

***Rabbi Ishmael, Meet Jaimini:
The Thirteen Middot of Interpretation in
Light of Comparative Law***

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Introduction

Before us lies a venerable religious text. Although regarded by the faithful as having no human author, the text is written not in some arcane Divine code, but in a recognizable human tongue. And yet the language of the text is often difficult to interpret: the vocabulary and grammar are not modern, and some messages that the words convey are terse and cryptic. This presents a problem to the faithful. They know that the text is intended to lay down their religious obligations, but they are left in the dark as to many of the practical details of fulfilling these duties. The faithful know that they cannot expect God Himself to reach down from the beyond and provide them with explanatory notes. Rather, they have no choice but to take upon themselves the task of working out the meaning of the text to the best of their human ability. And to guide them through this arduous but all-important process, a noted scholar has identified and enumerated a set of principles or canons that may be used as tools for interpreting the text.

The paragraph above may most naturally be understood by Jewish readers as referring to the problem of how to understand some of the commands of the written Torah, and to the Thirteen Middot (rules, principles, maxims, or canons) of Interpretation as listed by Rabbi Ishmael. Such readers may be surprised to learn that the entire paragraph can be applied equally well to the difficulties experienced by Hindu practitioners with respect to their Sanskrit scriptures, and to the Mimansa Principles of Interpretation that were listed by the Indian scholar Jaimini—who lived centuries before Rabbi Ishmael. All this is by way of introduction to the theme of this article: the Thirteen Middot as viewed in light of comparative law.

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The first part of the article will present the Middot and compare them with some of their counterparts from other legal traditions. The second part will examine how a comparative-law approach may shed light on the old scholarly question as to the origin of the Middot. Finally, the third part will look at criticisms that have been leveled at the Middot and other similar canons of legal interpretation, and will seek to arrive at a proper understanding of the role of these rules.¹

The list of the Thirteen Middot of Interpretation, familiar in at least a superficial way to anyone who recites it as part of the Morning Services, is attributed to Rabbi Ishmael ben Elisha (second century C.E.) and is taken from the introduction to the *Sifra*, the work of halakhic midrash on the Book of Leviticus. As translated by Chief Rabbi Lord Jonathan Sacks (with the addition of short Hebrew phrases by which some of the Middot may be identified), these rules are as follows:

1. An inference from a lenient law to a strict one (*kal va-homer*), and vice versa.
2. An inference drawn from identical words in two passages (*gezera shava*).
3. A general principle (*binyan av*) derived from one text or two related texts.
4. A general law followed by specific examples (*kelal u-ferat*) [where the law applies exclusively to those examples].
5. A specific example followed by a general law (*perat u-kehalal*) [where the law applies to everything implied in the general statement].
6. A general law followed by specific examples and concluding with a general law (*kelal u-ferat u-kehalal*): here you may infer only cases similar to the examples.
7. When a general statement requires clarification by a specific example (*kelal she-hu zarikh li-ferat*), or a specific example requires clarification by a general statement (*perat she-hu zarikh li-kehalal*) [then rules 4 and 5 do not apply].
8. When a particular case, already included in the general statement, is expressly mentioned to teach something new, that special provision applies to all other cases included in the general statement.

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9. When a particular case, though included in the general statement, is expressly mentioned with a provision similar to the general law, such a case is singled out to lessen the severity of the law, not to increase it.
10. When a particular case, though included in the general statement, is explicitly mentioned with a provision differing from the general law, it is singled out to lessen in some respects, and in others to increase, the severity of the law.
11. When a particular case, though included in the general statement, is explicitly mentioned with a new provision, the terms of the general statement no longer apply to it, unless Scripture indicates explicitly that they do apply.
12. A matter elucidated from its context (*davar ha-lamed me-inyano*), or from the following passage (*davar ha-lamed mi-sofo*).
13. When two passages [seem to] contradict each other, [they are to be elucidated by] a third passage that reconciles them.²

This enumeration is an expansion of an earlier list, the Seven Middot of Hillel (likewise found in the introduction to the *Sifra*); some of R. Ishmael's rules are identical with some of Hillel's, while others are new, and R. Ishmael's rules 4 through 11 are subdivisions of Hillel's rule 5.³

I. Comparisons

The Common Law

A student of American law will notice that some of R. Ishmael's Middot bear at least some family resemblance to maxims that are employed by courts in the United States for interpreting state or federal statutes. Such maxims are in fact shared by many countries—including India, South Africa, and even the State of Israel—whose legal systems are based on or influenced by English common law. Perhaps the most obvious parallel is between Middah 1 (*kal va-homer*) and the common law rule of inference *a fortiori*. Compare the following examples:

² Sacks, Jonathan. *The Koren Siddur*. Jerusalem: Koren Publishers, 2009, p. 54.

³ There is an additional list of 32 Middot of Rabbi Eliezer ben Yose Ha-Gelili, which include those of Hillel and R. Ishmael but mainly concern aggadic interpretation. Not included in the list of R. Ishmael's Middot are some similar and related rules, such as *hekkesb* ("comparison") and *semukhim* ("juxtaposition"). R. Ishmael's interpretive approach is often distinguished from that of R. Akiva, which was based on the premise that no words in the Torah are superfluous.

