

Idle Chatter or Vital Chat? *A Janus-Faced Talmudic Dictum*

By: DAVID NIMMER*

“Our complete Torah shall not be like your idle talk.” In three separate places, this distinctive phrase caps a story from rabbinic literature in which Rabban Yoḥanan ben Zakkai dismisses a sectarian. The message in each instance is: Opponents of normative Judaism are such fools as to not even deserve the dignity of a response. Theirs is mere *idle chatter*. Thus have many distinguished rabbis across the ages deployed this dictum—for example, Rashba in the fourteenth century.

And yet, other rabbis, of no less distinction than Rashba, have used the phrase in essentially the opposite sense. In particular, Joseph Saul Nathanson used the phrase to engage with the wisdom of other traditions—indeed, in deciding how to apply Torah in 1860 Lemburg to copyright protection, he took the occasion to engage in a *vital chat* with the examples of Russian and Austrian laws. Thus arises a mystery.

I. The Three Tales A. Fast Talk

All three stories¹ are found in the commentary to *Megilat Ta’anit*, the oldest extant rabbinic text.² Its cryptic language sets forth thirty-five calendrical commemorations of minor victories on which fasting is prohibited. Those events unfolded during the half-millennium from Ezra to Ca-

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¹ “Rabbinic texts have a fondness for multiple tellings of the same story.” Barry Scott Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* 75 (Pennsylvania 2011).

² Vered Noam, “Megillat Ta’anit—The Fasting Scroll,” in *The Literature of the Sages: Second Part* 339 (Shmuel Safrai et al., eds. Fortress 2006).

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ligula. Since ancient times, later elaborations of a piece with Talmudic material have accompanied the *Fasting-Scroll* called the scholion (from the Greek *σχόλιον*, “comment”). Since late medieval times, the two manuscript versions of that commentary have been mixed (sometimes giving rise to internal contradictions).

The three stories have in common an encounter between Rabban Yoḥanan ben Zakkai (RYBZ) and either the Sadducees or their close allies, the Boethusians. RYBZ occupies unique importance in the annals of Jewish history after being smuggled out of Jerusalem on the eve of the Temple’s destruction to perpetuate Torah studies at Yavneh.³ The Sadducees are noteworthy as the opponents of the Pharisees, antecedents to the later rabbis of the Talmud.⁴ (For current purposes, we treat the Boethusians⁵ as synonymous with their fellow sectaries.)⁶

Let’s start with the most distinctive instance story (the only one lacking a parallel text in the Babylonian Talmud).

Story 1

<p>[1] <i>On the 27th of Cheshvan, flour returned to be brought up upon the altar.</i> Because the Sadducees said to eat flour with meat. RYBZ said to them, “Whence do you derive that?” And no one knew how to bring a proof from the Torah, until one of them chattered against him, “Because Moses loved Aaron, so he said, ‘Don’t eat meat alone but rather have flour with the meat,’ just as a person tells his friend, ‘Here is some meat, and have some bread along with it.’”</p>	<p>מגילת תענית (ליכטנשטיין) הסכוליון // /עשרים ושבעה בחשוון/ בעשרין ושבעה ביה תבת סלתא למסק על מדבחה. מפני שהיו הצדוקין ואמרין אוכלין מנחת בהמה. אמר להם רבן יוחנן בן זכאי מגין לכם? ולא היו יודעין להביא ראיה מן התורה אלא אחד שהיה מפטפט כנגדו ואומר מפני שהיה משה אוהב את אהרן אמר אל יאכל בשר לבדו</p>
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³ Solomon Zeitlin, *The Takkanot of Rabban Jochanan Ben Zakkai*, 54 *The Jewish Quarterly* 288 (1964); Hayim Lapin, *Rabbis as Romans* (Oxford 2012).

⁴ Some scholars have questioned the rabbinic connection back to the Pharisees. Isaac Roszler, *Law as a Prism into National Identity: The Case of Mishpat Ivri*, 38 *U. Pa. J. Int’l L.* 715, 726 n.45 (2017). Indeed, in *Mishnah Yadayim* 4:6, our very own RYBZ, in discussion with the Sadducees, distances himself from the Pharisees! Binyamin Lau, *The Sages Vol I: The Second Temple Period* 342 (Maggid 2007).

⁵ One possibility is that their name represents “the house of (BYT) the Es-senes,” thus identifying them as the famous sect that lived by the Dead Sea. Seth Schwartz, *Imperialism and Jewish Society: 200 B.C.E. to 640 C.E.* (Princeton 2001) at 92.

⁶ “[R]abbinic portrayals of these two groups are sometimes indistinguishable.” Richard Kalmin, *Jewish Babylonia between Persia and Roman Palestine* 168 (Oxford 2006).

<p>RYBZ answered him with the verse, “Then they came to Elim, where there were twelve springs and seventy palm trees.” [Ex. 15:27] He replied, “What does one have to do with the other?” Then [RYBZ] said, “Fool! Our complete Torah shall not be like your idle talk. We already have a verse, “You shall make a burnt offering to the Lord, along with its meat offering, and drink offerings, a sweet savour, a sacrifice made by fire unto the Lord.”</p>	<p>אלא יאכל סלת ובשר כאדם שהוא אומר לחברו הילך בשר הילך רכיך. קרא לו רבן יוחנן בן זכאי ויבאו אילמה ושם שתיים עשרה עינות מים ושבעים תמרים. אמר לו מה ענין זה אצל זה? אמר לו שוטה ולא תהא תורה שלמה שלנו כשיחה בטלה שלך. והלא כבר נאמר יהיה עולה ליי ומנחתם ונסכיהם לריח ניחח אשה לה’.</p>
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The essence of this tale is that the sage vanquished the Sadducean heresy—and to remember that happy day, we refrain from fasting on its anniversary. But the clipped story poses questions:

What is the context of eating meat with flour? Without delving into the minutiae of Temple sacrifices, some offerings are entirely consumed at the altar whereas others are partially eaten by the priests. Everyone admits that a meat sacrifice entirely consumed by the altar does not result in giving any bread to the *kohen*. Turning to animal sacrifices that priests may partially eat, the Sadducees maintained that the priests may likewise eat the accompanying meal offering, whereas Pharisaic law disallowed that approach. Although the challenge to the Sadducees was “to bring a proof from the Torah,” their actual defense fell short of that mark. Grounded instead solely in “public policy,” they offered the rationale that Moses would have wanted his brother Aaron to have the benefit of a sandwich, if you will, rather than eating unadorned cold cuts.

How does one episode from the forty years of wandering in the desert disprove the thesis at issue? Of what significance is it that, at one point, the Israelites “came to Elim, where there were twelve springs and seventy palm trees”? That verse appears to be a *non sequitur*, amply warranting the response, “What does one have to do with the other?” The midrash interprets a reference to the seventy palm trees as the seventy sages, which naturally suggests the giving of the Oral Torah.⁷ The riposte that one must add insights from the Oral Torah might hit the mark in the context of the later stories, where the opponents support their view from the Written Torah. In the instant case, however, given that the Sadducee simply adduced public policy, it misses the mark to tell him that the Oral Torah must be added to the Written Torah to reach the correct result.

⁷ Rashi to Ex. 15:27, following *Mekhilta de-Rebbi Yishmael*. I have authored a whole article following that suggestion. David Nimmer, *Miriam’s Oasis*, 34 *Touro L. Rev.* 983 (2018).

Accordingly, we need to posit a different interpretation of that verse. One source⁸ suggests it be interpreted in light of a different verse that is close by: “And Moses said, This shall be, when the Lord shall give you in the evening flesh to eat, and in the morning bread to the full.” [Ex. 16:8]. That verse teaches that separate times exist for consuming meat *versus* bread, thereby disfavoring the Sadducee’s public policy goal of combining the two in a sandwich.

What does the final verse prove? The midrashic technique at issue in the quoted verse⁹ is *hekesh*, which allows words in proximity to be interpreted to the same effect. Given that the reference to the flour offering (ומנחהם) is adjacent to the word for an offering that is entirely consumed by the altar (עולה), we can conclude that the priests do not eat of that flour, either.¹⁰

Story 2

<p>[2] <i>On the 24th of Av, we returned to our rulings.</i> In the days of the Greek kingdom, they used to rule by Gentile law. And when the Hasmoneans prevailed over them and canceled their rulings, they reverted to judging by the Laws of Israel, and that day of cancellation they made into a holiday. For the Sadducees used to rule: “A daughter should inherit along with the daughter of a son.” RYBZ said to them, “Whence do you derive that?” And no one knew how to bring a proof from the Torah, until one of them chattered against him, “If the daughter of a son can inherit, whose entitlement arises from her father, then a daughter of the testator himself should all the more inherit.” RYBZ answered him with the verse, “These are the sons of Seir the Horite, who inhabited the land; Lotan, and Shobal, and Zibeon, and Anah.” [Gen. 36:20] “And there is another verse, ‘And these are the children of Zibeon; both Ajah, and Anah: this was that Anah that found the mules in the wilderness, as he fed the asses of Zibeon his father.’ [Gen. 36:24] This teaches that Zibeon had sexual relations</p>	<p>מגילת תענית (ליכטנשטיין) הסכוליון // עשרים וארבעה באב/ בעשרין וארבעה ביה תבנא לדיננא. בימי מלכות יון היו דנין בדיני הגוים וכשגברה ידם של בית חשמונאי בטלום חזרו לדון בדיני ישראל ואותו היום שבטלום עשאוהו יום טוב. שהיו הצדוקין דנין בדיניהם לאמר הבת יורשת עם בת הבן. אמר להם רבן יוחנן בן זכאי מגין לכם. ולא היו יודעים להביא ראיה מן התורה אלא אחד שהיה מפטפט כנגדו ואומר לו אם בת הבן הבאה מחמת אביה הבא מכחי ירושתני, בת הבאה מכחי לא כל שכן. קרא לו רבן יוחנן בן זכאי את המקרא הזה ואלה בני שעיר החרי יושבי הארץ לוטן שובל וצבעון וענה וכתוב אחד אומר הוא ענה אשר מצא את הימים במדבר ברעותו את</p>
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⁸ Avraham Eliyahu Bornstein, *Megillat Ta’anit* 54 (1908) (Hebrew).

⁹ The precise verse that RYBZ quotes does not exist. Over the course of millennia, corruption can afflict manuscript copying. In this case, Lev. 23:18 differs from the quoted text in only insignificant details. Vered Noam, *Megillat Ta’anit: Versions • Interpretation • History* 254 (Yad Ben-Zvi 2003) (Hebrew).

¹⁰ *Id.*

<p>with his mother and begot Anah.” He replied, “Behold, you are just playing around with us.” He said, “Fool! The words of our complete Torah shall not be like your idle talk.” He said, “With that you dismiss me!?” [RYBZ] replied, “If the daughter of a son possesses a right that is valid in the presence of brothers, can you say the same with respect to his daughter, whose ability is impaired in the presence of brothers?” The day that they were vanquished was made a festive day.</p>	<p>החמורים לצבעון אביו אלא מלמד שבא שבעון / צבעון/ על אמו והוליד ממנה ענה. אמר לו הרי אתה משחק בנו. אמר לו שוטה ולא יהו דברי תורה שלנו כשיחה בטלה שלכם. אמר לו בכך אתה מוציאני? אמר לו ומה בת בני שכן יפה כחה במקום האחים תאמר בבתי שכן הורע כחה במקום האחין דין הוא שלא תירשני. יום שנצחום עשאוהו יום טוב.</p>
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In this instance, the Sadducee argues for equity in inheritance.¹¹ Imagine a family constellation of Father, Daughter, Son, and Granddaughter (namely, Son’s offspring). All disputants accept that Torah law gives primacy to sons—at the death of Father, as between living Daughter and Son, the latter inherits all. But what happens if Son predeceases Father? In that instance, the tradition holds that Granddaughter inherits the entire share of her dead father. Against that policy, the Sadducees argue that Daughter should share 50% of Father’s estate with her. Their reasoning is *a fortiori*: “If the daughter of a son can inherit, whose entitlement arises from her father, then a daughter of the testator himself should all the more inherit.”

