only recognize the validity of a ruling after it has been given but do not endorse both views *ante factum*, argues Hayes, suggests that the rabbis adopt a monistic view. She therefore concludes that “the ‘*de-avad keX/haki avad*’ cases are not evidence for a pluralistic view of law in the Talmud.”

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**Response:** When I described these statements as *post factum* rather than *ante factum* I was making an uncontroversially true observation about the *form of the statement*. In other words, I meant that the statement addresses the legitimacy of *an act or ruling that has been or will have been performed or decided*. Moreover, I never denied that *formally post factum* declarations of legitimacy communicate *ante factum* permissibility – because it would be absurd to do so given the general nature of legal statements.

It is very possible that my emphasis on the *post factum* form of the statement (mis)led Hidary into thinking that my rejection of theoretical pluralism as the most likely explanation for these five cases somehow turns on the *post factum* form of the statement. It doesn't. The *post factum* form of the statement is important to me because although it grants *ante factum* permission, it does so with less "enthusiasm" than an *ante factum* clause would. The difference between: "for situation A, one may do X and one may do Y" and "for situation A, if one did X it is accepted and if one did Y it is accepted" is best illustrated by a concrete example. If I ask my business partner whether I should paint our storefront blue or yellow he might answer in one of two ways. He may say "you may paint it blue or yellow" or he may say "if you were to paint it blue or yellow, I wouldn't object." The first response, employing an *ante factum* form, is a positive endorsement of both blue and yellow as storefront colors. The second response is weaker. My partner is telling me he can live with blue or yellow. While both formulations amount to permission to paint the storefront blue or to paint it yellow, the first formulation has an aura of definiteness about it, perhaps even enthusiasm for both courses of action, implying that my partner thinks blue and yellow are equally meritorious choices. The second formulation has a slightly negative undertone. The sorts of reasons my partner might have for choosing the second

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formulation over the first are (a) he is *unable* to decide between blue and yellow and wants to leave the choice to me; (b) he doesn't care one way or the other; or (c) he thinks the two colors are equally bad choices but he is resigned to my having my way! There are certainly other possibilities. While these two formulations both permit either course of action, the first is a genuine and positive legitimation of the two choices. The second permits, but falls short of, a robust legitimation. Thus, when we speak of *post factum* clauses granting *ante factum* legitimacy we really mean an attenuated form of legitimation, i.e., simple permission.

In our famous five cases, this slight difference in tone combined with explicit references to procedural aporia in three of the five cases, gives the impression (only an *impression*) that practical pluralism is adopted less as an enthusiastic endorsement of the two options on their merits, and more as a result of procedural impasse.

An excellent illustration of the subtle differences signaled by the three forms occurs in connection with the fourth of our five cases (*b.B. Bat. 124a-b*), discussed by Hidary on pp. 244-46. As noted above, R. Hiyya employs form 2 – a *post factum* formula of double legitimation (“whoever did X, etc., and whoever did Y, etc.”) because he is unsure of the rule concerning who prevails in a conflict between Rabbi and his colleagues. By contrast:

Rava said: “One may not act [lit. it is prohibited to act] according to Rabbi; but if he already did, then it was [legitimately] done.” He thought it [the rule about Rabbi and his colleague] was said to incline [towards the sages].

Where R. Hiyya's statement employs form 2 (*post factum* double legitimation from which we infer *ante factum* permission), Rava's statement employs form 3. His statement contains two clauses: (a) an *ante factum* clause employing an infinitive (“it is prohibited