- *Jewish law*: If, when a person definitely comes to steal [without threatening violence] and the victim kills the thief, the victim is liable, all the more so (*kal va-homer*) one about whom there is a doubt whether he comes to steal [that his killer would be liable].⁴
- *Common law (U.S.)*: If, under the Iowa Constitution, the state legislature itself may not propose legislation to be enacted by vote of the people, then, *a fortiori*, an individual citizen may not do so.⁵

Resort to *a fortiori* reasoning is quite common in American courts, but one New York state judge (who also happened to be a rabbi⁶) specifically chose to use the language of Middah 1 when ruling as to the range of jurisdiction of his Family Court:

[T]he Kal v'chomer holds that where a principle of law holds true of a major category, it most certainly applies to every minor category included therein. By applying this principle for which no exact counterpart can be found in the common law, one can reason, even without legislative enactment, that the [Family Court's] right to adjudicate and award [child] custody must certainly include the right to independently adjudicate visitation without the pendency of a prime proceeding for custody.⁷

Other Middot have their common law equivalents as well. Middah 2, the *gezerah shavah*, has been compared with the common law maxim, "A particular word or phrase should have the same meaning when used in different parts of the same statute."⁸ Thus we have the following:

- *Jewish law*: One Torah verse (Deut. 22:13), speaking of marriage, uses the phrase "When a man takes (*yikkab*) a woman." Another Torah verse (Gen. 23:13), describing Abraham's acquiring a parcel of real estate from a landowner, uses the phrase, "I give you

⁴ *Mekhilta de-R. Ishmael, Nezikin* 13.

⁵ *Anderson v. Secretary of State of Iowa*, 634 N.W.2d 148 (Supreme Court of Iowa, 2001).

⁶ Judge Stanley Gartenstein; see <<http://alternateresolutions.com/arbitrators/>>.

⁷ *Application of Juan R*, 84 Misc. 2d 580, 374 N.Y.S.2d 541 (Fam. Ct. 1975), cited in Fromer, Jeanne C. "Note: Looking to Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance in American Statutory Interpretation." 115 *Harvard L. Rev.* 1456 (March, 2002), n. 34. This reference to *kal va-homer* appears to be the only instance in American jurisprudence of employment of any of the Thirteen Middot by name.

⁸ This parallel and others are noted in Miller, Geoffrey P. "Pragmatics and the Maxims of Interpretation." 1990 *Wis. L. Rev.* 1179, p. 1187.

the price of the field, take (*kaḥ*) it from me.” Because the latter usage of the term “taking” (*kiḥab*) involves a financial transaction, the Gemara likewise understands the former usage of the same term to mean that a man may acquire a woman in marriage by means of a monetary payment to her.⁹

- *Common law (U.S.)*: One federal statutory provision (28 U.S.C. §1331) grants original jurisdiction to federal district courts to hear cases “arising under” federal law. Another provision (28 U.S.C. §1338(a)) grants exclusive jurisdiction to federal district courts to hear cases “arising under” patent law. In §1331, the “arising under” phrase has been interpreted to mean that a district court’s federal-question jurisdiction extends only to those cases in which the plaintiff’s right to relief depends on a question of federal law. “Linguistic consistency, to which we have historically adhered, demands” that a district court’s patent-law jurisdiction under §1338(a) likewise extend only to those cases in which the plaintiff’s right to relief depends on a question of patent law.¹⁰

Middah 12, *davar ha-lamed me-inyano/mi-sofo*, may be compared with the common law maxim *noscitur a sociis*, “a word is known by the company it keeps,” that is, a word derives meaning from surrounding words. Note the following examples:

- *Jewish law*: The Eighth Commandment, “You shall not steal” (Ex. 20:12), is preceded in the same verse (in the Hebrew version) by the Sixth and Seventh Commandments, “You shall not murder” and “You shall not commit adultery.” “Stealing” in this context must refer to the capital offense of kidnapping, since the two preceding offenses are both capital offenses (*Mekhilta*).
- *Common law (England)*: Under the Factories Act 1961, “floors, steps, stairs, passageways and gangways” had to be kept free from obstruction. The court held that as all the other words in the list were used to indicate passage, a floor used exclusively for storage did not fall within the Act.¹¹

Another frequently used common law maxim is *ejusdem* (or *eiusdem generis*) (literally, “of the same kind or class”), which teaches that when a general word or phrase follows a list of specific persons or things, the

⁹ Talmud Bavli, *Kiddushin* 2a.

¹⁰ *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (U.S. Supreme Court, 1988).

¹¹ *Pengelly v. Bell Punch Co. Ltd* [1964] 1 WLR 1055 (High Court of England and Wales).

general word or phrase will be interpreted to include only persons or things of the same type as those listed. An interesting example is found in Israeli case law:

The Law on Nazi and Nazi Collaborators (Punishment) of 1950 defined “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts.” The general phrase “other inhumane acts” could apply only to such acts as resembled in their nature and gravity those specified in the definition. Thus, a custodian in Auschwitz-Birkenau (who was herself an inmate) was held not to have committed a crime against humanity by beating detainees with her bare hand or making them kneel.¹²

Here there is an apparent conflict with Jewish law, since Middah 5 directs that when specific examples are followed by a general statement (*perat u-kehal*), the law applies to *everything* implied in the general statement, not merely things of the same type as the examples. However, R. Ishmael’s system does afford a place for a modified version of *eiusdem generis* in Middah 6, *kehal u-ferat u-kehal*. This is how he might have explained his position to a common law judge: “You say that a statement of particulars (what I call a *perat*) will somewhat blunt the force of a general statement (what I call a *kehal*) that follows it. I agree that this can happen, but only if the *perat* first demonstrates its strength by completely blunting the force of another *kehal* that precedes it, as in my Middah 4.” For example:

Exodus 22:8 discusses a bailee’s double-payment liability “for every matter of misappropriation [*kehal*], whether it be for ox, for ass, for sheep, for raiment [*perat*], or for any manner of lost thing [*kehal*].” Applying Middah 6, the Rabbis conclude that the *kehal* is not to be taken literally and broadly, but is to be understood as referring only to a class of articles resembling those in the *perat*, i.e. items of personal property with a monetary value.¹³

Christian and Muslim Sources

English common law is not the only legal system with parallels to the Thirteen Middot. A century or two after R. Ishmael, the Christian theologian Augustine of Hippo (354–430 C.E.), when interpreting ambiguous passages in Scripture, made use of various rules, one of which resembles Middah 12: “it is necessary to examine the context of the preceding and

¹² Attorney General v. Ternek, 5 *Pesakim Mehozim* 142, pp. 147-48 (Isr. Dist. Ct. 1951).