Is the verse about Seir the Horite another non sequitur? Against their logic, RYBZ juxtaposes two verses from Genesis. One adduces Anah and Zibeon as two sons of Seir, but the other portrays Anah as the son of Zibeon. How could he be both? The answer is incest—Zibeon lay with his mother to produce Anah, who therefore qualifies as Seir’s grandson as well as his son.¹² So why did the first verse list them both together? To teach that a grandson can inherit equally the share attributed to his deceased father.¹³

¹¹ The story appears in slightly altered form in the Gemara as well. T.B. *Bava Batra* 115b. (Note the parallel in *Tosefta Yadayim* 2:20.) For instance, the version there commemorates 24 Tevet rather than 24 Av.

¹² A different explanation would be that there may have been two people named Anah. The parallel passage in the Gemara cited above posits just that possibility, and then diverges into a sizable interpolation about a certain King Shapor, who likewise discussed Anah.

¹³ Rabbi Yosaif Asher Weiss in *ArtScroll Talmud Bavli* 115b2 (1994).

The unconvinced Sadducee remonstrates, “With that you dismiss me!” He reasonably objects to that outré invocation of incest by virtue of juxtaposition—although a possible reading, the incest hardly jumps out from the text (as regarding Lot’s daughters). Indeed, the Gemara even entertains, as a serious possibility, that there may have been two people named Anah. Thus, to premise the entire edifice on Anah’s bastard-status is hardly self-evident.

What point was RYBZ making about the presence of brothers? More particularly, the Genesis verses just quoted deal with the grandson of a deceased son, as opposed to the Sadducee’s case of the granddaughter of a deceased son. So, it would seem that RYBZ’s verses do not effectively refute the argument. Going further still, RYBZ’s interpretation works only on the assumption that Zibeon was dead—which is nowhere stated.

Evidently aware that he has failed to prevail until now, RYBZ confronts the Sadducee on his own terms, namely through answering his logical proposition: “If the daughter of a son can inherit, whose entitlement arises from her father, then a daughter of the testator himself should all the more inherit.” To reiterate, given that Granddaughter admittedly inherits the entire share of her dead father, the Sadducees argue that Daughter should share 50% of Father’s estate with her.

To understand the refutation, it helps to expand the family constellation. Let us now add to Son1 brothers Son2 and Son3. Examining the status in light of the famous story of the daughters of Zelophehad [Num. 27], we can conclude, at the death of Father, that Son2 and Son3 have to share their inheritance with the progeny of predeceased Son1—even if that progeny contains only daughters. But Son2 and Son3 do not have to share with Daughter—even the Sadducees acknowledge that a living son dispossesses her interest.

To summarize, it was common to both Sadducees and Pharisees that Daughter does not inherit when Son2 and Son3 are alive—but the Sadducees wished to posit a special case when the only children of Father were deceased Son1 and Daughter. RYBZ capitalized on their concession that Daughter cannot inherit in the presence of brothers (namely Son2 and Son3) by deriving from it that the rights of Daughter are inferior to the rights of her brother, *i.e.* Son. Yet the rights of a Granddaughter are equivalent to the rights of her father, *i.e.* Son (thanks to the Zelophehad example). So we can now infer that Granddaughter’s rights trump Daughter’s rights. With that conclusion, he exploded the Sadducee’s *a fortiori* argument.

Finally, we reach the last story, in which the adversarial role has switched from Sadducees to Boethusians.

Story 3

<p>[3] <i>On the 8th of Nisan until the end of the festival, the holiday was fixed, not to make eulogies or to fast.</i> What holiday? The festival of Shavuot. For it was not necessary to list all the festival days in the scroll, but rather was set forth in opposition to the Boethusians, who said that Shavuot comes only after the Sabbath, as in the verse “And ye shall count unto you from the morrow after the Sabbath, from the day that ye brought the sheaf of the wave offering; seven Sabbaths shall be complete.” [Lev. 23:15]</p> <p>A certain Boethusian said to RYBZ, “Moses loved Israel, and he knew that Shavuot is only one day long, so he fixed the time for them to come after the Sabbath, so that they could rest two days, one after the other.”</p> <p>Rabban Yohanan ben Zakkai joined into discussion with him and said, “‘There are eleven days’ journey from Horeb by the way of Mount Seir unto Kadeshbarnea.’ [Deut. 1:2] If Moses loved Israel so much, then why did he detain them for forty years in the desert!?”</p> <p>He replied, “Behold, you are just playing with us.”</p> <p>He said, “World-class fool!¹⁴ Our complete Torah shall not be like your idle talk.”</p> <p>He said, “With that you dismiss me!?”</p> <p>[RYBZ] replied, “Does not one verse say, ‘It shall be seven complete weeks’ [Lev. 23:15] and [the next] verse say ‘You shall count fifty days’? How so? If the festival falls on the Sabbath we count seven weeks; if it falls after the Sabbath we count fifty days. So when you read ‘You shall count from the morrow after the Sabbath,’ it is from the morrow of the first festival day of Passover.”¹⁵</p>	<p>מגילת תענית (ליכטנשטיין) הסכוליון // /שמונה בניסן/ מן תמניא ביה ועד סוף מועדא אתותב הגא דילא למספד ודילא להתענא. ואיזה חג זה יום טוב העצרת והלא לא נצרכו לכתב כל הימים הטובים שבמגלה אלא שהיו דנין כנגד בייתוסים שהיו אומרים אין עצרת אלא לאחר השבת שנאמר וספרתם לכם ממחרת השבת... אמר חד ביתוסא לרבן יוחנן בן זכאי: משה אוהב היה את ישראל והיה יודע שעצרת אינה אלא יום אחד וקבעה להם אחר השבת שיהיו נחים שני ימים זה אחר זה נטפל לו רבן יוחנן בן זכאי ואמר לו אחד עשר יום מחורב דרך הר שעיר עד קדש ברנע אם משה אוהבן היה מפני מה עכבן במדבר ארבעים שנה. אמר לו הרי אתה משחק בנו. אמר לו שוטה שבעולם לא תהא תורה שלמה שלנו כשיחה בטלה שלכם. אמר לו בכך אתה מוציאני. אמר לו לאו כתוב אחד אומר שבע שבתות תמימות תהיינה וכתוב אחד אומר תספרו חמשים יום הא כיצד חל להיות יום טוב בשבת מונין שבע שבתות חל להיות אחר השבת מונין חמשים יום וכשאתה קורא וספרתם לכם ממחרת השבת ממחרת יום טוב הראשון של פסח... ורבי אליעזר אומר אינו צריך...</p>
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¹⁴ Or “worldly fool.” Michal Bar-Asher Siegal, *Jewish-Christian Dialogues on Scripture in Late Antiquity* 67 (Cambridge 2019).

¹⁵ At this point, the text turns to four alternatives that prove the same proposition. Rabbi Eliezer posits that the proof offered by RYBZ is not needed because it is the Beit Din that determines the pertinent date; Rabbi Joshua reasons by analogy to parallel verses about counting; Rabbi Ishmael reasons by analogy to parallel verses about offering sacrifices; and Rabbi Judah ben Beirah reasons by usage of the word “Sabbath” elsewhere in proximity to bread.

By this time, the pattern is clear. This particular dispute is well-known as an oft-discussed example of Jewish textualism versus oral law.¹⁶ Strictly as a matter of approaching the verses, the Boethusian has the better argument—*Leviticus* begins the counting from “the morrow after the Sabbath.” But Pharasaic tradition holds the contrary. In this instance, RYBZ was able to answer them effectively on their own level—he countered the supposed love that Moses had for Israel by giving them one long weekend every year with the observation that Moses detained them for forty years in the desert—on a journey that only required eleven days!

In addition, RYBZ was able to adduce textual support for his own position. By juxtaposing one verse that counted weeks with another that counted days, he was able to allocate the former to a situation when Passover ended on Saturday night and the latter when it ended later in the week. Thus did he blunt the Boethusian’s “plain text” argument. So we are left with a final question.

How can the innovation in the law be ascribed to Moses, who simply took dictation from the true Author of the Torah? As in Story 1, one obvious defect with the opponent’s initial logic is to attribute innovation to Moses—that Moses loved his brother Aaron and gave him a sandwich or loved all of Israel and gave them a long weekend. Both instances posit that Moses was composing the Torah originally rather than accepting divine dictation. The normative view could hardly accept that proposition! Yet RYBZ’s riposte steers clear of that defect on both occasions.¹⁷ It is strange that the text itself fails to raise that objection.¹⁸

¹⁶ In this instance, the parallel in the Gemara discusses Sadducees rather than Boethusians. T.B. *Menaḥot* 65a. It first rehearses the identical quartet noted above, namely Rabbi Eliezer, Rabbi Joshua, Rabbi Ishmael, and Rabbi Judah ben Beteirah. Then, it adduces a wholly different *baraita* containing additional arguments to defeat the interpretation that Shavuot always falls on Sunday. *Id.* 65b–66a. Finally, Rava pronounces that many of the foregoing positions can be refuted, so that only a few withstand challenge. *Id.* 66a. In particular, reverting to the first set, only the logic of Rabbi Ishmael and Rabbi Judah ben Beteirah holds up.

¹⁷ Maharsha explicitly makes this point in *Hidushei Agadot* to *Menaḥot* 65a (ascribing authorship to Moses labeled “close to *minut*”).

¹⁸ A potential explanation may emerge from “the most extreme expression of disapproval of the Sadducees found in any ancient rabbinic text,” namely a reference to “two disciples of the sages from among the disciples of Moses ... to exclude Sadducees.” Kalmin, *supra* n. 6, at 150–51, citing T.B. *Yoma* 4a. Stories 1 and 3 may have appreciated that the opponents in these instances ex-

Instead, both *Megilat Ta'anit* and *Bava Batra* discuss at length alternatives to RYBZ's points leading to the same outcome. But the Bavli's more complete discussion is telling—it concludes that only some of the alternatives hold water, leaving the balance to drown. It follows that RYBZ's logic is not airtight enough to end discussion; instead, further analysis is needed. When that analysis unfolds, the victorious viewpoints pointedly do not include RYBZ's. Clearly, then, we are not dealing with obvious truth versus rank idiocy. For that reason, the epithet "Fool!" hardly seems apropos. In turn, the antinomy between "our complete Torah" and "your idle talk" is not as pristine as RYBZ makes it out to be.

B. Composite Message

It is a truism that the victors write history. Our sources accordingly portray consistent defeat of the Sadducees and their allies.¹⁹ The common feature of all the stories is that those groups propound a viewpoint against the mainstream, which they defend based on either the plain language of the Torah or on public policy. The sectarians are unable to offer a cogent response, until one of their number chatters²⁰ against RYBZ. The latter tosses off a bizarre verse in response, to which the response is incredulity. At that point, RYBZ calls him a fool and then issues what we will henceforward label as our *Dictum*: "The words of our complete Torah shall not be like your idle talk." He follows up by issuing a more pointed proof text that bolsters the Pharisaic position. His defeat of the sectarian position warrants the proclamation of a holiday.

The key components of the Dictum juxtapose "our complete Torah" against "your idle talk." Some take "complete Torah" to signal a composite of both Written Torah and Oral Torah, attributing to RYBZ the sensibility that his more panoramic perspective refutes the narrow fixation of his opponent (who are effectively cast as Karaites *avant la*

pressed their fealty to Moses, and therefore did not wish to single them out for criticism on that basis.