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to act according to Rabbi”) that prohibits one view while permitting the other and (b) a *post factum* clause employing a perfect verb (“if he did it”) that declares even the prohibited view to be legitimate after the fact of having been performed. This text reveals that the difference in formulation correlates to *different degrees of doubt or procedural aporia*. R. Ḥiyya is *entirely* uncertain regarding the relative authority of Rabbi vs. his colleagues and so avoids any *ante factum* declaration of legitimacy. On the other hand, he wants to avoid paralysis, so he adopts *post factum* double legitimation which has the effect of permitting both views without having to make a definitive declaration for either. By contrast, Rava has *less* uncertainty regarding the relative authority of Rabbi vs. his colleagues. He thinks that in cases of conflict the law *inclines* towards the sages. Therefore he is willing not merely to permit but to fully legitimate the sages’ view *ante factum* and prohibit the view of Rabbi. However, since the halakhah only inclines or *tends* to follow the sages in disputes with Rabbi (i.e., it doesn’t always *certainly* follow the sages), he is not so confident of the illegitimacy of Rabbi’s view that he is willing to exclude it entirely, and so he grants it *post factum* legitimacy. Of course, we may imagine that a third authority very sure of the rule governing disputes between Rabbi and his colleagues would have employed form 1 – a simple *ante factum* clause legitimating a single view both *ante factum* and *post factum*.

Thus, despite a functional equivalence between *ante factum* and *post factum* forms (according to both formulations an act is *permitted* in the *ante factum* situation), the two communicate, and likely correspond to, different levels of confidence about or enthusiasm for the legitimacy of the rule in question. Nevertheless, we can agree that whether the motivation for adopting it is indecision, indifference, or something else entirely, the *post factum* form does establish an *ante factum* permission (if not full

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legitimacy) for both views and thus, in effect, a practical pluralism. I believe that the *context* of the passage cited by Hidary from my original article (to the effect that these cases are not evidence for a pluralistic view of law in the Talmud) makes it clear that I was talking about *theoretical* pluralism only; in fact, these passages are very good evidence for practical pluralism.

- (3) Hidary, 241-42: “It is manifest that these formulae do apply *ante factum* based on their contexts. The first case cited above discussed which shoe one should put on first. Rav Yosef declares that one acts properly whether he has put on the right or the left shoe first. How can one understand this statement as being only *post factum*? What is one supposed to do *ante factum*? ... Similarly in the second case, a judge must either rule according to Rav and Shmuel who allow the orphans to swear and collect, or like the sages who do not. The judge cannot simply refuse the case because he cannot decide. This view is affirmed by the statement of Rav Papa ... “Rav Papa said, ‘We do not tear up a document of orphans, nor do we collect with it. We do not collect with it for perhaps we agree with Rav and Shmuel; we do not tear it up because a judge who rules according to R. Elazar has acted [legitimately].’” Rav Papa addresses the case *ante factum* and states that the loan contract should remain unpaid in the hands of the lender’s inheritors and await judgment. If one option were preferable over the other, then Rav Papa should have required that the contract either be destroyed or presented for payment immediately. Thus we can conclude that both Rav Hama and Rav Papa deem both options legitimate even *ante factum*.”

**Response:** It should be clear by now that I do NOT say that these formulae offer no guidance in the *ante factum* situation and so lead to paralysis. These formulae do offer guidance, but that doesn’t change the fact that they do so even when employing a locution that addresses only the *post factum* situation *explicitly*. These statements of double legitimation are formulated as single

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*post factum* clauses. As explained above, a single *post factum* legal clause communicates *ante factum* permission because we typically *infer ante factum* permission from the *post factum* legal formulations.

But here is the interesting thing: a late amora, Rav Papa, offers an alternative solution to the problem of procedural aporia: the solution of compromise. In his view, one can honor both views simultaneously, or more precisely, one can adopt a course of action according to which neither of the original two views is violated but neither is completely fulfilled. Thus, concerning the debt document of an orphan which can be used to collect a debt according to Rav and Shmuel but not according to R. Elazar, Rav Papa states that we don't tear it up because of the principle that one who acts according to R. Elazar has acted, and we don't collect with it because *perhaps* we agree with Rav and Shmuel. This is an alternative strategy for coping with the procedural aporia so explicitly thematized in this text ("a judge who rules according to R. Elazar has acted, but *perhaps* we agree with Rav and Shmuel"). Rav Papa rejects practical pluralism and forges a third, compromise position instead.