¹³ Talmud Bavli, *Bava Mezia* 57b.

following parts surrounding the ambiguous place, so that we may determine which of the meanings among those which suggest themselves it would allow to be consistent.”¹⁴ Then there came the Islamic jurists, who applied principles of *qiyas* (legal derivation based on analogical inference), including the *a fortiori* reasoning found in Middah 1. For example:

The Qur’an prohibits disrespecting parents by saying “Fie!” to them; from this it is deduced *a fortiori* that striking a parent is prohibited.¹⁵

Greece and Rome

Scholars have long been pointing out the many striking parallels between R. Ishmael’s Middot and various Greco-Roman principles of rhetoric and legal interpretation. The by-now familiar Middah 1 meets its Greek match in the rhetorical device of *ek tou mallon kai betton* (from the more and the less), which became a principle of Roman law, as illustrated by the following:

- Aristotle, *On Rhetoric*, 2.23: “If not even the gods know everything, human beings can hardly do so.”
- Quintilian, *Institutes*, 5.10.88: “If it is lawful to kill a thief in the night [when one is not sure if he threatens violence], how much more is it lawful to kill an armed robber [who definitely threatens violence]?”¹⁶

Note that Quintilian’s statement here is a sort of mirror image of the *Mekhilta’s kal va-homer* concerning thieves, cited above. Roman law also had its equivalent of Middah 3, the derivation of a general principle (*binyan av*) derived from one text or two related texts. Compare the following examples:

- *Jewish law*: Exodus 22:4 states, “If a man cause a field or vineyard to be eaten, and shall let his animal loose, and it feed in another man’s field, of the best of his own field and of the best of his own

¹⁴ St. Augustine, *On Christian Doctrine*, trans. D.W. Robertson. Book III, § 2. New York: Liberal Arts Press, 1958.

¹⁵ Cohen, Mordechai Z. “A Talmudist’s Halakhic Hermeneutics: A New Understanding of Maimonides’ Principle of Peshat Primacy.” *JSIJ* 10 (2012) 257–359, p. 277.

¹⁶ Both of these are cited in Hidary, Richard. “The Controversial Kal va-Homer: Hillel’s Introduction of Midrashic Interpretation to Bnei Betera.” midrash.rabbinics.org/Sources/20-20English.docx.

vineyard shall he make restitution.” I know only this case; what is the source for anyone who pays a fine that we assess it only from the best land? Therefore the verse comes to teach, “the best of his field and the best of his vineyard he shall pay.” This is an archetype (*binyan av*) for anyone who pays a fine.¹⁷

- *Roman law:* The first chapter of the *Lex Aquila* establishes that one who kills the cattle of another must pay the highest value that animal had during that year. The third chapter of the *Lex Aquila* legislates compensation for non-lethal damage to cattle as well as to all other animals and property, but there, the requirement to pay the “highest value” (*plurimi*) does not appear. However, Sabinus held that we must interpret as if there too the word *plurimi* had been inserted, the legislator having thought it sufficient to have used the word in the first chapter.¹⁸

Roman law was acquainted with the narrowing general-to-specific rule expressed in Jewish law as Middah 4, *kelal u-ferat*. Compare the following:

- *Jewish law:* Leviticus 1:2 provides for sacrifices to be brought “of the animals, of the herds and flocks [i.e. cattle, sheep, and goats].” The general term “animals” (*bebemah*) is restricted by the more specific term “herds and flocks,” and thus we infer that sacrifices may be brought only from those classes of animals, and not from wild beasts (Talmud Bavli, *Zevahim* 34a).
- *Roman law:* A man, in conveying land, gave an assurance that (1) it was first class (i.e. free from servitudes), and (2) he had not allowed its legal position to deteriorate (had not allowed any servitudes to be imposed). Proculus held that only the second, narrower clause was binding; though the first clause alone, without the addition of the second, would mean the complete absence of any servitudes, yet I believe the second clause releases him sufficiently to limit his responsibility to such servitudes as were imposed through himself.¹⁹

¹⁷ *Mekhilta de-R. Ishmael*, 22:4.

¹⁸ These examples are given by Daube, David. “On the Third Chapter of the *Lex Aquila*,” *Law Quarterly Review* 52 (1936), 265, cited in Hidary, Richard. “Talmudic Topoi: The Hermeneutical Rules of Midrash and Greco-Roman Rhetoric.” <<http://midrash.rabbinics.org/07%20Hidary%20-%20Talmudic%20Topoi.pdf>>.

¹⁹ Cited in Daube, David. “Rabbinic Methods of Interpretation and Hellenistic Rhetoric.” 22 Hebrew Union College Annual 239 (1949), pp. 253-254.

Likewise, Roman law knew the broadening specific-to-general rule found in Jewish law as Middah 5, *perat u-kehalal*. Thus we have the following:

- *Jewish law*: Deuteronomy 22: 1, 3 states: “You shall not see your brother’s ox or his sheep driven away, and hide yourself from them; you shall surely bring them back to your brother... And so shall you do with his ass, and so shall you do with his garment, and so shall you do with every lost thing of your brother’s...” Because the general term “every lost thing” follows the specific examples, we rule that the obligation to return lost property applies to all losses, even those of real property (Talmud Bavli, *Bava Me’zila* 31a).
- *Roman law*: A will provided that “X shall be my heir if he ascends the Capitol; X shall be my heir.” Mucius held that the second clause should prevail, since it is fuller than the first (cited in Daube, *Rabbinic Methods* 253).

A close echo of Middah 12, moreover, is found in Cicero’s rule that “the ambiguous passage becomes intelligible from what precedes and comes after it” (cited in Daube, *Rabbinic Methods* 257).