¹⁹ Charlotte Fonrobert, *When Women Walk in the Way of their Fathers: On Gendering the Rabbinic Claim for Authority*, 10 J. Hist. Sexuality 398 (2001) ("the rabbis depict both Samaritans and Sadducees as consulting with them regarding matters of law in order to bolster their own authority over and against the leaders of these other groups").

²⁰ Various translations into English for מַפְטֵפֵט include *babble* (Kalmin), *mumble and stumble* (Neusner), and *taunt* (ArtScroll).

lettre).²¹ That reading is pointed for Story 3, in which the Sadducee brought a specific verse for his point of view;²² yet the other two stories lack that feature, so it is less than a full explanation. Turning to “your idle talk,” the phrase arises against the previous usage of “chatter” but actually brings a more neutral word that means “talk.” We will mine that aspect presently.

In any event, the bottom line is that RYBZ scolded his adversaries.²³ Far from treating them as equals or even trying to teach his inferiors, he altogether rejected any value from engaging with them, holding them up instead for ridicule.²⁴ A modern paraphrase of the Dictum could be, “You are so worthless that I won’t even dignify your ‘points’ by engaging them.”

C. The Wages of Lightning Fast Analysis

Before considering later reception of the Dictum, the final word about our three stories is to test how well RYBZ’s criticism has withstood the test of time. In each of the stories, he is quick to dismiss his adversaries. So entrenched is he in the wisdom of his own approach that he cavalierly rejects any questioning as the product of “Fools.” In that light, it is fascinating to reflect that Jewish tradition actually rejects his reasoning (albeit not his bottom-line ruling) in each and every instance.

Story 1. RYBZ explicitly marshaled two verses for his interpretation, Ex. 13:27 and Lev. 23:18. Yet, unlike his viewpoint, later sages explain the Mishnah (which justifies the priest not eating the flour brought along with a meat sacrifice) on a wholly different basis, with no reference to any verses.²⁵

Story 2. The bulk of this story concerns RYBZ’s explication of Anah’s genealogy, with the aim of demonstrating that he was the prod-

²¹ Jacob Neusner, *A Life of Yohanan Ben Zakkai* 81 (1970); Kalmin, *supra* n.6, at 166–67 (attributing stance to Josephus’ influence on Babylonian rabbis); Zeitlin, *supra* n. 3, at 300.

²² In Story 3, the Sadducee’s viewpoint represents his understanding of the *peshat* of “And ye shall count unto you from the morrow after the Sabbath, from the day that ye brought the sheaf of the wave offering; seven Sabbaths shall be complete.”

²³ Noam, *supra* n. 9, at 176 (on Story 3).

²⁴ *Id.* at 254 (on Story 1).

²⁵ The subject matter here is M. Menaḥot 6:2 which, in typical mishnaic fashion, simply sets forth the rule without any explanation. But the standard commentator proceeds on the basis of a different scriptural justification: Num. 15 makes no mention of consumption by the *kobanim*, so this sacrifice is completely burnt upon the altar. Yad Avraham *ad loc.*

uct of incest. Yet the version in the Gemara posits the reasonable possibility that there may have been two people named Anah; although it ultimately rejects that point of view, the very fact that it is entertained dispels the notion that the Sadducee was an out-and-out fool for questioning the matter. Even more pointedly, Ramban accepts the proposition that there was another Anah!²⁶ Accordingly, RYBZ's contempt for his adversary seems out of place.²⁷

Story 3. This case contains the most extreme rejection of the view put forth by the erstwhile sage. Rabbi Eliezer posits that the proof offered by RYBZ is not needed. More remarkably still, the Gemara continues by citing a different *baraita* to defeat the Boethusian's interpretation that Shavuot always falls on Sunday, and then ends with Rava refuting much of what has gone before such that RYBZ's proof no longer remains operative. So, the full text again undermines the latter's arrogance towards his foes.

As if that set-back were not enough, consider RYBZ's final explanation—that the two verses of Lev. 23:15–16 exist to distinguish between Passovers that fall on Saturday and those that fall on other days. In contrast to that reading, the normative explanation for those two verses is that one commands the counting of days and the other mandates the separate counting of weeks.²⁸ So almost no aspect of the venerable sage's reasoning ultimately survives unscathed.

In sum, our stories show three instances of RYBZ's contempt and arrogance for any who would dare question his explanations²⁹—but far from supporting those explanations, the subsequent rabbinic tradition³⁰

²⁶ Ramban on Gen. 36:24, makes the salient point that the text identifies him as the Anah who was tending to the donkeys in order to distinguish him from his uncle of the same name.

²⁷ The Sadducee proposal itself has been described as “mature, moderate and equitable” Reuven Yaron, *Sadducees and Pharisees: Two Controversies*, 33 *Isr. L. Rev.* 743, 751 (1999).

²⁸ T.B. *Hagiga* 17b.

²⁹ That arrogance stands in contrast with RYBZ's depiction in Mishnah *Shabbat* 16:7 and 22:4, both of which times he limits his conclusion to the statement “I suspect that he is liable for a sin offering.” That soft-pedaling “undermines the picture of R. Yohanan as an authoritative rabbi.” Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* 116 (Oxford 2012)

³⁰ It should be recalled that RYBZ lived much earlier than the sages of the Talmud. His method of expositing scripture may have worked for people of his own generation, but was removed from later sensibilities. Neusner, *supra* n. 21, at 124.

has rejected his reasoning on each occasion.³¹ When one adds that the contrary position in each instance was itself defensible, his extreme reaction stands out as difficult to justify. On the one hand, RYBZ is a foundational figure, so his viewpoint in the Dictum deserves deference. On the other hand, however, we have just seen problems with each enunciation of the Dictum. Future figures could therefore take it either at face value or with more nuance—which is exactly what later transpired, as we shall now see.

II. In the Hands of Later Generations

A. Holding Hard and Fast

Over the ensuing millennia, commentators have invoked our Dictum in the manner of RYBZ to deride the approach of their opponents,³² sometimes in very harsh terms.

In a lengthy polemic against a Jerusalem butcher of the seventeenth century who relied on surgical manuals to make determinations about disqualifying blemishes, Rabbi Hayyim Benveniste, a Turkish rabbi who died in 1673, used our Dictum to heap scorn upon his adversaries. He then concluded by asking rhetorically, “Is there no G-d in Israel to expound Torah from sages and books, that he must go after delusions and nothingness!”³³

Another example is Solomon ben Abraham Adret (1235–1310). Rashba addressed the case of a father in Perpignan who claimed the right to inherit his deceased daughter’s dowry.³⁴ The father claimed that he had priority over his late daughter’s husband, citing two sources of entitlement under Jewish law:³⁵

1) Custom—“everyone knows” that the Jews in that city “follow Gentile law,” and since that is the local practice, everyone marrying

³¹ This situation reflects the inverse of “later Babylonian authorities eschew[ing] the radical midrashic techniques of past rabbis, even as they praised their interpretive pyrotechnics.” Christine Hayes, *Rabbinic Contestations of Authority*, 28 *Cardozo L. Rev.* 123, 131 (2006). Although later authorities ruled to the same effect as RYBZ in each instance, they did not celebrate his interpretive pyrotechnics but instead grounded their rulings in different midrashic techniques.

³² Responsa of Maharit, part 2, *Yoreh De’ah* 9.

³³ *Knesset Gedolah Hagha’ot Tur, Yoreh De’ah* 39.

³⁴ Rashba responsum 6:254. See Ron S. Kleinman, *To what Extent Should Adjudication Be According to Civil Law?*, 37 *Techumin* 388 (2017) (Hebrew).

³⁵ The case was actually brought in secular court, but the father wished to vindicate his rights under *halakhab* as well. A Beit Din can apply secular law and a secular court can apply Jewish law, under appropriate circumstances.

there is aware of this fact, thus in advance agreeing to Gentile law, and it is deemed as if he had stipulated so explicitly; and 2) this law was legislated by the king and “the law of the State is law.”³⁶

Those two categories correspond to two bases for bringing secular law into halakhic decision-making: *minbag ha-medinah* and *dina d-malkhuta dina*. It is instructive to review the great Spanish rabbi’s response to each argument.

In terms of the argument rooted in *local custom*, Rashba rejects the father’s claim that the pious residents of Perpignan, that “place of Torah and great wisdom”³⁷ would have agreed to adopt secular law, a practice “which our complete Torah has forbidden.”³⁸ The upshot is that a recognized Torah giant has invoked our phrase for the purpose of rejecting the importation of general secular law as a governing *minbag* to which *halakhab* should yield.³⁹

What about the other argument that the father advanced in Perpignan, rooted in *governing secular law*? On that score, Rashba was even more harsh: “By saying so, you have abolished the inheritance of the eldest son... and completely uprooted all the laws of our complete Torah.”⁴⁰ He embroidered on that sentiment even further, “What is the purpose of all the holy books composed by Rabbi [Yehudah ha-Nasi if instead] they teach their children the laws of non-Jews... Heaven forbid. This cannot be allowed in Israel, lest the Torah wrap itself in the sackcloth of mourning.”⁴¹

In sum, Rashba’s deployment of the Dictum is fully congruent with RYBZ. The great Sephardic sage relied on elements of the Dictum from over a millennium earlier to deride any value at all to secular law, erecting a high barrier around Torah.

³⁶ Ron S. Kleinman, *Civil Law as Custom: Jewish Law and Secular Law—Do They Diverge or Converge?*, Rev. Rabbinic Judaism 11, 19 (2011).

³⁷ Given its roots in Provence, Perpignan was distinct from such northern French locales as Troyes, home to Rashi.

³⁸ Kleinman, *supra* n. 36, at 20. Kleinman posits the further nuance that the problem in that particular case was that the intent was to renounce Jewish law—as noted above, the father filed the case before a civil court, albeit he asked that body to apply Jewish law. *Id.*

³⁹ Not only is Rashba a well-respected halakhist on whom to place reliance, but this particular responsum is cited by Joseph Karo and many other decisors. *Id.* at 20.

⁴⁰ *Id.* at 31 (emphases original).

⁴¹ *Id.* On Rashba’s typology of heresy, see Adiel Schremer, *Brothers Estranged: Heresy, Christianity, and Jewish Identity in Late Antiquity* 25 (Oxford 2010).

B. Playing Fast and Loose

As reasonable as is the foregoing, some sages have applied the Dictum in the opposite sense. We thereupon enter into the realm of paradox.

1. Early Exemplars

Moses Maimonides quoted our Dictum in his *Guide to the Perplexed*. The particular invocation arises to justify the invocation of the authority of the Torah, rather than pure philosophic reasoning. As he reasoned there, if invoking the Sabians is good enough for Aristotle, then he has every right to invoke our complete Torah.⁴²

Moses Sofer did the same many centuries later. The question arose whether Gentile contractors building a synagogue could continue their labors on the Sabbath—after all, it is not as if Jews would act as the construction workers, and the congregation did not yet occupy the building. Rabbi Mordechai Breisch (died 1976) explained that Gentiles do not labor on their own holy day, as that would be a desecration in their eyes.⁴³ He then proceeded to quote Ḥatam Sofer⁴⁴ asking, “Is there a greater desecration of G-d’s name than this [Jews not honoring their own holy day by allowing Gentile contractors to build on it]? Woe to that embarrassment and shame; ‘our complete Torah shall not’ etc.” At the end of the day, the ruling was that, even though *halakhab* allows a leniency, we dare not utilize it and thereby allow another nation to become more holy than we.