Whether one opts for genuine practical pluralism (Rav Ḥama) or tries to honor both views in a compromise (Rav Papa), the larger question of *why* one adopts some such strategy remains. Hidary answers that question by asserting that efforts to legitimate both views (Rav Ḥama's practical pluralism) or honor both through compromise (Rav Papa's solution) are grounded in a belief in the authenticity of both views. In an addendum to principle 3, we may say that not only practical pluralism but also compromise does not entail a belief in the authenticity of both views. Both practical pluralism and compromise are strategies for avoiding paralysis when procedural aporia makes it impossible to establish the halakhah according to one authority. Hidary is correct to say that if one option were preferable over



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the other, then Rav Papa should have declared the halakhah according to it. Rav Papa does not, but that means nothing more than that he does not legitimate one view over the other. The larger question of *why* he doesn't legitimate one over the other remains. There is no textual support for Hidary's assertion that Rav Papa must think both views are authentic (there is no language affirming the authenticity of either view). There *is* textual support for the idea that he is stymied by procedural aporia: language that focuses on the uncertainty over which opinion to follow and so he identifies a strategy to resolve the resulting paralysis.

- (4) Hidary, 243: "Once we confirm that this formula applies *ante factum*, we must conclude that the judge has discretion to choose either possibility. We can therefore uphold Ben-Menahem's argument that in these cases, the judge is granted 'full autonomy to make a choice between conflicting and incompatible norms and that consequently in these instances no one uniquely correct answer exists.' Hayes argues that the formula assumes that 'there is indeed a single right answer,' but that it validates both options *post factum* only because it has recused itself from these cases in which 'we have no means available to determine which view should prevail as the halakhah.' I agree that these cases describe situations of procedural breakdown where neither law has been established as the halakhah. However, this procedural breakdown relates only to the validity of each opinion, not their authenticity. The formula comes to say that although neither has been validated through the usual decision-making process, we will nevertheless consider both options as valid. The formula does not assert that there is doubt regarding the truth value of each opinion at the theoretical level."

**Response:** This passage sets the agenda for the rest of Hidary's argumentation. Hidary is convinced that a proper understanding of the theoretical commitment underlying the famous five cases

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turns on understanding that the declaration of the legitimacy of both views applies *ante factum*. Specifically, Hidary argues that once one sees that the declaration of the legitimacy of both views applies *ante factum*, one is compelled to conclude that both views are deemed authentic. Therefore, in the remainder of his article, Hidary undertakes to prove that the declaration of the legitimacy of both views in these five cases applies *ante factum*.

The problem is that I *agree* that these declarations of the legitimacy of two options, although phrased in single *post factum* clauses, communicate the *ante factum* permissibility of the views. My description of the clause as *post factum* referred to its *form* not its *function*. So Hidary's extensive argumentation devoted to demonstrating the *ante factum* permissibility (and hence practical pluralism) of these cases is unnecessary. Where I disagree with Hidary is in his assessment of the theoretical commitment underlying this practical pluralism. Hidary makes the unwarranted leap from the permissibility of two views (practical pluralism) to their authenticity (theoretical pluralism). He endorses Ben-Menahem's conclusion that allowing a choice between two norms means that "in these instances no one uniquely correct answer exists" – i.e., no authentic answer exists. By contrast, and in keeping with principle 3, I maintain that theoretical pluralism (the simultaneous authenticity of two different norms) does not follow automatically from an *ante factum* declaration of the legitimacy of the two views in question, i.e., from practical pluralism. Thus, I would conclude that allowing a choice between two norms means that "in these instances no one uniquely *valid* answer exists." As for the *authenticity* of the views, the texts provide no information one way or the other (a point that Hidary himself acknowledges in this very paragraph).