Rabbi Ishmael, Meet Jaimini

If much attention has been paid to these Greco-Roman parallels with the Thirteen Middot, the same cannot be said for the equally intriguing parallels to be found in the law of ancient India. Although points of similarity between “the literature of the Talmud and that of the Sanskrit Purva Mimamsa” were noticed at least as long ago as 1893,²⁰ and a more recent American law review article on maxims of statutory construction (Miller) gave examples from both the Jewish and Indian traditions, no direct comparison seems to have been made until now. Thus a bit of background information is in order here.²¹

²⁰ Cowell, E. B. “Inaugural Address,” *Transactions of the Ninth International Congress of Orientalists*, vol. 1. London: 1893, p. 393.

²¹ In order to forestall any unease that some readers may possibly feel as a result of an extended comparison between the Jewish and Hindu legal traditions, it may be helpful to refer to the following statements from the Declaration of the Second Hindu-Jewish Leadership Summit (Jerusalem, 2008), representing the views of the Chief Rabbinate of Israel and a body of major Hindu religious leaders: “[T]he participants reaffirmed their commitment to deepening [their] bilateral relationship predicated on the recognition of One Supreme Being, Creator and Guide of the Cosmos; shared values; and similar historical experiences... It is

The oldest sacred scriptures of the Hindu religion, said to have been composed during the first millennium B.C.E., are known as the Vedas, from the Sanskrit word *veda* meaning “knowledge” or “wisdom.” “Orthodox Hindus believe that the Vedas are divine and eternal truths and that they had no human author. “They are [said to be] the breath of God, eternal truths revealed to the rishis [seers] of yore.”²² Attached to the Vedas are treatises called Brahmanas, likewise considered to be of divine origin, which prescribe methods of performing various Yagyas, or sacrifices. According to one of the classic Hindu schools of philosophy, these rules were of particular importance, as proper performance of the Yagyas was believed essential to achieve *moksha*, or liberation. As the centuries passed, however, a problem arose. Not only was the text itself sometimes vague and even contradictory, but the archaic language of these scriptures, known as Vedic Sanskrit, became increasingly difficult for the public to understand.²³

Ultimately, however, the Indian scholar Jaimini systematized various interpretive guidelines that had evolved before his time and formulated the Mimamsa Principles of Interpretation.²⁴ Eventually these principles came to be applied not only in interpreting the rules of Yagya, but more broadly in construing Vedic legal texts. Jaimini’s work has been variously

recognized that the One Supreme Being, both in its formless and manifest aspects, has been worshipped by Hindus over the millennia. This does not mean that Hindus worship ‘gods’ and ‘idols.’ The Hindu relates only to the One Supreme Being when he/she prays to a particular manifestation.” See <http://www.millenniumpeacesummit.com/2nd_Hindu-Jewish_Leadership_Summit_Declaration.pdf>.

²² Baybrooke, Marcus. *Beacons of the Light: One Hundred People Who Have Shaped the Spiritual History of Humankind*. Ropley, UK: O Books, 2009, p. 27, citing Mahadevan, T.M.P. *Outlines of Hinduism*. Bombay: Chetana, 1956, p. 29.

²³ For a basic discussion of the background of the Vedas and their interpretive rules, see the two-part article by Katju, Markandey, “The Mimamsa Principles of Interpretation,” 1 SCC (Jour) 16 (1993), available at <<http://www.ebc-india.com/lawyer/articles/93v1a4.htm>>, and “The Mimamsa Principles of Interpretation—II,” 2 SCC (Jour) 16 (1994), available at <<http://www.ebc-india.com/lawyer/articles/94v2a1.htm>> (hereinafter referred to respectively as Katju I and Katju II).

²⁴ The word “Mimamsa” (alternatively transliterated “Mimamsa” or “Mimangsa”) is derived from the Sanskrit *man* (“to know”) and can be translated as “desire for knowledge” or “inquiry,” that is, inquiry into the Veda (Biderman, Shlomo. *Scripture and Knowledge: An Essay on Religious Epistemology*. Leiden: E.J. Brill, 1995, p. 182).

dated to 600 B.C.E. (e.g. Katju I), 500 B.C.E.,²⁵ or a range between 400 and 200 B.C.E.²⁶ In other words, he may have been active as early as 20 years before the Babylonian destruction of the First Temple in Jerusalem, or as late as the era of Ptolemaic rule during the Second Temple.

Upon examination, many of the Mimamsa Principles seem to have no equivalent in the Thirteen Middot. Some of the Principles address concerns that are not at issue in the Middot; for example, the Laghava axiom states that the construction that makes a law's meaning simpler and shorter is to be preferred, and the Shruti principle directs that the literal meaning prevails as long as the text is clear and the literal meaning accords with the law's intention (Katju I).

And yet there are affinities as well. Resembling Middah 2, Jaimini's Arthaikatva principle provides that there should be consistency in the meaning given to the same word in different contexts, that is, the same word used in different places should be given the same meaning.²⁷

Under Jaimini's Vakya principle of "syntactical connection," when a provision is in need of clarification, it becomes complete by being supplemented by some detail that is found in close proximity (Jois 460). As the following example indicates, this Principle may resemble Middah 12 in operation:

A text states, "He places besmeared pebbles of sandstone." Then follow the words, "Ghee [i.e. clarified butter] is light." In the first sentence, it is not clear as to what the pebbles are to be besmeared with. This difficulty is obviated under the Vakya principle by reading the first sentence along with the second sentence, which indicates that the pebbles are to be besmeared with ghee (Katju II).

Reinforcing the Middah 12 approach is the Prakarana principle, which instructs that doubts regarding the meaning of a word in a provision should be resolved by looking into the rest of the provision and having regard to the context in which the word is used (Jois 463).

In one instance, an apparent conflict between R. Ishmael and Jaimini turns out, on closer inspection, to be less serious than it appears. Compare the following:

²⁵ See, for example, Sarathi, Shri Vepa P. Foreword, *The Sikkim Code*, vol. II. Gangtok: Sikkim Government Press, 1991, p. vii.

²⁶ See, for example, Fowler, Jeanane D. *Perspectives of Reality: An Introduction to the Philosophy of Hinduism*. Brighton, UK, and Portland, Ore.: Sussex Academic Press, 2002, p. 67.