We have now relocated to an entirely new realm. Rather than dealing with worthless Sadducees, the point of comparison is pious Christians. They observe a Sabbath (albeit Sunday rather than Saturday), so the obligation falls on us to be even more scrupulous, lest we appear impious in comparison. What remains constant is that Torah represents the Best. But the comparison is no longer with the Worst—instead, it is with the Very Good. Matters have changed significantly over the course of the many centuries since RYBZ first formulated the Dictum.

2. Nathanson

Matters get even more extreme when we progress some decades forward from Ḥatam Sofer. Joseph Saul Nathanson, born in 1810, was elected in

⁴² *Guide to the Perplexed* part 2, chap. 23.

⁴³ *Shu”t Hēlkat Ya’akov, Ibn Ha-Ezer* 14.

⁴⁴ In context, Sofer was commenting on *Magen Avraham*, a work by Avraham Gumbiner of Poland (d. 1682).

1857 to serve as rabbi for the chief town in his native Galicia. The modern Ukrainian city of Lviv is far removed from the center of world culture.⁴⁵ But, in 1860, the town known by its German name Lemberg could claim to be a metropolis in good standing located at the cradle of civilization⁴⁶—the first city in Europe, for example, to feature street lights.⁴⁷ Its Jewish residents (almost a third of the population) considered it the “New Jerusalem,”⁴⁸ one of the “mother cities” of Judaism,⁴⁹ in competition with Prague or even Paris.⁵⁰

Nathanson officiated in Lemberg until his death in 1875. By then, he had secured recognition as one of the most famous Torah scholars of the nineteenth century, “the outstanding *posek* and writer of responsa of his generation.”⁵¹ In fact, he is known by the name of his *magnum opus* in six volumes of *teshuvot*, the *Sho’el u-Meshiv*, namely *Questioner and Respondent*.

But he also has another moniker. Nathanson was so prolific in issuing *haskamot* (book approbations or commendations) that Solomon Buber said of him that “without exaggeration there are extant 300 commendations by him,”⁵² which translates to “more approbations by him on rabbinic books than by any other rabbi.”⁵³ Such profusion earned Nathanson the sobriquet *Sar ha-Maskim*,⁵⁴ i.e. “Chief Approver.”

My own field is the law of copyright, so I first delved into the matter of approbations when collaborating with my friend and UCLA Law School colleague Neil Netanel to author a book about Jewish copyright responsa.⁵⁵ After writing up the divergent copyright approaches in the

⁴⁵ Michael Stanislawski, *A Murder In Lemberg* 22 (Princeton 2007).

⁴⁶ Galicia was “the demographic centre for Austrian Jewry throughout the nineteenth century.” Robert S. Wistrick, *The Jews of Vienna in the Age of Franz Joseph* 41 (2006).

⁴⁷ <http://en.wikipedia.org/wiki/Lviv> (visited June 11, 2012).

⁴⁸ Jacob Weiss, *The Lemberg Mosaic* 7, 9 (2010).

⁴⁹ Israel Bartal & Antony Polonsky, “Introduction,” in *Polin: Studies in Polish Jewry, Volume 12 Focusing on Galicia* 3, 8 (Israel Bartal & Antony Polonsky, eds. 1999).

⁵⁰ Stanislawski, *supra* n. 45, at 22; Weiss, *supra* n. 48, at 7, 9.

⁵¹ Shillem Warhaftig, “Nathanson, Joseph Saul,” 15 *Encyclopedia Judaica* 18, 18 (2007). “Problems reached him from all parts of the world and he corresponded with all the great contemporary scholars.” *Id.*

⁵² Shillem Warhaftig, “Nathanson, Joseph Saul,” 12 *Encyclopedia Judaica* 866, 868 (1972).

⁵³ Solomon B. Freehof, *A Treasury of Responsa* 270 (1962).

⁵⁴ Warhaftig, *supra* n. 52, at 868. That title represents a transposition of the reference to Pharaoh’s chief butler, *Sar ha-Mashkim*. Gen. 40:9.

⁵⁵ After my initial efforts, Prof. Netanel masterfully brought the whole project to fruition. With characteristic grace, he styled the title page: *From Maimonides to*

early nineteenth century between Moses Sofer and Mordechai Banet,⁵⁶ I turned to the dispute later in that century between Nathanson and his student, Isaac Judah Schmelkes (1827–1905), known as *Beit Yitzhak*. It was then that I had my first exposure to our Dictum, as part of Nathanson’s famous copyright responsum regarding *Asblei Ravrabi*, a work first published in 1836.⁵⁷

Let us turn to its particulars. In his responsum dated November 25, 1860,⁵⁸ Nathanson at the outset expressed himself in opposition to “the incisive rabbi, our teacher, the *Av Beit Din* of Zolkiew,”⁵⁹ who had effectively denied copyright protection to the claimant. He continued that the latter’s words

are puzzling because this is certain, that if an author prints a new book and he merits that his words are received all around the world, he obviously has an eternal right [to his work], because in any case if one prints or invents some type of craft, another person is not allowed to do so without his consent. And it is known that Rabbi Abraham Jacob of Harobshob, who invented a machine to do arithmetic, received throughout his life payment from the government in Warsaw; and “our complete Torah shall not be like their idle talk.” This is something that common sense rejects, and it is a daily occurrence that one who prints a work, he and those empowered by him retain the rights.

The reversal threatens whiplash! When RYBZ formulated the Dictum that “our complete Torah shall not be like your idle talk,” we have seen that its meaning was essentially, “You are so worthless that I won’t even dignify your ‘points’ by engaging them.” By contrast, the opening words from Nathanson’s *teshuvah* move in the opposite direction. Given the fact that Reb Abraham Jacob⁶⁰ received lifetime patent royalties

Microsoft: The Jewish Law of Copyright since the Birth of Print, by Neil Weinstock Netanel with contributions by David Nimmer (Oxford 2016).

⁵⁶ David Nimmer, “In the Shadow of the Emperor: The Hatam Sofer’s Copyright Rulings,” 15 *Torah U-Madda J.* 24 (2010); David Nimmer, “Rabbi Banet’s Charming Snake,” 8 *Hakirah* 69 (2009).

⁵⁷ Netanel, *supra* n. 55, at 217-21. The work setting forth *Yoreh De’ah* bore the Aramaic title for “great tamarisk trees,” a poetic connotation of “the seminal sources of *halakhic* interpretation upon which one should rely.” *Id.* at 217.

⁵⁸ *Sbo’el u-Meshiv*, part 1, # 44.

⁵⁹ The reference is to Rabbi Samuel Valdberg (1829–1907). Netanel, *supra* n. 55, at 217-18.

⁶⁰ The individual in question was Abraham Jacob Stern (1762–1842). When presented with the machine, Tsar Alexander I decreed that Stern would receive

from the Russian government for his proto-computer, and with a further nod that Austrian law directly grants copyright protection,⁶¹ it would be a dishonor to the Torah, and something that common sense rejects, for the Jewish legal system to be less solicitous. After all, “our complete Torah shall not be less than their idle talk.” An expansion of his logic thus runs, “These other legal systems are so worthwhile that I will consider their points as vital stepping stones on which to build my Torah edifice.”⁶²

In this manner, we see a fascinating progression. Nathanson invoked a familiar phrase to signal his own vector about proper grounds for interpretation. What is novel is the direction in which it pointed: Nathanson totally inverted RYBZ’s methodology. Whereas the originator of the saying meant that he cared not a fig to align *halakhab* with norms drawn from outside the tradition, Rabbi Nathanson signals at the outset that he intends to engage in a halakhic journey to vindicate the application of Jewish law with a weather eye on surrounding legal regimes. Indeed, as he continued, “common sense rejects” any other disposition.

It is not only Nathanson who looked at legal frameworks beyond the Jewish realm. Galician Jewry was part and parcel of the German-speaking world⁶³ so it is not out of character to find a reference to Austrian⁶⁴ copyright law.⁶⁵ Nathanson’s biographer emphasizes that his rul-

yearly treasury payments for life. Naḥum Rakover, *Copyright in Jewish Sources* 251 n.6 (Sifri’at Ha-mishpat Ha-ivry 1991) (Hebrew); Ira Robinson, “Hayim Selig Slonimski and the Diffusion of Science Among Russian Jewry in the Nineteenth Century,” in *The Interaction of Scientific and Jewish Cultures in Modern Times* 49, 55 (Yakov Rabkin & Ira Robinson, eds., Mellen 1995).

⁶¹ The *teshuvah* notes that, “in our own country,” civil law itself forbids republication.

⁶² In Story 2, the Dictum denoted the utter rejection of giving any consideration to Greek inheritance law. By 1860, the Dictum denoted consideration of Russian and Austrian copyright law, and reaching Torah results accordingly.

⁶³ Robinson, *supra* n. 60, at 58 (“Without German there can be no cultural educated Jew”). It is said that Jewish schoolboys of the 1860s “secretly read Schiller and Lessing hidden inside volumes of the Talmud.” Jerzy Holzer, *Enlightenment, Assimilation, and Modern Identity: The Jewish Élite in Galicia*, in Polin, *supra* n. 49.

⁶⁴ The enactment in question is the Austrian Law for the Protection of Literary and Artistic Property of 1846. Regarding Nathanson’s reliance on that law, in the context of its antecedents within Prussian, Russian, and French copyright laws, see Netanel, *supra* n. 55, at 225–26.

⁶⁵ Decades earlier, a rabbi in Lemberg was caught “reading Montesquieu’s *Spirit of the Laws* while still clad in *tallit* and *tefillin*.” Stanislawski, *supra* n. 45, at 42.

ings took contemporary circumstances into consideration⁶⁶—such as his most famous responsum validating machine-made matzah⁶⁷—at times evincing surprising flexibility in the process.⁶⁸

We have now seen that RYBZ invoked our Dictum to compare the Best to the Worst, whereas *Sbo'el u-Meshiv* quotes the same language to compare the Best to the Very Good. In the former context, *siba beteilah* is mere *idle chatter*. In the latter, though, it has become a *vital chat* to allow Torah to extend to the full extent of its destined glory.⁶⁹

Given that disparity from the original meaning, it is not surprising to find Schmelkes not only disagreeing with his teacher's bottom-line result but also citing the exact same Dictum in the course of reaching his own diametrically opposed conclusion.⁷⁰ But that usage lays bare the inquiry: Is it really possible for our Dictum to mean the opposite of itself? To answer that question, we need to catalogue the Dictum into its proper channel.

III. Typology of Talmudic Dialogues

A. Excursion into History

Story 2 celebrates a return to Jewish law. It tells the tale of the Hasmoneans chasing out the Greeks and thereupon discarding Hellenistic inheritance law. The sensibility corresponds to both 2 *Maccabees* and Josephus, restoring ancestral Torah law in place of that foreign implant.⁷¹ In the ancient struggle between Athens and Jerusalem,⁷² it cele-

⁶⁶ Warhaftig, *supra* n. 51, at 18. Another example was when he validated the death certificate of a Jewish soldier listing his name incorrectly, allowing his widow to remarry, given that rank, branch of service, and other details matched the deceased. Leo Landman, *Jewish Law in the Diaspora: Confrontation and Accommodation* 211 n. 37 (1968).

⁶⁷ Solomon B. Freehof, *The Responsa Literature* 184–88 (1955).

⁶⁸ Nathanson once publicly endorsed heterodox candidates, including the preacher of the Lemberg Temple. Rachel Manekin, *Politics, Religion, and National Identity: The Galician Jewish Vote in the 1873 Parliamentary Elections*, in Polin, *supra* n. 49.

⁶⁹ Cf. Tamar Ross *Expanding the Palace of Torah* (Brandeis 2004).