As Hidary notes at the end of this paragraph, "The formula does not assert that there is doubt regarding the truth value of each opinion at the theoretical level." This is very true. But

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evidently, Hidary and I interpret this datum differently. Because the texts are entirely silent regarding the authenticity of the two views in question, I maintain that we can draw no conclusions regarding authenticity *one way or the other*. To do so is to go beyond the evidence of the text. On the other hand, the texts *do* express doubt about validity, and for this reason, we have some textual warrant for inferring that the double legitimation is a response to procedural aporia, a strategy for avoiding paralysis when standard validation procedures fail. But this is not how Hidary interprets the fact that the formula expresses no explicit doubt about the truth value of the two views. Hidary seems to take it for granted that the reason authenticity is not questioned is because it is *assured*. Not only is this an *é silencio* argument, it contradicts what we know about the halakhic process – that authenticity does not need to be present in order for a view to be established as the halakhah and, as we demonstrated in principles 1 and 2, the rabbis do on occasion legitimate in-authentic laws.

This is what it comes down to then: Hidary construes the text's silence regarding the authenticity of the views in question as highly suggestive evidence that authenticity of the views is unquestioned and certain. I construe the silence as silence. We can infer nothing about a matter when nothing is said about the matter. And given that the texts talk about something else – validity – it seems much more likely to me that the authenticity of the views is a matter of complete indifference while their validity (and the inability to ascertain it) is the motivation for adopting a strategy of double legitimation.

Hidary adopts a final and extremely interesting line of argumentation. He cites four cases of procedural aporia that he feels can be fruitfully compared with our famous five cases. This is a very important insight and Hidary has done us a great service by coralling this material. As he astutely points out, in these four cases the problem of procedural aporia

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– of not knowing which view should be validated as the established halakhah – is resolved in some way *other* than declaring both views to be permissible with the result that a single ruling or course of action is recommended (practical monism instead of practical pluralism). We may summarize these other solutions as follows:

- (1) Might makes right – an undesirable and rarely invoked principle that essentially permits parties to take the law into their own hands (*b.Git.* 60b, “whoever is stronger prevails”);
- (2) Legal presumption, according to which we simply assume an existing situation to be valid until rebutted by evidence – good for cases in which there is a stable status quo (*b.Ketub.* 64a, “if she is in possession of it then we do not take it from her”);
- (3) Compromise – usually for matters of ritual law because it is often possible to fulfill both views sequentially, or to combine both views in a single action (*b.Pesah.* 115a; see also the rejected solution of Rav Papa in *b.Šebu.* 48b discussed above);
- (4) Stringency – appropriate when the difference between views is a difference in degree so that by acting in accordance with the more stringent view one automatically satisfies the less stringent view (*b.‘Erub.* 46a is cited by Hidary as a case in which stringency *could* have been adopted but wasn’t).

Hidary thinks these cases are important *contrasts* to the famous five because in each instance of procedural aporia they find a way to establish a single course of action and hence are monistic. He feels justified in making the following inference: since the famous five cases do not avail themselves of one of these monistic solutions it is probably because they reject monism. When would one reject monism? When one has two authentic answers instead of just one. In these five cases, then, Hidary holds that we have good reason to violate principle 3 and infer theoretical pluralism (the authenticity of both views) from practical pluralism, for what else but a belief in the authenticity of both views would induce the rabbis to forego solutions that offer practical monism

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and to adopt practical pluralism instead? Hidary's argument (and I hope I am not misreading it) is that the best and strongest explanation for choosing practical pluralism as a solution to halakhic aporia over solutions that offer practical monism is a belief in the authenticity of both views. Hidary walks through three of our five famous cases showing how each might have been resolved by adopting one of these monistic solutions (251):

These [monistic four solutions to procedural breakdown] are all alternatives to the either-or solution provided by the [famous five] texts quoted above. *b.Šebu.* 48b is a monetary case in which the Talmud could have said, "Whoever is stronger prevails," or "If he is in possession of it then we do not remove it but if he is not in possession of it then we do not give it to him." In *b.Šabb.* 61a, one opinion actually does suggest that one should fulfill both opinions; but the other solutions in that sugya do not agree. One could similarly legislate that one should not recite *minḥah* in the later afternoon, just to be stringent, a road not taken by *b.Ber.* 27a. The fact that the Talmud in those three cases decides to leave it up to the judge or the individual to decide which opinion to follow even where alternative solutions are possible does not fit well with a monistic view but rather suggests a pluralistic attitude at the theoretical level. If a rabbi chooses to endorse two opposing positions rather than rule stringently, attempt to fulfill both, or excuse himself completely by leaving the status quo or putting the case back into the hands of the litigants, then such a rabbi ascribes some level of authenticity to both positions.