²⁷ Jois, Mandagadde Rama. *Legal and Constitutional History of India*. New Delhi: Universal Law Publishing Co., 1984, p. 448.

- *Middah 13*: When two passages (*shenei ketuvim*) [seem to] contradict each other, [they are to be elucidated by] a third passage that reconciles them.
- *Mimansa Principles*: The Samanjasya axiom states that all attempts should be made at reconciling apparently conflicting texts. However, the Vikalpa axiom provides that if there is a real and irreconcilable contradiction between two legal rules having equal force, the rule more in accordance with equity and usage should be adopted at one's option (Katju I).

However, these seemingly divergent approaches are brought into closer harmony when one takes into account that Middah 13 is not an absolute rule. "It should be noted that only a small portion of the *shenei ketuvim* expositions in Halakhic Midrashim make use of a third, decisive verse; the majority of these expositions present the seeming contradiction... followed by a proposal for resolving the two verses that is not based on a third 'decisive' verse, but that explains each verse as reflective of a different reality."²⁸

Even if there seem to be relatively few direct parallels between the Thirteen Middot and the Mimansa Principles,²⁹ the real significance of Jaimini's system to our discussion, as we shall see, is the very fact that such a system existed when and where it did.

II. Origins

By way of justifying his invocation of Middah 1, the *kal va-homer*, as a means of determining a point of New York state law, Judge Stanley

²⁸ Kahana, Menahem I. "The Halakhic Midrashim," *The Literature of the Sages : Second Part: Midrash and Targum, Liturgy, Poetry, Mysticism, Contracts, Inscriptions, Ancient Science and the Languages of Rabbinic Literature*, ed. Shmuel Safrai, Zeev Safrai, Joshua Schwartz, and Peter J. Tomson. Assen, The Netherlands, and Minneapolis: Royal Van Gorcum and Fortress Press, 2006, p. 14.

²⁹ One more Middah has its equivalent in an ancient Indian source: the *kal va-homer*. The principle of *kaimutika (kaimutya) nyaya*, found in the philosophical writings of Aksapada Gautama (ca. 2nd century B.C.E.; see Matilal, Bimal Krishna, *Perception: An Essay on Classical Indian Theories of Knowledge*, Oxford: Clarendon Press, 1986, p. xiv), is the inference *a fortiori*. An example: "Will not a benefit, which is got by one who is not qualified, be obtained by one who is qualified?" (See M. Abraham, Dov M. Gabbay and U. Schild. "Analysis of the Talmudic Argumentum a Fortiori Inference Rule (Kal Vachomer) using Matrix Abduction," *Studia Logica: An International Journal for Symbolic Logic*, Vol. 92, No. 3 (Aug. 2009), 281–364, p. 292.)

Gartenstein launched into a detailed discussion of the origins of English common law going back to the reign of Edward I (1272–1307), who expelled the Jews in 1290. “It is not unreasonable,” he said, “to tentatively postulate (hopefully someone with sufficient credentials to do so will someday undertake a definitive study) that much of the mercantile and legal system developing at that time had at least some significant roots in the already sophisticated legal system carried into England by those who made best use thereof to their own advantage,” i.e. the Jews. After giving several examples of “certain Hebraic and Aramaic Talmudic concepts found in the Common Law, the origin and/or existence of which is obscure or unknown to most scholars,” he concluded that “it is not unreasonable to assume that the very ‘Rosetta Stone’ of Talmudic exegesis wherein law was derived from text, history, custom and usage via thirteen principles of construction, played a major part in the development of classic rules of construction in the Common Law” (Application of Juan R).

With all due respect, it should be noted that Judge Gartenstein’s conjectured historic link between the Thirteen Middot and the common law canons of interpretation has yet to find support among legal scholars with “sufficient credentials.” Parallels, even close and striking ones, between the two systems do not provide, in and of themselves, sufficient evidence that one influenced the development of the other. Even assuming that certain “Talmudic concepts” found their way into the substantive common law (Gartenstein suggests, for example, that the 23-member English grand jury derived its number from the 23-member Jewish court), the Thirteen Middot had long since passed out of active use as tools of Jewish legal interpretation by the time of King Edward, as will be discussed further below.

But what about the origin of the Middot themselves? Traditionalists assert that although it was R. Ishmael who enumerated them as thirteen, they “have come down to us from God through Moses at Sinai.”³⁰ However, given the many and obvious connections between the Land of Israel and the Greco-Roman civilization during and after the Second Temple period—and in particular, the parallels between the Middot and Greco-Roman rules of rhetoric and law—it is not surprising that some modern scholars have argued that the Jewish sages “must have learned of such

³⁰ Chajes, Zevi Hirsch. *The Students’ Guide through the Talmud* (3rd ed.), trans. Jacob Shachter. New York: Yashar Books, 2005, p. 21. According to Talmud Bavli, *Temurah* 16a, one thousand seven hundred *kalin va-ḥamurin*, *gezzerot shavot*, and *dikdukei soferim* (hermeneutically derived rules of law) were forgotten during Moses’ mourning period but were restored by Othniel ben Kenaz by means of his dialectical reasoning (*pilpulo*).

lists in their dealings with lawyers, traveling sophists, or innumerable people who studied in the nearby schools of rhetoric” (Hidary, ‘Talmudic Topoi’). According to David Daube:

We have before us a science the beginnings of which may be traced back to Plato, Aristotle, and their contemporaries. It recurs in Cicero, Hillel and Philo—with enormous differences in detail, yet *au fond* the same. Cicero did not sit at the feet of Hillel, nor Hillel at the feet of Cicero; and there was no need for Philo to go to Palestinian sources for this kind of teaching... The true explanation lies in the common Hellenistic background. Philosophical instruction was very similar in outline whether given at Rome, Jerusalem or Alexandria (Daube, *Rabbinic Methods* 257).