⁷⁰ “And regarding what the *Sbo'el u-Meshiv* wrote that if one innovates a new craft, then another person is not allowed to do so in the same format without the former's consent, because ‘our complete Torah shall not be like their idle chatter,’ this is not in accordance with what we learned about the Torah: ‘Just as I give it freely, so you shall give it freely.’ The Torah is not an axe to cut with.” *Shu"t Beit Yitzhak, Yoreh De'ab*, part 5, # 75 (1899).

⁷¹ Brent Nongbri, “The Motivations of the Maccabees and Judean Rhetoric of Ancestral Tradition,” 85, 93–94 & n.29, in Carol Bakhos, ed., *Ancient Judaism in Its Hellenistic Context* (Brill 2005).

brates the latter's victory (regardless of its historical verisimilitude)⁷³ that Greek inheritance law was banished from Israel.⁷⁴

Nonetheless, one aspect of the tale stands out as a glaring anachronism. The Hasmoneans victory occurred around the second century BCE, long before the birth of RYBZ. One need not resort to exotic gymnastics to resolve the discrepancy—it results from the two different versions of the scholion,⁷⁵ one of which recounts the Greek judgments abrogated by the Hasmoneans without mentioning names,⁷⁶ and the other of which pits RYBZ against the Sadducees without mentioning Gentile law.⁷⁷ The two were artificially combined in the Middle Ages and have been printed in that fashion since.⁷⁸

The rabbis of the Talmudic period may have known the contours of laws imposed by the systems of their Greek and Roman rulers, but the point here is not to explicate that facet.⁷⁹ For our present concern is not

⁷² In classical times, Greeks did not register the existence of Jews. “Herodotus did not happen to visit Jerusalem. A page of Herodotus would have been sufficient to put a battalion of biblical scholars out of action.” Arnaldo Momigliano, *Alien Wisdom* 81–82 (Cambridge 1975).

⁷³ The stories’ “highly stylized form, . . . together with the dubiety of commemorating Yohanan’s victories with festival celebrations, casts doubt on the historicity of the account.” Neusner, *supra* n. 21, at 81.

⁷⁴ Even in RYBZ’s own sanctuary at Yavneh in the 1st century CE, two documents have been found that “invoke ‘Greek law’ or ‘custom’ to guarantee maintenance of wife and children,” indicating that the victory was not as great as advertised. Lapin, *supra* n. 3, at 50.

⁷⁵ Prof. Noam identifies them from their manuscript locations, one at Parma and the other at Oxford. Noam, *supra* n. 2, at 341, 351. Others maintain, to the contrary, “that in fact we have a sequential reworking on the Babylonian Talmud,” thereby “clearly dating the commentary later than Noam’s conclusions.” Isaiah Gafni, “The Modern Study of Rabbinics and Historical Questions: The Tale of the Text,” in *The New Testament and Rabbinic Literature* 43, 56 (Reimund Bieringer et al., eds., Brill 2010).

⁷⁶ Noam, *supra* n. 2, at 351 (quoting Oxford version).

⁷⁷ *Id.* (quoting Parma version). Note that the Parma version focuses on the Sadducees and never mentions Boethusians, whereas the Oxford version mentions them twice. *Id.* at 352.

⁷⁸ *Id.* at 355. The conflation may trace back as early as the ninth century. *Id.* at 355–56. It led to a printed version in Mantua in 1514. *Id.* at 359.

⁷⁹ “Rabbinic sources show familiarity with the terminology and practices of Roman legal institutions consistent with the rabbis’ status as elite members of a provincial minority. Christine Hayes, *What’s Divine About Divine Law?* 325, 306 n. 25 (Princeton 2015).

with the Dictum's historicity, but rather with its subsequent reception⁸⁰ (which is why the combined text extant since medieval times is more important than each individual scholion in isolation). As we have just seen, later rabbis have trodden two very different paths in construing the Dictum. To explain the discrepancy, it is helpful to sketch the types of categories into which the Dictum may be slotted.

B. A Bakhtinian Prism

1. Hail Mikhail

The Russian literary theorist Mikhail Bakhtin (1895–1975) bequeathed valuable insights regarding “dialogic” texts, namely “the creation within a single text of a plurality of independent and unmerged voices or consciousnesses, a genuine polyphony of fully valid voices.”⁸¹ Given that the Talmud is replete with dialogue, a rich literature reads its discourse through a Bakhtinian filter.⁸² The dialogic nature of our own Three Stories leads naturally to tapping into that perspective.⁸³

⁸⁰ Our search here investigates “Jewish creativity ... in a way that purely historicist knowledge about the Jewish past could never” reveal. David Stern, *Midrash and Theory: Ancient Jewish Exegesis and Contemporary Literary Studies* 10 (Northwestern 1996).

⁸¹ Christine E. Hayes, “Displaced Self-Perceptions: The Deployment of *Minim* and Romans in *B. Sanhedrin* 90b–91a,” in *Religious and Ethnic Communities in Later Roman Palestine* 263 (Hayim Lapin, ed., Maryland 1998).

⁸² One example is Wimpfheimer, *supra* n. 1, which looks to Bakhtin along with another “scholarly father,” *id.* at 13, namely Robert Cover. (Let me add that Cover was my professor at Yale Law School.) Another is Daniel Boyarin, *Socrates and the Fat Rabbis* 14 (Chicago 2009), which deploys Bakhtin to view the Talmud through a seriocomical prism. Boyarin credits David Stern (formerly my next-door neighbor in Los Angeles) as the first modern critic to hoist the Bakhtinian banner. *Id.* at 146.

⁸³ In traditional terms, the stories form part of *aggada* rather than *halakha*. One legacy of the two books just cited is to abandon that distinction. *Id.* at 20, 28, 370 (citing Wimpfheimer). That trope has a venerable history: “An old *halachab*, abrogated, retires into the crucible of the heart, and is transmuted into an *aggadah*, [which later] again condenses into *Halachab*, but in an improved or wholly new form.” Haim Nahman Bialik, *Revelment And Concealment : Five Essays* 49 (Jerusalem 2000).

2. Socratic Torah

Consider a famous midrash about the red heifer:⁸⁴

A certain *goy* questioned RYBZ saying, “These things that you do appear to be a kind of sorcery. You bring a heifer, slaughter it, burn it, grind it, take its ashes; [when] one of you is defiled by contact with a corpse, you sprinkle two or three drops on him and tell him, you are pure!”

Rabban Yoḥanan said, “Has the spirit of madness ever possessed you?”

He replied, “No.”

“Have you ever seen a man whom the spirit of madness has possessed?”

He said, “Yes.”

“And what do you do for such a man?”

“We bring roots and make smoke under it and we throw water on it and it [the spirit] flees.”

Rabban Yoḥanan then said, “Do your ears not hear what your mouth is saying? So too that spirit is a spirit of impurity as it is written, ‘*And I will also make the prophets and the unclean spirit vanish from the land.*’” (Zech 13:2.)

When he [the non-Jew] left, his [Rabban Yoḥanan’s] disciples said: “Our master, you put off that non-Jew with a reed, but what answer will you give us?”

Rabban Yoḥanan answered: “By your lives! The corpse does not defile, and the water does not purify; rather it is a decree of the Holy One, blessed be He. The Holy One, blessed be He, said, I have set it down as a statute, I have decreed a decree and you are not permitted to transgress my decree.’ *This is the statute of the Torah*’ (Num. 19:2).⁸⁵

The parallel with our Stories is striking—not only is RYBZ again the protagonist, but he gives an initial answer that fails to hit the nail on the head, and then has harsh words for his interlocutor (“Fools” in our Stories, “not hear[ing] what your mouth is saying” here). Only when challenged does he supply the correct explanation, replete with scriptural citation. All that is missing from our Stories is the familiar trope about the initial answer “putting off [his interlocutors] with a reed.”

⁸⁴ It is found, in almost identical form, in two places. See *Numbers Rabbah*, *Hukkat* 19:8; *Pesikta de-Rav Kahana* 4:7.

⁸⁵ This English translation comes from Hayes, *supra* n. 79, at 277–78.

Jenny Labendz cites the above tale as an example of Socratic Torah in her book thus entitled.⁸⁶ Throughout rabbinic literature, rabbis respond to questions put to them by Gentiles. The distinctive feature of Socratic Torah is that “the non-Jew does not merely prompt engagement with the Torah; he participates in it.”⁸⁷ In a nutshell, the thesis is that, like Plato, rabbis engaged in this sort of dialogue “because they believed that knowledge that comes from life experiences and intuitions even of non-Jews is relevant to Torah, and in fact may itself be a source of rabbinic knowledge.”⁸⁸ The audience of these tales may justly conclude that listening to Gentiles is one productive vehicle towards ultimate truth.⁸⁹

3. Isocratic Torah

What construct should we place in opposition to Socratic Torah? For this purpose, we can call upon the “true rival of Plato,” namely Isocrates.⁹⁰ Thus, the converse label “Isocratic Torah” is apropos—plus it has the virtue of being euphonic, given that it happens to append the Hebrew prefix for negation to the very phenomenon whose opposite we wish to invoke.⁹¹

Nonetheless, it is not contended that the historical Isocrates was actually xenophobic⁹²—any more than that the historical Socrates unfailingly dealt with his interlocutors in good faith to learn from their wis-

⁸⁶ Jenny R. Labendz, *Socratic Torah: Non-Jews in Rabbinic Intellectual Culture* 61, 73–74, 104, 128 (Oxford 2013).

⁸⁷ *Id.* at 107.

⁸⁸ *Id.* at 75. An obvious distinction, however, is that Socrates always claimed at the end not to know anything, whereas the rabbis drew “advanced clear conclusions by the end of each dialogue of Socratic Torah.” *Id.* at 84.

⁸⁹ *Id.* at 93; “Readers who come to the Talmud after a long acquaintance with Plato cannot fail to be struck by the dialectical character of rabbinic thought.” Jacob Howland, *Plato and the Talmud* 11 (Cambridge 2011).

⁹⁰ Boyarin, *supra* n. 82, at 69, 85.

⁹¹ For instance, the negation of *efshar* (possible) in Hebrew is *i-efshar* (impossible). The usage here is whimsical rather than scientific; of course, in Greek itself, the prefix for negation is an alpha rather than the iota with which Isocrates’ name begins, as we see in such English terms with Hellenic roots as *symmetric* versus *asymmetric*.

⁹² In composing *Busiris*, Isocrates admittedly has been charged with “Athenian ethnocentrism.” Phiroze Vasunia, *The Gift of the Nile: Hellenizing Egypt from Aeschylus to Alexander* 184 (Berkeley 2001). But the better view acquits him of anything beyond satiric intent. Erich S. Gruen, *Rethinking the Other in Antiquity* 104–05 (Princeton 2011).

dom.⁹³ The typologies of Socratic Torah and Isocratic Torah simply qualify as useful labels, not as historical markers. Those labels allow us to slot our three stories of “idle chatter” below into their proper disposition.