This is an elegant argument but I don't think it works for two reasons. First, it is not the case that the only reason one would reject these monistic alternatives is because one is convinced of the authenticity of the two views in question. Second, it is not the case that when convinced of a view's authenticity the rabbis feel compelled to legitimate it. I consider these points in turn.

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First, the monistic solutions reviewed by Hidary may be rejected for reasons other than a belief in the authenticity of the two views in question. Each of these solutions has disadvantages that detract from its appeal. Strategy (1), for example, is a highly undesirable “jungle law” option and for this reason it is invoked on only a handful of occasions in rabbinic literature. Strategy (4), advocating unprincipled stringency just to be “on the safe side,” is also unappealing as attested by numerous cases in which the rabbis consciously do not favor stringency though it would be “a safe bet.”<sup>37</sup> Unprincipled stringency is objectionable for pedagogical reasons – if one rules according to the stringent scholar “just to be on the safe side” others may mistakenly believe the stringent view is followed because it is actually more authoritative, with the result that this view may be fixed as the halakhah even though it is not actually more authoritative and even though the other view is not prohibited.<sup>38</sup> Strategy (3) will sometimes be objectionable for the

37 As an illustration we need look no further than talmudic discussion of the menstrual laws. Many doubtful issues are decided in the direction of leniency, though one might have thought the more stringent option would be supported as the “safer” bet: e.g., *b.Nid.* 58b adopting the larger of two proposed minimum sizes for a bloodstain to be considered impure; *t.Nid.* 8:3 giving women the benefit of the doubt regarding the nature of blood flowing from the vagina; *b.Nid.* 2a-3b adopting the more lenient view regarding retroactivity of defilement; *b.Yebam.* 62b allowing a presumption of pure status prior to a husband’s journey, and so on. In these passages, ruling stringently for the sake of caution is explicitly and openly trumped by other sociological considerations (such as the desire not to inhibit marital relations). The point is this: we cannot assume without further ado that the rabbis will always prefer the stringent option. Stringency can have undesirable consequences one might actively seek to avoid.

38 Indeed, the story of R. Ishmael and R. Elazar b. Azariah on *b.Ber.* 11a makes this very argument concerning the point at issue in our fifth text (whether to stand or recline for the recitation of the *shema*): it is better to permit both views than to lead future generations astray. This idea is encapsulated in the phrase “lest the disciples should see and fix the halakhah so for future generations” (*b.Ber.* 11a). Thus, it is not at all clear that the rabbis would want to resolve the fifth of our famous five cases (regarding recitation of the *shema*) by simply opting for the stringent view of Beit

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same pedagogical reason. Strategy (2) doesn't even establish a particular position as halakhah at all. It simply tells us to preserve the status quo on the understanding that the status quo can be reversed upon discovery or presentation of rebutting evidence. In short, all of these strategies are imperfect and we cannot assume that the rabbis would always prefer to adopt one of them wherever possible, rather than adopt a strategy of double legitimation. Double legitimation in some cases and to some authorities will be the most appealing strategy for resolving procedural aporia, so it is entirely possible that it will be chosen as an option even when a monistic option is available and even in the absence of a belief in the authenticity of both views.

Second, as we have argued throughout, it is demonstrably false to say that rabbis convinced of the authenticity of a view will feel compelled to establish it as the legitimate halakhah. Rabbinic literature contains both programmatic texts and practical cases in which the "authentic" view is passed over in favor of a view deemed preferable on pragmatic, moral, or other grounds. Thus, in line with principle 2, legitimacy is no guarantee of authenticity and Hidary cannot argue that the double legitimation that occurs in our famous five cases shows that both views are deemed authentic. It is entirely possible that the rabbis would prefer a strategy of practical pluralism to one of the other (less than ideal) strategies identified by Hidary even if they are not convinced of the authenticity of both views or of either view.