Saul Lieberman, for one, took a more moderate approach:

[A]lthough we possess no evidence that the Rabbis borrowed their rules of interpretation from the Greeks, the situation is quite different when we deal with formulation, terms, categories and systematization of these rules. The latter were mainly created by the Greeks, and the Jews most probably did not hesitate to take them over and adapt them to their own rules and norms.³¹

It is plausible that some degree of such cross-cultural borrowing might have been going on. More recent scholarship, however, has broken free of the Hellenocentric mindset and has recognized an important principle:

[I]n any society which treasures fundamental documents held to have been given by God or by ancient men of great esteem, a viable hermeneutic is essential to contemporary living. Only such a hermeneutic can draw out of the documents the necessary support for commonly held values and a framework for interpreting experience. Since most societies do in fact treasure documents of this sort, *the hermeneutical problem is absolutely ubiquitous*.³²

Applying this principle to the Jewish context, W. Sibley Towner concludes:

Some individual middot can certainly be compared with methods of juridical interpretation in Roman law, as well as with methods of literary interpretation among the Alexandrian grammarians. Some terminology may have been borrowed. However, the evidence is much

³¹ Lieberman, Saul. *Hellenism in Jewish Palestine*. New York: Jewish Theological Seminary of America, 1950, p. 78.

³² Towner, W. Sibley. “Hermeneutical Systems of Hillel and the Tannaim: A Fresh Look.” 53 *Hebrew Union College Annual* 101 (1983), p. 102. (Emphasis mine.)

too diffuse to suggest that the Tannaim simply learned their methods of interpretation from the Greek rhetors or grammarians. There being no other likely external first and second century C.E. sources from which the basic methods of rabbinic hermeneutics might have been drawn, we are left with the inescapable conclusion that the work of formulating their sophisticated system of hermeneutics was done by the rabbis themselves, largely after 70 C.E., in the academies of the Tannaim and their successors (Towner 135).

There we are: a non-Jewish academic,³³ writing in a Reform Jewish publication that was once Daube's forum, has made it once again acceptable to believe that (1) any given culture has the wherewithal to develop its own methods of interpreting its centrally important texts; and (2) this is what the Jews did, at least after the Second Temple period. But note that the examples that Towner gives for this "ubiquitous" phenomenon—Greek and Alexandrian grammarians, Roman jurists, New Testament writers, the sectaries of Qumran, medieval scholastics, Protestant reformers, etc. (Towner 103)—are restricted in geographical range to Europe and the Mediterranean region. Is there no example available of a culture farther afield that originated its own sophisticated methods of legal interpretation?

In point of fact, there is. Let us again consider the Mimamsa Principles. These were produced in a country quite distant from Greece, possibly even before the birth of Plato, and anywhere from 400 to 800 years before R. Ishmael's time. As formulated by Jaimini, the Principles contain advanced concepts that have parallels in many other later cultures and are elegantly worded and titled. If ancient India could attain such intellectual developments on its own, why could ancient Israel not have done so?

As Towner himself posits, "At least some of the seven hermeneutical principles attributed to Hillel were ancient already by his day" (Towner 111), which might bring them back, conservatively speaking, to the early Second Temple or perhaps even late First Temple period. Academic research may never be able to bring them all the way back to *Mattan Torah*. However, when we speak of the Thirteen Middot as having come down to us "from God through Moses at Sinai," perhaps this might best be understood as another way of expressing the revolutionary idea of *Lo bashamayim hi* ("It is not in heaven")—the Torah, as soon as it was entrusted into human hands, was surrendered by God to human interpretation, with the keys to such interpretation (some of which, in the course of time, were

³³ Towner was a professor of Biblical Interpretation at the Union Theological Seminary and Presbyterian School of Christian Education in Richmond, Virginia.

distilled into Thirteen Middot) kindly left to us under the doormat, that is, embedded in our human intellect.

To conclude this section of the article, let us make clear that in keeping with what might be called Towner's Ubiquity Principle, it would be pointless and perhaps frivolous to suggest that Jaimini's system should be looked to as the source of Greco-Roman or Jewish rules of legal interpretation. Yes, theoretically Alexander the Great could have taken the Mimansa Principles among the spoils of war during his Indian campaigns, and King Solomon could have imported pre-Jaimini Indian legal wisdom along with his cargo of ivory, apes, and peacocks (I Kings 10:22). But such borrowings have yet to find support among legal scholars with "sufficient credentials."

III. Criticisms

Notwithstanding the honored place that canons of statutory construction have occupied in the common law, they have also received their share of abuse at the hands of some modern authorities. One observer, for example, expressing herself in a colorful Australian way, has said, "For some reason these presumptions are often articulated in Latin. This assists to disguise the fact that they are very often either:

1. a statement of the bleeding obvious; or
2. disregarded, distinguished, doubted or ignored."³⁴

Karl Llewellyn, a leading figure of the "legal realist" movement in the mid-twentieth century, published an influential essay in which he cynically endeavored to show that for each canon, there was an equal and opposite canon available for a judge's use. Among his examples of such evil twins are the following:

- If language is plain and unambiguous it must be given effect, *but—*
- Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.
- The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute, *but—*

³⁴ Howell, Claire. "Syntactical Presumptions." <<http://www.denmanchambers.com.au/dev/wp-content/uploads/2011/09/Syntactical-Presumptions.pdf>>.

- This presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent.³⁵

Even those who are not opposed to the use of classic interpretive rules have sounded notes of caution. Speaking of one particular canon, a New Delhi law student has warned that “disputes cannot be resolved by merely tying the issue to the procrustean bed of Eiusdem Generis... The rule of Eiusdem Generis must be applied with great caution, because, it implies a departure from the natural meaning of words, in order to give them a meaning on a supposed intention of the legislature.”³⁶ An English Law Lord has said, “The rule [of *eiusdem generis*], like many other rules of statutory interpretation, is a useful servant but a bad master”³⁷—a remark echoed by a modern-day defender of Jaimini: “Principles of interpretation are good servants but bad masters” (Katju I).