As we have seen, one typical ingredient of Socratic Torah is putting off one’s interlocutors initially with a reed. That crucial element reveals a different dimension to the dialogue, when “the author pulls the camera back, as it were, and we find that the rabbi’s students had been present and listening all along.”⁹⁴ The text thereby reveals two successive modes to the rabbi’s discourse: “When speaking to the non-Jews, he bases his explanation of rabbinic law on the imagination and intuition of a non-Jew, but when speaking to his students, he cites a biblical verse. He changes gears in a matter of seconds.”⁹⁵

An alternative way to express the point is through Christine Hayes’ invocation of “two incommensurate exegetical perspectives.”⁹⁶ The answer to the outsider can be based on objective features, but when the disciples later invoke the familiar trope of “you have driven away these minim with a mere reed; but what will you answer us?”, a different answer is required “for those who accept the hermeneutical assumption of omniscience,” which is the fundamental basis for traditional rabbinic interpretation.⁹⁷

Isocratic Torah lacks that stereo feature—its repetition is monophonic, with the rabbi never departing from his own self-contained perspective. More broadly still, “Socratic Torah reflects a cosmopolitan rabbinic self-perception as members of a broad intellectual community that includes non-Jews.”⁹⁸ In this sense, the conflict between the two can be mapped as the difference between parochialism and universalism.⁹⁹

4. Discussions with Sectarials

Apart from rabbis’ conversations with Gentiles, the vast bulk of discussion recorded in rabbinic literature is with their fellow Jews. Three types of discussion along those lines are possible—(a) with learned adversaries who are equally devoted to the same underlying framework; (b) with learned adversaries, but who have descended into heresy; and (c) with

⁹³ For a comprehensive debunking of Socrates’ good faith, see Boyarin, *supra* n. 82.

⁹⁴ Labendz, *supra* n. 86, at 103.

⁹⁵ *Id.* at 127.

⁹⁶ Hayes, *supra* n. 81, at 270 n. 49.

⁹⁷ *Id.*

⁹⁸ *Id.* at 213.

⁹⁹ Labendz, *supra* n. 86, at 119.

the great unwashed. In all three instances, the text portrays the rabbis of the academy basically as living for the sake of sharp argumentation.¹⁰⁰ Discussions “in the Bavli routinely employ words connoting antagonism and physical struggle.”¹⁰¹ In terms of category (a), even discussions between fathers and sons or between teachers and disciples, when matters of Torah are at stake, are presented such that “they become enemies toward each other.”¹⁰² Such is the give-and-take of the oral exchanges recorded in the Talmud, where conversation is “unmediated, and often fast-paced, which can prompt tempers to flare and insults or fists to be hurled.”¹⁰³ And yet, by the end, their friendship is restored.¹⁰⁴

Turning to category (c), rabbinic tradition is filled with contempt towards the unlearned, to such an extent that “one is permitted to tear apart an *am ha-aretz* as (one would) a fish.”¹⁰⁵ Taking the antagonism even further, the same *sigya* that condones fish-gutting continues:

R. Eleazar said, “It is permitted to stab an *am ha-aretz* on Yom Kippur that falls on the Sabbath.” His students said to him, “Master! Say ‘to slaughter him.’” He said to them, “Slaughtering requires a blessing, stabbing does not require a blessing.”¹⁰⁶

Although it is admittedly perilous to judge what an ancient culture might have considered humorous,¹⁰⁷ those observations seem so over-the-top as to qualify.¹⁰⁸

Nonetheless, as in category (a), ultimate reconciliation is also the goal here. The same individual who condoned fish-gutting “objected to the opinion that the *ammei ha-aretz* have no hope of resurrection.”¹⁰⁹ The

¹⁰⁰ For them, “the lack of intense dialectical debate was essentially a fate worse than death.” Jeffrey Rubenstein, *The Culture of the Babylonian Talmud* 42–43 (Johns Hopkins 2003).

¹⁰¹ *Id.* at 59.

¹⁰² T.B. Kiddushin 30b. See Rubenstein, *supra* n. 100, at 60.

¹⁰³ *Id.* at 63. This commentator explains the direction, “One may not enter the study-house with weapons,” T.B. Sanhedrin 82b, with the explanation, “While metaphoric shields protect against metaphoric warfare, they might not help against real weapons and actual bloodshed.” *Id.* at 61.

¹⁰⁴ T.B. Kiddushin 30b.

¹⁰⁵ Lee I. Levine, *The Rabbinic Class of Roman Palestine* 116 (JTS 1989).

¹⁰⁶ Rubenstein, *supra* n. 100, at 129, quoting T.B. *Pesahim* 49a–b (omitting brackets from that author’s translation).

¹⁰⁷ Momigliano, *supra* n. 72, at 99 (lamenting “our deplorable ignorance of Carthaginian and Parthian jokes”).

¹⁰⁸ Rubenstein, *supra* n.100, at 201 n. 70.

¹⁰⁹ *Id.*

end of the *sugya* counsels the *am ha-aretz* to marry off his daughter to a sage, thereby raising his own stature at the same time that he benefits the latter's property interests.¹¹⁰

Finally, we come to category (b). Adiel Schremer counsels that the essence of the *minut* that the rabbis opposed inheres in their social separation, rooted in the need for group unity.¹¹¹ Emblematic here is the famous episode of the Boethusians¹¹² suborning perjury over the advent of the new moon, to engender the chaos of calendrical confusion into the Jewish community¹¹³—a subversive tactic directly connected to their program of establishing Shavuot on Sunday, as discussed in Story 3. Michal Bar-Asher Siegal understands *minut* according to its more traditional interpretation of *heresy*.¹¹⁴ She adds that they merit the label “fool” not so much as a measure of their intellectual deficiency so much as the peril of their salvific condition.¹¹⁵

Under either view, opposition to *minim* constituted an essential feature of protecting the community itself.¹¹⁶ With them, there could be no compromise, thus warranting full-scale opposition.¹¹⁷ When dealing with sectarians, Isocratic Torah reigns supreme.

¹¹⁰ *Id.* at 136.

¹¹¹ Schremer, *supra* n. 41, at 16, 50. That author avoids the label *heresy*, which connotes a theological quarrel (and hence is more representative of views that Christians held of Jews than vice versa). *Id.* at 144 (debunking “the widespread scholarly assumption that *minut* is the rabbinic equivalent of the Christian ‘heresy’”).

¹¹² With respect to the Sadducees, by contrast, their status is more contested. One view identifies them as *minim*, others do not. *Id.* at 259 n. 2, 167 n. 58. Various textual variations exist among the terms *minim*, Sadducees, and Pharisees. *Id.* at 173 n. 8, 175 n. 39.

¹¹³ T.B. Rosh Hashanah 22b, discussed in Schremer, *supra* n.41, at 79; Raymond Harari, *Rabbinic Perceptions of the Boethusians* 235–53 (UMI Microfilm 1995).

¹¹⁴ She pays her respects to Schremer, but reaches the opposite conclusion. Bar-Asher Siegal, *supra* n. 14, at 10, 14. Note further that “*min* in tannaitic sources refers to a heretical Jew, whereas in Talmudic literature it denotes a non-Jewish heretic.” *Id.* at 19.

¹¹⁵ *Id.* at 46. A synonym for “fool” is “empty,” which characterizes their understanding of scripture. *Id.* at 43–65 (“A Fool You Call Me? On Insult and Folly in Late Antiquity”). See n. 145 *infra*.

¹¹⁶ From a psychological perspective, one may cite here the narcissism of small differences. Sigmund Freud, *Civilization, Society and Religion* 131, 305 (Penguin 1991).

¹¹⁷ “Towards gentiles, the rabbis could allow themselves the ‘generosity’ of practical tolerance, at times even a sense of brotherhood. Toward separatists, who had challenged the identity of the community, they were uncompromisingly hostile.” Schremer, *supra* n. 41, at 141.

C. Slotting in Our Stories to that Framework

Based on those observations, our Stories should qualify as paradigmatic Isocratic Torah. Their concern is not universalistic, but instead particular.¹¹⁸ Far from learning anything from the opponents, they are dismissed as fools. Rather than stereo presentation of initially the putting off the outsiders with a reed and then drawing back the curtain for the insiders, the presentation is monophonic, incessantly driving home the same conclusion: “You are so worthless that I won’t even dignify your ‘points’ by engaging them.”

And yet. On the surface, the Stories look like Socratic Torah. A quick perusal of the Red Heifer Midrash, which qualifies as vintage Socratic Torah, reveals a pattern identical to our Stories in numerous particulars—RYBZ as protagonist, who gives an initial answer that fails to hit the nail on the head, proceeding to harsh words for his interlocutor, and replete with the “real story” that concludes with the accurate verse from scripture. It appears to embody everything that Socratic Torah requires except the reed.

Indeed, so closely do our stories adhere to that paradigm that Rashi actually supplies that missing reed in his commentary—he explicates the phrase “our complete Torah” in Story 3 as “putting off a person with a reed or with straw like your idle chatter—for we have a proof but you lack any proof.”¹¹⁹ His grandson uses similar language to explicate that phrase in Story 2.¹²⁰ In their minds, no fundamental gap separated our Stories from those other incidents in which famous rabbis, including RYBZ, engaged in dialogue that we now characterize as Socratic.

But they actually are the opposite of Socratic, the hallmark of which is that, after invocation of the reed, the curtain is drawn back to make way for the different answer given to “those who accept the hermeneutical assumption of omniscience.” In other words, when speaking to Gentiles, there can be no appeal to scripture—so Socratic Torah necessarily invokes logic. But, after retreating back to his own students, RYBZ gives a new answer based on the bedrock principal of scriptural omniscience.

¹¹⁸ The tension between those poles is perennial. James Loeffler, *Rooted Cosmopolitans* (Yale 2018).

¹¹⁹ Rashi to T.B. Menaḥot 65b (לדחות אדם בקנה ובקש כשיחה בטילה שלכם דלנו יש ראייה ולכם אין ראייה).

¹²⁰ Rashbam to T.B. *Bava Batra* 115b (איני צריך לדחותך בקש). The doyenne of *Megilat Ta’anit* studies likewise characterizes RYBZ as “putting [them] off with straw by [citing] a verse that does not belong.” Noam, *supra* n. 9, at 254.

We can now appreciate why the opposite framework is at work with his dispute with the Sadducees: Given that they accept the written Torah, they are equally committed to omnisignificance. That is why the curtain is not subsequently drawn back. It also accounts for the explanation of “complete Torah” as referring to the combination of Written Torah plus Oral Torah, as the Sadducees reject only the latter.

The above interpretation is how Maharsha explains Story 3—the Sadducees reject the Oral Torah (as opposed to the omnisignificance of the Written Torah).¹²¹ Nonetheless, when we move to Story 2, that same commentator offers a radically different reading, which opens a new dimension here—perhaps the Sadducees accepted the binding nature of the Written Torah yet denied its omnisignificance.

To understand Maharsha’s interpretation of Story 2, we must start with the tale told about how King Manasseh started down the path towards consummate evil.¹²² He began by questioning whether it was really necessary for Moses to record such “worthless” details as “And the children of Lotan were Hori and Heman; and Lotan’s sister was Timna” (Gen. 36:22). Maharsha attributes to the Sadducees in Story 2 the view that “many words in the Torah are idle chatter that deserve to be burned,”¹²³ thus aligning their view with Manasseh’s regarding such matters as the superfluity of Lotan’s genealogy. That stance yields a perfect explanation for why RYBZ initially cited verses about Lotan and his brothers (Gen. 36:20, 36:24)—it sets up his position that this biblical passage is necessary to derive the proper lesson for rules of inheritance even before the giving of the Torah. The Sadducee cannot grasp the point from those bare citations and is incredulous: “With that you rebuff me!?” At that point, he earns the response, “Fool! Our complete Torah shall not be like your idle talk” in order to drive home the point that our complete Torah is perfect (following Ps. 19:8) and contains within it no “idle chatter” along the lines of “your claim that it does contain that idle chatter, G-d forbid.”¹²⁴

Given that wicked Manasseh specifically singled out Gen. 36:22 as extraneous, it was highly skillful, on this reading, for RYBZ to rely on Gen. 36:20 and 36:24. Story 2 is thus beautifully structured to exalt exe-

¹²¹ Maharsha, *Hidushei Agadot to Menahot* 65a (א"ל שוטה ולא תהא תורה שלימה שלנו עם קבלתה כשיחה בטילה שלכם).

¹²² T.B. Sanhedrin 99b.