Where Hidary sees these four additional cases and their strategies as *contrast* cases to the famous five that are the focus of his discussion, I see them as *sister* cases. They display alternative solutions to the problem of procedural aporia. (Indeed, in his discussion of *b.Šebu. 48b*, Hidary himself understood Rav Papa's proposal of a compromise to be an *alternative* to R. Hama's solution of double legitimation.) Some of the solutions lead to practical monism, and some to practical pluralism.

Shammai, as Hidary suggests. To do so can mislead others into believing that the halakhah is certain when it is not.

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Presumably, the circumstances of each case suggest which solution is most desirable in that particular case. I must then disagree with Hidary's conclusion (251) that "if other less pluralistic options are available, and yet the either-or option [double legitimation as per our famous five cases] is still endorsed, then we can detect a non-monistic outlook even in these statements." Selecting one solution in a particular case doesn't mean one will select the same solution in every instance of procedural aporia, and passing over one solution in a particular case doesn't mean that one would never see fit to employ that solution in a different case. Different cases lend themselves to different solutions. Moreover, there is a genetic fallacy in Hidary's conclusion. Just because the solution chosen has a monistic or pluralistic result doesn't mean it was chosen *because* of the monistic or pluralistic result. It may be adopted and other options rejected for other reasons (e.g., pragmatic, pedagogical, or moral considerations). Finally, the only monism and pluralism detected in these various solutions is *practical* not theoretical. We are not in any better position to understand what theoretical commitments underlie these four cases of practical monism than we are in a position to understand what theoretical commitments underlie our famous five cases of practical pluralism. As Hidary himself notes, there is no necessary connection between practical monism and either theoretical monism or pluralism, just as there is no necessary connection between practical pluralism and either theoretical monism or pluralism. So a *complete* list of the strategies available to the rabbis when confronted with procedural aporia would include: the four strategies of *practical monism* listed above (stringency, force, presumption, and compromise) and two strategies of *practical pluralism* (permitting both views *ante factum* as in our famous five cases, or recommending one view *ante factum* but legitimating both views *post factum* in a case of limited procedural aporia [the strategy adopted by Rava in *b.B. Bat.* 124a-b]). None speaks to the issue of theoretical pluralism or monism.

In the last section of his paper, Hidary cites three cases from the Yerushalmi which he believes parallel the double legitimation of the



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Bavli's famous five cases. The formula employed is different, but Hidary is correct to see these cases as parallel to the Bavli's double legitimation. Nevertheless, these cases add little to the conversation since they are also examples of practical pluralism only. Like the famous five cases they are silent regarding the theoretical commitments that underlie their practical pluralism and regarding the authenticity of the views in question. However, to the extent that procedural aporia is thematized in these texts, I believe they provide additional evidence for my understanding of the famous five cases.

The first case (*y.Git.* 3:1 [44d]) features conflicting reports of the established halakhah. Three different amoraim (Rav Huna in the name of Rav, Shmuel, and R. Yehoshua ben Levi) state that the halakhah follows three different tannaim (R. Meir, R. Yehudah, and R. Shimon). R. Shimon bar Carsena then rules that all three courses of action will be recognized after the fact. The language differs from that found in the Bavli, but the clause is a *post factum* clause (form 2) employing perfect forms. It grants *post factum* legitimation and therefore *ante factum* permission – *practical* pluralism pure and simple, and it does so on the basis of procedural aporia. We can be sure of this because in the very next line we learn that another amora suffering from no procedural aporia has no difficulty in establishing the halakhah in line with one view. R. Manna gives a statement of robust *ante factum* legitimation (form 1) employing participles: “Since it is said ‘the halakhah follows the sages’ [i.e., R. Meir whose view is stated anonymously elsewhere], we leave the opinion of the individual and we practice according to the sages [i.e., R. Meir].” Armed with a procedural rule for determining halakhah in cases of dispute involving R. Meir, R. Manna has no need to adopt R. Shimon bar Carsena's solution of double legitimation.