Such criticisms may help to put in perspective some of the negative evaluations that the Thirteen Middot have received. In a book called *Judaic Logic*, candidly acknowledged to be “not the work of a Talmudist, but that of a logician,”³⁸ author Avi Sion, Ph.D., examines the Middot one by one and finds them wanting. Using adjectives such as “artificial” and “arbitrary,” Dr. Sion concludes that the Rabbinic system of hermeneutics, “whatever it is, is not a teaching of pure logic. There are, to be sure, many aspects of it which are perfectly natural and logical. But certain distinctive aspects of it... must be admitted to be, for the most part, either non-sequiturs or antinomial; in all evidence, products of very muddled thinking” (Sion 200, notes omitted).

In truth, questions about the logical nature of the Middot were already raised centuries ago. No lesser a figure than Judah Halevi (ca. 1075–1141) actually denied that the Middot were tools of human reasoning; he concluded that they did not resemble any rational exegetical method, but rather comprised a kind of mysterious cipher entrusted to the Rabbis for interpreting the Biblical text (Cohen 284). “They must have had secrets

³⁵ Llewellyn, Karl N. “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed.” 3 *Vanderbilt L. Rev.* 395 (1950), pp. 401–06; 5 *Green Bag 2d* 297 (2002).

³⁶ Bhatt, Jayant. “Construction Eiusdem Generis.” <<http://www.legalserviceindia.com/articles/edjem.htm>>.

³⁷ Lord Scarman in *Quazi v. Quazi*, 3 *All-England Reports* 897 (1979).

³⁸ Sion, Avi. *Judaic Logic: A Formal Analysis of Biblical, Talmudic and Rabbinic Logic*. Geneva: Editions Slatkine, 1997, p. 247. The author further acknowledges that he is a disappointed former *ba'al teshuvah* (p. 252 n. 308).

hidden from us in their ways of interpreting (*tafsir*) the Torah, which came to them as a tradition in the usage of the Thirteen Middot.”³⁹

Before him, Saadiah Gaon (882–942) took the startlingly modern-sounding view that the Rabbis did not even use the Thirteen Middot to infer anything logically from the Torah; rather, the Middot served merely as a post facto means of confirming laws that they had received via oral tradition by linking them to the written text.⁴⁰ In other words, “Saadia denies that the *middot* serve any creative legal function” (Cohen 274). Putting it crudely, one might say that he viewed these rules as targets painted around existing bulls-eyes of halakhah. Such a position is remarkably similar to that of the twentieth-century legal realists, the only difference being that they meant it as a criticism,⁴¹ while Saadiah did not.

Each in his own way, Saadiah Gaon and Judah Halevi would effectively eliminate any need for the Thirteen Middot to adhere to the norms of logic; the Middot are what they are, and if they seem artificial or arbitrary, so be it. A different approach was taken by Maimonides, who maintained that the Rabbis did in fact employ the Middot as tools of logic to derive new rules of law (Cohen 292-293).

Let us assume, for the sake of argument, that R. Ishmael’s system is properly viewed as one that purports to be logic-based. Let us make two further assumptions: that the harsh criticisms of Avi Sion, Ph.D., are absolutely on target; and that if the Rabbis had tried harder, they could have formulated new, improved Middot so flawlessly logical that they would have satisfied not only Dr. Sion but even Mr. Spock of *Star Trek*. Would we then have been better off? Not necessarily.

As Justice Oliver Wendell Holmes famously declared, “The life of the law has not been logic: it has been experience... The law embodies the story of a nation’s development through many centuries, and it cannot be

³⁹ Judah Halevi, *Kuzari* III:73, as quoted in Cohen 283.

⁴⁰ This position of Saadiah was not stated in his commentary on the Thirteen Middot—a straightforward listing of the principles with examples—but rather appears in an anti-Karaite work, “Book Concerning the Sources of the Irrational Laws,” that was translated from the original Arabic to Hebrew apparently for the first time in 1972 (Zucker, Moses. “Fragments of the *Kitab Tahsil Al-Shara’i Al-Sama’iyah*.” *Tarbiz* vol. 41 (1972) 373–410, p. 378).

⁴¹ Their view has been summarized as follows: “An inspection of the decisions revealed that the canons of construction did not help to decide cases; instead they operated as mechanical, after-the-fact recitations disguising the reasons for decision” (Sunstein, Cass. “Interpreting Statutes in the Regulatory State.” 103 *Harvard L. Rev.* 405 (1989), p. 451).

dealt with as if it contained only the axioms and corollaries of a book of mathematics.”⁴² It has further been observed, “Logic is an organized way of going wrong with confidence.”⁴³ No one was more wary than the Rabbis of the pitfalls of pure, unchecked human reasoning when applied to the law, and thus it was that they introduced “a large dose of skepticism” about the Thirteen Middot, “though not so much that would nullify their use altogether” (Hidary, Topoi).

Middah 1, the *kal va-homer*, was singled out by the Rabbis as—if you will—a particularly “loose canon.” Thus, R. Yannai showed that it could be proven by means of a *kal va-homer* either that a dead mouse is not a source of ritual impurity, or that a dead snake is—both conclusions, unfortunately, directly contradicting the established halakhah:

Said R. Yannai, “If a snake, which kills, is itself pure, then all the more so a mouse, which does not kill, should be pure. Or the inverse: if a mouse, which does not kill, is impure, then all the more so a snake, which does kill, should be impure” (Talmud Yerushalmi, *Sanhedrin* 4:1, cited in Hidary, Topoi).