¹²³ Maharsha, *Hidushei Agadot to Bava Batra* 115b.

¹²⁴ שאנו אומרים שהתורה שלמה תמימה ואין בה שיחה לבטלה כשיחה בטילה שלכם שאתם אומרים שיש בה שיחה בטילה ח"ו.

getical omnisignificance,¹²⁵ which we have already identified as the defining characteristic of the rabbinic outlook.¹²⁶ On that interpretation, it moves further in alignment with Socratic Torah, albeit still retaining elements of the opposite stance.¹²⁷

The irony is rich. The Stories have the hallmark of particularistic Isocratic Torah. Yet they combine many of the elements of universalistic Socratic Torah. Story 2 commences, “In the days of the Greek kingdom, they used to rule by Gentile law,” and uses the Dictum to celebrate the triumph when Gentile law is banished from the realm of Torah. Centuries later, however, Nathanson invokes the Dictum to construe Torah in light of Russian and Austrian law. How can the same phrase mean something and its opposite?

IV. On Autonyms

A. Getting Nowhere Fast

Words function to convey meaning, which entails, at its most basic level, to exclude the opposite. Thus, the minimal denotation of “hot” tells us that the matter in question is not “cold.” Yet some rare words fly free of their semantic straitjacket, conveying a given meaning plus, alternatively, its opposite. Consider the common noun “sanction”—it can mean either *a threatened penalty for disobeying* or alternatively *official permission for an action*. Those two meanings are almost directly opposed. To take another example, the adjective *fast* means *moving at high speed*, as in “a fast car.” Yet an additional meaning is *firmly fixed or attached*, as in “being fast

¹²⁵ Regardless of which of Maharsha’s interpretations applies, both fall within the paradigm of calling the opponents a Fool as a measure of “fierce scriptural arguments in rabbinic literature.” Bar-Asher Siegal, *supra* n. 14, at 61. It should be added that the epithet represents a rare slur in rabbinic literature used most notably “against specific groups, such as the Sadducees.” *Id.* at 60.

¹²⁶ “The Rabbis always undertake their study of the Bible with the assumption that every word in Scripture is both necessary and significant.” Stern, *supra* n. 80, at 18. The technique extends even to every letter (sometimes all the way to every scribal flourish or enclitic). *Id.* at 29, 60.

¹²⁷ It qualifies as Socratic Torah insofar as it ends on a theme of omnisignificance, but not in the respect that there is first one answer to outsiders and then a true answer to insiders. Instead, on this interpretation, RYBZ first articulated a “teaser” with Gen. 36:20 and 36:24. There is no curtain raised at the end for the disciples to revel in the common assumption of omnisignificance, but instead an ongoing debate throughout with the *minim* who consistently deny that proposition.

asleep.” So the same word means *moving* or else *not moving*, depending on the context.¹²⁸

These Janus-words are variously called *contronyms* or *autonyms*.¹²⁹ Sigmund Freud, in a 1910 article, called them *Urworte* (primal words),¹³⁰ adducing the English word *cleave* as a prime example.¹³¹ Though his article does not elaborate usages, the King James Version aptly bears him out as to that English-language usage: In the verse, “If I forget thee, O Jerusalem, ... let my tongue *cleave* to the roof of my mouth” [Ps. 137:5–6], the word means “stick together,” whereas in the verse, “And every beast that parteth the hoof, and *cleaveth* the cleft into two claws, and cheweth the cud among the beasts, that ye shall eat” [Deut. 14:6], it means “split apart.”

In a previous article, I have explicated the fundamental term on which copyright law is premised as an example of this phenomenon¹³²—the law protects only *original* works of authorship,¹³³ but what does that word mean? In context, it refers to something *new*—even though the law equally recognizes “original” in other contexts as something *old*: A scholar of constitutional law who composes an article today has created *original* expression (circa 2020)—concerning the subject matter of the Founders’ *original* intent (circa 1789).¹³⁴ The same term in Hebrew (*meqori*) evinces an identical fluctuation.¹³⁵ Failure to appreciate the dif-

¹²⁸ The Federal Trade Commission once defined the word “fast” synonymously with “fade-proof.” 16 C.F.R. § 171.4 (1973). By contrast, current Coast Guard regulations detail the requirements for “a fast rescue boat.” 46 C.F.R. § 160.156-7 (2018). The latter *fast* requires quick movement, the former none at all.

¹²⁹ Even more ponderous terminology lurks here. Barbara Lewandowska-Tomaszczyk, “Dynamic Perspective on Antonymous Polysemy,” in *Making Meaningful Choices in English* (Rainer Schulze, ed., Gunter Narr 1998) (examples from *handicap* to *weather*).

¹³⁰ *The Antithetical Meaning of Primal Words*, Collected Papers vol. 4, 181–191 (translated by M.N. Searl 1925). His treatment ends with what we now call “Freudian slips”: It is “the original antithetical meaning of words” that occasions people inadvertently blurting out the opposite of what they intend. *Id.* at 161 n. 3.

¹³¹ *Id.* at 159. Most of Freud’s article concerns words in ancient Egyptian, but there is a generous mixture of German and Latin in the presentation. My thanks to David Stern for the Freud reference.

¹³² David Nimmer, *Copyright in the Dead Sea Scrolls*, 38 Hous. L. Rev. 1, 196 (2001).

¹³³ 17 U.S.C. § 102(a).

¹³⁴ The same article investigates other building blocks of copyright to similar effect, showing the instability of numerous terms. Nimmer, *supra* n.132, at 193-96.

¹³⁵ Israel’s Copyright Act, הוק זכות יוצרים, התשס”ח, 2007 § 4 accords protection to expression that is *יצירה מקורית*, a reference denoting something new. Equally

ference led the Supreme Court of Israel into error in a famous copyright case decided in 2000.¹³⁶ Thus is Janus a constant, albeit unremarked, presence in our lives.

With that terminology under our belt, we are now ready to categorize the Talmudic phrase in question.

B. Idle Chatter as Its Own Opposite

“Our complete Torah shall not be like your idle talk” rests on two contrasting foundations. The first one is unambiguous. תורה שלמה reflects the high end of praise. By contrast, שיחה בטלה itself exhibits Janus-like qualities; in fact, that status pertains to both component words—it may be idle chatter or something near the other end of the spectrum.

Let us start with the first word of the phrase. At its most basic level, *siḥa* represents simply *talk*; the content of that talk can range from supernal to infernal. At the latter end, *Ethics of the Fathers* uses that noun as part of its direction, “Engage not in conversation with a woman.”¹³⁷ The word is interpreted in that context to refer to *flirtation*.¹³⁸

Nonetheless, the same word can carry the opposite valence. When Isaac meets Rebecca, the text describes him as לְשׁוֹחַ בְּשׂוּדָה—in other words, he engages in the verb form of that same word. (Gen. 24:63) What does the word mean? Although it is a hapax legomenon,¹³⁹ Rashi interprets it to mean *prayer*.¹⁴⁰ His interpretation faithfully reflects the tradition, which hangs Isaac’s institution of the afternoon service on that precise phrase.¹⁴¹ In sum, then, *siḥa* can range widely.

common usage refers to ancient writings as מקורות, transvaluing the same word into something old. Rakover, *supra* n. 60 (*Zekhut Ha-yotsrim Bemegorot Ha-yebudi'im*).

¹³⁶ Nimmer, *supra* n.132, 116–32, 193–96, citing *Eisenman v. Qimron*, C.A. 2790/93, 2811/93, 54(3) P.D. 817.

¹³⁷ Mishnah *Avot* 1:5.

¹³⁸ Rambam, ad loc: וידוע כי השיחה עם הנשים על הרוב אמנם היא בעניני הביאה. Another commentator interprets the unadorned word *siḥa* here to refer to *siḥa beteilah*. Meiri, *ad loc*. Admittedly, the end of the same Mishnah indicates that this conversation leads to neglect of Torah studies (*uvotel midivrei Torah*).

¹³⁹ A modern translator guesses at the word’s intent, as “no one is sure what it really means.” Robert Alter, *The Hebrew Bible* (Norton 2019), comment to Gen. 24:63.

¹⁴⁰ Rashi, ad loc., citing Psalms 102:1

¹⁴¹ The Talmud could not be more definitive identifying the mysterious verb *la'suah* as deriving from our word *siḥa*: יצהק תקן תפלת מנחה - שנאמר ויצא יצהק. ואין שיחה אלא תפלה T.B. *Berakhot* 26b.

Turning to *beteilab*, that adjective is one of *negation*. A *batlan* who does not engage in business affairs can justly be labeled *idle*.¹⁴² Yet there is another meaning for that same term: one who refrains from commerce in order study Torah full time.¹⁴³ The meaning of *batlan* can therefore toggle¹⁴⁴ from *worthless bum* to *dedicated scholar*.¹⁴⁵ We thus meet Janus face-to-face (as it were) once again.¹⁴⁶

In sum, *Torah shelaimah* always qualifies as the Best; *siha beteilab* may fall at the opposite end of the spectrum, namely the Worst; but it alternatively could fall simply at a lower level—the Very Good, shall we say. In other words, it could be *idle chatter* of no consequence at all, or it could be part of a *vital chat* by comparison to which *Torah shelaimah* reaches its crowning glory.

¹⁴² The Biblical verb itself carries that meaning. Eccl. 12:3 (וּבְטָלוּ הַטְּחָנוֹת). The King James Version loses that meaning by rendering it “the grinders cease,” but Robert Alter preserves it in his translation: “the maids who grind grow idle.”

¹⁴³ “What city is big? One that has ten *batlanim*; less than that is a village.” Mishnah *Megilla* 1:3, In his *Perush la-Mishnah*, Maimonides explains that this category refers to “having ten people in the synagogue who have no work outside the community and reading the Torah and being zealous for the synagogue.”

¹⁴⁴ See Avivah Gottlieb Zornberg, *The Particulars of Rapture* 113 (Schocken 2001) (noting Targum’s use of *batlanim* as translation of term that can convey either *lax* or *medicinal*).

¹⁴⁵ An alternative locution lacks that ambiguity—sometimes, the words of *minim* are derided as *davar req*, an “empty word.” Bar-Asher Siegal, *supra* n.14, at 51–57. Had that term been used, it would have been much more difficult to interpret our Dictum as a contronym. By contrast, the word *beteilab* “on its own does not necessarily mean ‘empty’” and instead depends on context. *Id.* at 58 n. 52.

¹⁴⁶ Boyarin demonstrates that the parallel Greek term ἀπράγμονα likewise bears both of those conflicting meanings. Literally *a-pragmatic*, it refers to a person who is “useless” by one measure but a “philosopher” (one who does not strive for power, prestige, money) on another. Boyarin, *supra* n. 82, at 67. Avivah Zornberg has pointed me to the further anomaly that, in ancient Greek, “the word for business activity [ασχολειν] was formed by the prefixing of an a-privative to the word for enjoyment of leisure.” Kenneth Burke, *Language as Symbolic Action* 471 (Berkeley 1966).

C. Explaining the Dictum's Two-Facedness

So how do these considerations explain our Janus-faced Dictum? The seeds planted above may sprout in several different directions, many of them interleaved. This final section pulls those explanations together.

1. Context

Several aspects of context come to the fore. One concerns the context in which the Stories themselves are set. The others deal with the context in which later rabbis have appropriated the Dictum from those Stories. We consider each in turn.

Fast Company—Let us look at the company our Stories keep. In general, tales throughout the Talmud at times qualify as Socratic Torah, at other times as its opposite. As explicated above, our Stories occupy a middle ground—they have many features characteristic of the universal outlook, but at base they evince a particularistic bent.