In the second Yerushalmi case (*y.Yoma* 5:5 [42d]), R. Shimon bar Carsena employs a *post factum* form (form 2) to grant legitimacy to conflicting practices performed by priests. These practices already exist. R. Shimon bar Carsena recognizes the legitimacy of both existing practices and, by implication, permits both for the future. This is a

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straightforward case of practical pluralism, but like other cases of practical pluralism it sheds no light on the reason for permitting both practices, the question of their authenticity, or the issue of theoretical pluralism. The third case (*y.Git.* 3:1 [44d]) is interesting in that a later amora reinterprets, and ultimately erases, the practical pluralism of an earlier amora. The earlier amora is R. Yirmiah, who, when judging a particular case, follows the view of Resh Laqish even though others hold that the halakhah should follow R. Yoḥanan. R. Yirmiah defends himself by saying that R. Yoḥanan's view is a teaching (i.e., legitimate) and Resh Laqish's contrary view is a teaching (i.e., legitimate). No explanation is provided (the authenticity of the views is not made explicit) so the most we can safely conclude is that R. Yirmiah's is a practical pluralism. However, in the remainder of the sugya (not discussed by Hidary) the later amora R. Yose b. R. Bun dismantles the impression of practical pluralism altogether! He asserts that the halakhah does follow Rabbi Yoḥanan, that even Resh Laqish acknowledged that the halakhah follows R. Yoḥanan, and that R. Yirmiah also concurred. R. Yose b. R. Bun goes on to say that once in a particular case, Resh Laqish ruled differently on the basis of a beraita that was known only to him and not to R. Yoḥanan. Without that beraita he would have agreed with R. Yoḥanan. The implication is either that R. Yirmiah was mistaken to suppose both views legitimate or that when he declared both views legitimate he meant this: the halakhah follows R. Yoḥanan, except in an exceptional circumstance when we adopt the teaching of Resh Laqish, who had an authoritative beraita unknown to R. Yoḥanan. Either way, on R. Yosi b. R. Bun's revisionist account there is no practical pluralism at all!

### Conclusion

Ultimately, I think the difference between Hidary and myself on the question of theoretical pluralism – the existence of more than one authentic answer to a legal question – in rabbinic literature, is a difference not of kind but of degree. The conclusion Hidary reaches at

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the end of his article differs little from statements in my own article. Hidary writes that “we can conclude that many rabbis believed that in some cases there does exist more than one right answer” (by which I believe he means theoretical and not merely practical pluralism). I too have acknowledged that there is evidence for theoretical pluralism in talmudic literature (Hayes, 78-9, 87). We differ only in our identification of the texts that provide that evidence. We agree that some programmatic statements attest to theoretical pluralism. We disagree regarding the famous five cases of practical pluralism in the Bavli. Hidary wants to read these cases as evidence of a commitment to theoretical pluralism. I argue that they are inconclusive one way or the other. Hidary actually concedes as much on p. 251 of his article when he says of the famous five cases that they “do not explicitly address the issue of multiple truths and their authors may not have been consciously expressing any opinion on that subject.” He nevertheless believes that “we can attempt to derive from their statements what might have been their unstated and perhaps even subconscious assumptions.” I appreciate the elegance of his argument – that exercising a pluralistic option when monistic options exist suggests a commitment to the authenticity of the two views involved – but as explained, I think it suffers from some fatal fallacies. Thus, I prefer to be cautious. As long as the texts are silent regarding the authenticity of the two views in question I prefer to remain agnostic on the matter and say that the texts are inconclusive one way or the other. We never move beyond the level of practical pluralism in these texts and from practical pluralism we can infer nothing about one’s theoretical commitments. We simply need to look elsewhere.