In order to put a lid on such logic run amok, the Rabbis imposed a set of restrictions and protocols on the use of the Thirteen Middot. For example, (1) one was not allowed to decide the law based on Middah 2, *gezerah shavah*, unless this was in accord with a teaching received from one’s rabbi; (2) according to some, the same restriction applied with respect to the use of Middah 3, *binyan av*; (3) if a *gezerah shavah* taught the opposite of a *binyan av*, the *gezerah shavah* took precedence; and (4) a *kal va-homer* also took precedence over a *binyan av*.⁴⁴ Indeed, the halakhic system eventually reached a stage of development in which the need for new applications of the Middot faded away; once the “Oral Law” was authoritatively compiled into the Mishnah and other tannaitic works, it was these rather than the original Torah text itself that “now became the immediate source for purposes of study and adjudication in daily life.”⁴⁵

As for the common law canons of construction, somehow they survived Karl Llewellyn’s cannonade. Although many academic legal scholars continued to view them as crude anachronisms, others maintained that “his claim of indeterminacy and mutual contradiction was greatly overstated” (Sunstein). In particular, Geoffrey Miller sought to “rehabilitate”

⁴² Holmes, Jr., Oliver Wendell. *The Common Law*. Boston: Little, Brown and Co., 1881, p. 1.

⁴³ Charles F. Kettering (1876–1958), American inventor and engineer, from an address before the American Society of Mechanical Engineers (c. 1944).

⁴⁴ *Encyclopedia Talmudit*, s.v. “Binyan Av.”

⁴⁵ *Encyclopaedia Judaica*, s.v. “Interpretation.”

these canons as embodying “legitimate and valid inferences of legislative intent,” by demonstrating that “some of these maxims have endured across a wide variety of legal systems”—including halakhah—“and that the insights captured by the maxims reflect common sense methods of interpreting utterances in ordinary conversation” (Miller). At any rate, judges in common law countries have continued to make prominent use of them.

Even the Mimansa Principles have made their appearance in modern Indian law. Out of a sense of national pride, Justice Markandey Katju of the High Court of Allahabad has made a conscious effort to employ them in some of his decisions, with the caveat that they “should not be applied blindly” in interpreting legal texts, but rather “having regard to the context and commonsense and reason” (Katju I). Even so, another Indian judge has objected to the use of the Principles in situations that do not concern traditional Hindu law. “In my respectful view,” Justice B.N. Srikrishna has opined, “the results have been unsatisfactory and somewhat confounding.”⁴⁶

There does not seem to have been any similar effort to revive the Thirteen Middot in current Israeli law. And yet in 2009, Israeli attorney Dr. Michael Factor reported in his blog that Israel’s Commissioner of Patents and Trademarks had issued a statement to the effect that Patent Office Circular M.N. 40, establishing certain specific requirements for biotechnology patent applications, overruled the earlier Circular M.N. 12, which set guidelines for patent applications in general. “Readers with a Talmudic background (and those that do the *Korbanoth* in the Preliminary Morning Service and understand what they are reading),” said Dr. Factor, “will note that this is an example of *klal u’prat* (where a generalization is followed by a specification, the specification overrides).”⁴⁷

It would appear that the Patent Commissioner was not consciously applying Middah 4, and that Dr. Factor’s analysis was tongue in cheek. However, even (or perhaps especially) an inadvertent use of one of R. Ishmael’s principles may indicate that at least some of them reflect innate common sense and would not be out of place in today’s law office or courtroom.

Conclusion

When seen in the light of comparative law, the Thirteen Middot of R. Ishmael can be appreciated in new and interesting ways. First of all, they

⁴⁶ Srikrishna, B.N. “Maxwell v. Mimamsa.” (2004) 6 SCC (Jour) 49.

⁴⁷ Factor, Michael. “Talmudic Exposition of Patent Office Circulars.” *The IP Factor*, posted 7/30/2009. <<http://blog.ipfactor.co.il/category/news/page/8/>>.

are not isolated concepts; rather, many of them have their counterparts in legal systems old and new, Western and Eastern. When examined carefully, such cross-cultural parallels may be understood as showing that in any human society that treasures fundamental documents, there is a need for some system of interpretive rules by which such documents may continue to be properly applied. This ubiquitous need, in turn, may indicate that the Thirteen Middot were not necessarily the products of a Greco-Roman milieu or any other outside source, but may reasonably be seen as ancient and autonomously Jewish in origin.

Furthermore, R. Ishmael's system is not the only one that has been criticized as artificial and arbitrary. But just as the common law canons have been defended by "neo-Orthodox" legal scholars, so too it may be possible to reassess the viability of the Thirteen Middot from a modern point of view. It may not be possible to demonstrate their strict conformance with pure rules of formal logic, but this need not trouble us, just as it did not trouble some of the great Jewish minds of the past. Over-reliance on logic in the law is, moreover, misplaced and may lead to results that are undesirable or even absurd. Perhaps a two-tier approach may be applied when evaluating R. Ishmael's system: a few of the more complex Middot⁴⁸ might be accepted as tools of post facto reasoning (à la Saadiah), while the others might be vindicated simply as guidelines of natural common sense when employed with due care.

One final thought: as noted above, the Thirteen Middot of R. Ishmael have been incorporated into the *Shaharit* services. They are there "to complete the daily minimum of Bible and Talmud study required of every Jew."⁴⁹ The inclusion of such material in the Siddur is a phenomenon that is quite unique among the world's religions. The Mimansa Principles form no part of any Hindu liturgy,⁵⁰ and surely no Anglican Canon ever thought of inserting the canons of common law into the Book of Common Prayer. It is the particular glory of Judaism to have recognized the study of the law, in and of itself, as a mode of Divine worship.⁵¹ ❧

⁴⁸ The alert reader will have noted that no non-Jewish parallels have been cited above for Middot 7 to 11. Although a sharp-eyed researcher might be able to identify some such parallels, none are readily apparent.

⁴⁹ Birnbaum, Philip. *Daily Prayer Book*. New York: Hebrew Publishing Co., 1949, p. 41.

⁵⁰ Although the Mimansa texts "must be considered as part of the sacred textual corpus of Hinduism," they "are not part of a liturgy" (Davis, Jr., Donald R. "Law and 'Law Books' in the Hindu Tradition." 9 *German L.J.* 309 (2008), p. 316).

⁵¹ See Isaacs, Nathan. "Study as a Mode of Worship," *The Jewish Library, First Series*, ed. Leo Jung. New York: Macmillan, 1928.