It therefore requires careful analysis to slot the Dictum into its proper compartment. But rabbis across the ages who have quoted the Dictum have not undertaken that exercise.

Thinking, Fast and Slow—An Israeli psychologist who won the Nobel prize has captured two modalities of thought: some is deliberate and plodding, the other arrives instantly.¹⁴⁷ A *poseq* writing about copyright protection of a book, inheriting from a predeceased daughter, or the permissibility of Gentiles laboring to build a synagogue on Saturdays requires deliberate concentration on the subject matter at hand—that aspect proceeds slowly. On the other hand, the act of composition requires fluid writing—one cannot devote endless time investigating the roots of each locution used, or the *teshuvah* will never get written.

We can therefore appreciate why sages across the ages have used the same locution, but in opposite senses. It was simply a useful slogan for the moment to express a point of view, not a considered reflection on the etymology of the words that comprise the slogan.

Pulling a Fast One. Or maybe, to the contrary, those using the Dictum as a defense of secular learning were thinking slowly, as they decided deliberately to invoke the quoted words “against the grain.” Readers of *midrash* can grow dizzy as the Rabbis wrest a Biblical verse out of its setting and adduce it as essentially the opposite of its original meaning. Similarly, in the poetry of medieval Spain, a whole rhetorical strategy of

¹⁴⁷ Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus & Giroux 2011).

shibutz (interweaving) developed.¹⁴⁸ When Ramban wrote a letter to French rabbis of his era who had pronounced a ban on the *Guide to the Perplexed*, that defense of his illustrious Spanish forebear incorporated many Biblical verses without citation, “pulling a phrase out of context, shockingly so at times.”¹⁴⁹ Beyond enhancing (not incidentally) his own erudition, this process of *shibutz* was designed to win over adherents, as they recognized Ramban’s densely packed allusions and appreciated new depth to his polemic.¹⁵⁰

This explanation has some limited purchase here. On the one hand, it establishes a pedigree for the process of meaning-reversal, rendering the whole phenomenon less mysterious. On the other, though, it is doubtful that Nathanson credited readers of his responsum with the same depth that Ramban accorded his own correspondents, the French rabbis. So we have only half of the ingredients present of classical *shibutz*; we may presume that Nathanson knew the original Talmudic context of the Dictum when he invoked it against the grain—but not that he would thereby improve his luster with readers who would appreciate the reversal as a sparkling rhetorical device.

2. Narrative

Fast Acting—The most salient aspect of our three Stories is that they are narratives.¹⁵¹ RYBZ acts as a character in them, as do his adversaries. That status is not inexorable—one could have drafted a legal code containing propositions, such as: “It is forbidden to consult any other legal system when reaching a Torah ruling.”¹⁵² Instead, our tradition embod-

¹⁴⁸ David Stern, “Introduction” in *Rabbinic Fantasies* 26 (David Stern & Mark J. Mirsky, eds. Yale 1990) (“Sometimes, the intent . . . was to extend the connotation of a scriptural phrase to a new and original point; at other times, it was to shock the reader into seeing the sacred text in a profoundly profane setting”). See generally Raymond P. Scheindlin, *Wine, Women, & Death: Medieval Hebrew Poems on the Good Life* (JPS 1986).

¹⁴⁹ Patricia Bizzell, “Shibutz as a Conciliatory Rhetorical Style in Nachmanides’ ‘Letter to the French Rabbis,’” 17 *Advances in the History of Rhetoric*, 109, 123 (2014).

¹⁵⁰ *Id.* at 114.

¹⁵¹ Talmudic exchanges with a *min* constitute “fictitious dialogue composed to express rabbinic thought”. Bar-Asher Siegal, *supra* n. 14, at 22.

¹⁵² One is put in mind of the movement in the United States to ban courts from consulting *Sharia* as a source of law. Eugene Volokh, *Religious Law (Especially Islamic Law) In American Courts*, 66 Okla. L. Rev. 431 (2014).

ies a story with actors from which some readers derive that view—and others its opposite.

“A narrator tells a story because it is interesting, and legal narratives are almost always more interesting for describing protagonists whose actions trump the expectations established by rules of law.”¹⁵³ It is no great surprise for readers to derive different lessons from the story, depending on their own times.

A Turn Towards the Menippean—In addition, an important register of our Stories is their humorous nature. In *Socrates and the Fat Rabbis*, Daniel Boyarin explicates those parts of the Talmud that paint our rabbinic heroes in Rabelaisian hues, with humor to spare.¹⁵⁴ The three tales about RYBZ are scarcely as over the top as the tales he explicates. Withal, they evidence an admixture of humor with seriousness, which is that book’s leitmotif.¹⁵⁵

The invocation of humor sheds valuable light on our Three Stories. In each instance, RYBZ initially brings forth seemingly irrelevant citations as a strategy to ridicule his opponents.¹⁵⁶ He exhibits what Christine Hayes labels “exegetical exuberance,”¹⁵⁷ which is particularly ironic in that the tradition subsequently rejected his exegesis (even as it accepted his bottom line).

In short, although RYBZ is a revered role model in general,¹⁵⁸ one may view his interchanges with the sectarians as less than his finest hour, punctuated as they were by calling his opponents fools for failing to accept propositions that were themselves wobbly. It is therefore not surprising to find future Nathansons and others who wished to invert the initial sense with which he pronounced the Dictum.

¹⁵³ Wimpfheimer, *supra* n. 1, at 133.

¹⁵⁴ Boyarin, *supra* n. 82, at 28 (“bodily glory and mess”).

¹⁵⁵ The following is representative: “Menippean satire, also known as spoudogeloion, is a peculiar type of literature produced by and for intellectuals in which their own practices are both mocked and asserted at one and the same time.” *Id.* at 26. For more on humor and ridicule as polemical tools used in the rabbinic corpora against heretics, see Bar-Asher Siegal, *supra* n.14, at 189–90.

¹⁵⁶ Neusner, *supra* n. 21, at 85.

¹⁵⁷ Hayes, *supra* n. 81, at 282. Although the target of the text analyzed in that work consists of heretics, a variant reading is to Sadducees. *Id.* at 264.

¹⁵⁸ Gedaliah Alon, *The Jews in Their Land in the Talmudic Age* 86–118 (Gershon Levi, trans. Harvard 1989).

3. Fast Forward

A lot can happen over the course of two thousand years. Things change. New sensibilities emerge. Moving from the time of RYBZ to Nathanson, let us look at significant currents in the Jewish world in the decades before his 1860 *teshuvah*.

As a young lad in Romania, Solomon Schechter learned that a place existed called “America.” The cause was not a vibrant geography curriculum in his heder, but instead that he read *Sefer haBrit*, a work that popularized science and other secular subjects on the theory that their understanding was needed for a proper appreciation of Torah.¹⁵⁹ Pinḥas Elijah Horowitz of Lithuania composed the work in 1797, with a Kabbalistic spin across a broad swath of subject matters.¹⁶⁰ From its publication through 1925, the book went through forty printings in Hebrew, Yiddish, and Ladino.¹⁶¹ Jews throughout Eastern Europe read it, right down to characters in Yiddish novels.¹⁶²

Sefer ha-Brit admonishes its readers, “Go and learn from that good and wise man, Socrates.”¹⁶³ There follows a paean to copyright protection—Horowitz places a duty on his readers to support the works of authors by going out and buying their books, even if not of interest!¹⁶⁴ The milieu in which Nathanson was writing militated in favor of his approach, both favoring works of authors and appreciating secular wisdom while refining Torah.¹⁶⁵

¹⁵⁹ Ira Robinson, *Kabbala and Science in Sefer Ha-Berit: A Modernization Strategy for Orthodox Jews*, 9 *Modern Judaism* 275, 275 (1989).

¹⁶⁰ David B. Ruderman, *A Best-Selling Hebrew Book of the Modern Era: The Book of the Covenant of Pinḥas Hurwitz and its Remarkable Legacy* (Washington 2014).

¹⁶¹ *Id.* at 123-29. More recently, a hardcover edition published in Israel runs 779 pages with notes, commentaries, and indices. Rabbi Pinchas Eliyahu Horowitz, *The Complete Book of the Covenant* (Yitzhak Leqes, ed., Hen Le-Dodi 2014) (Hebrew).

¹⁶² Isaac Bachevis Singer, *Shosha* 8 (Farrar Straus & Giroux 1978).

¹⁶³ *Sefer ha-Brit*, part 2, *Divrei Emet* 78a. Socrates “did not wish to flee from the prison and jailor to save himself from death, even though he had the chance afforded by his students who paid a bribe.” *Id.*

¹⁶⁴ “Don’t say, ‘Why do I need another book or invention?’ That is not only failing to support but is actually causing harm to the author and to the whole world. It causes them monetary harm and to not wish to write anymore.” *Id.* at 77b-78a. Hurwitz himself was a victim of copyright infringement in 1800, soon after the initial 1797 publication of *Sefer ha-Brit*. Ruderman, *supra* n. 160, at 7, 33.

¹⁶⁵ It is no great leap to associate *Sefer ha-Brit* with Nathanson’s composition of his copyright *teshuvah* in 1860—Hurwitz himself originally composed the first part of *Sefer ha-Brit* in Lemberg and a new edition of the work was published there in 1859. *Id.* at 22, 125.

On that note, our investigation concludes. Historians strive to avoid retrojecting modern sensibilities onto ancient texts.¹⁶⁶ Rabbis have no such compunctions. Given their freedom to adjust to their own times, it is almost natural to find Nathanson looking at Austrian copyright law when adjudicating Torah law about copyright protection.¹⁶⁷ Nor should it occasion surprise that, to express himself felicitously, he alighted on a pithy saying from the sources, without being bothered that he was using it in a manner at odds with its origin.

The standard interpretation of the “complete Torah” that RYBZ referenced in the Dictum is that it contains two branches: Written and Oral. The passage of two millennia allows us to reclassify those branches: Socratic Torah and Isocratic Torah. For the particularistic outlook exemplified in the Stories has never ceased—yet, the tradition has also witnessed powerful universalistic expressions throughout the ages. The dichotomy persists through today—one need not search far to locate current books with particularistic tendencies published in the Orthodox world¹⁶⁸ nor to find universalistic admonitions in that same literature.¹⁶⁹

For that reason, we find one and the same slogan deployed by champions of particularism to support their viewpoint no less than by champions of universalism to support their contrary position. After all, our Torah is complete. Expecting anything less would just be idle chatter. ❧

¹⁶⁶ Rubenstein, *supra* n. 100, at 198 n. 31.

¹⁶⁷ Greater depths lurk here than can be fully explicated in this article. A vast corpus of doctrines exists whereby rabbis consider other legal systems in reaching their Torah rulings; we previously saw references to *minbag ha-medinah* and *dina d'malkhuta dina*. Although Rashba rejected application of those doctrines in the matter he faced in Perpignan, other situations call for different expedients. For a discussion of this aspect of Nathanson’s ruling, see generally Netanel, *supra* n. 55.

¹⁶⁸ Yitzhak Shapira & Yosef Elitzur, *Torat Ha-Melech* (Od Yosef Chai 2009). The Israeli police investigated the authors and *baskamah* writers of that book for incitement in endorsing wanton murder of Arabs; but the state ultimately decided not to press charges. Jeremy Sharon, “A–G: ‘Torat Ha-Melech’ Authors will not be Indicted,” *Jerusalem Post* (May 28, 2012).

¹⁶⁹ One recent book condemns an ontological view of non-Jews as “tragic and extremely dangerous... the very antithesis of all that Judaism stands for.” Nathan Lopes Cardozo, *Jewish Law as Rebellion* 87 (Urim 2018). It concomitantly celebrates “the universalistic mission, as expressed by the prophets...” *Id.* at 111.