

*Methodological Musings on the Study of 'Kelalei Pesak':
'Hilkheta ke-Rav be-issurei ve-khi-Shemuel be-dinei' **

JONATHAN S. MILGRAM

The Jewish Theological Seminary

דמאיזה טעם עשו חכמי הגמרא כלל זה לפסוק הלכה
כשמואל בדיני וכרב באיסורי בכל מקום? לפי שידעו
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(פסקי הרא"ש, בבא קמא, ד:ד)

For Reut Hadas

Abstract

This article analyses one set of principles of adjudication, *hilkheta ke-Rav be-issurei ve-khi-Shemuel be-dinei*, 'the law is according to Rav in ritual matters and according to Shemuel in civil matters'. It demonstrates the methodological advantages and limitations of investigating primary textual witnesses of the Babylonian Talmud (Geniza fragments, medieval manuscripts and first printed editions) and medieval Jewish legal literature (Geonim and Rishonim) for dating principles of adjudication. Although the data collected do not enable definitive conclusions for dating the principle concerning Rav, an Oriental Geniza fragment of Talmud along with the commentaries and rulings of medieval Spanish authorities yield the conclusion that the rule concerning Shemuel can be dated to the post-talmudic period.

Introduction

Principles of adjudication, or *kelalei pesak*, appear throughout talmudic literature, from the Mishnah to the Babylonian Talmud.¹ In the Mishnah we find guidelines for ruling between tannaitic disputants.² Among the Amoraim we find additional principles regulating disputes between Tannaim

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¹ For an extensive introduction to the subject of principles of adjudication in rabbinic law, see T. Groner, *The Legal Methodology of Hai Gaon* (Scholars, Chico, California, 1985), pp. 44–116.

² See e.g. *mEduv.* 1:5–6.

and early Amoraim,³ and in later layers of talmudic discourse, principles of adjudication for ruling between Amoraim.⁴ A number of studies on the function and chronological provenance of these principles have been written recently.⁵ This article analyses one set of principles for deciding between amoraic disputes, *hilkheta ke-Rav be-issurei ve-khi-Shemuel be-dinei*, 'the law is according to Rav in ritual matters and according to Shemuel in civil matters'.⁶ It demonstrates the methodological advantages and limitations of investigating primary textual witnesses of the Babylonian Talmud (Geniza fragments, medieval manuscripts and first printed editions) and medieval Jewish legal literature (Geonim and Rishonim) for dating principles of adjudication. The data culled do not enable dating the rule concerning Rav with any degree of accuracy. In stark contrast, the evidence found in an Oriental Geniza fragment of *Bekhorot* and corroborated by the comments of medieval Spanish authorities enables dating the rule concerning Shemuel to the post-talmudic period.

The Principles of Adjudication

The principles *hilkheta ke-Rav be-issurei ve-khi-Shemuel be-dinei*, like other principles of adjudication, were seemingly created⁷ to standardise ruling practices for disputes between sages.⁸ The principles are cited frequently in post-talmudic halakhic works, establishing them as fundamental to Jewish legal decision making in the medieval period.⁹ In contrast, the talmudic evidence

³ See e.g. *bEruv* 46a-b.

⁴ On this, see the literature cited in n. 5 and Groner, *Legal Methodology* (as in n. 1), pp. 44–45.

⁵ On tannaic principles of adjudication, see Y. Brandes, 'The Beginnings of the Rules of Halakhic Adjudication' (in Hebrew) (PhD diss., Hebrew University, 2002); on amoraic/talmudic, E. Halivni, *The Rules for Deciding Halakha in the Talmud* (in Hebrew) (Haberman, Lod, 1999); on saboraic and geonic, E. R. Zaimi, *Rabanan Saborai u-khelalet ha-Halakha*, vol. 1 (Erez, Haifa, 1992). For an earlier study of geonic principles, see S. Assaf, *Tekufat ha-Geonim ve-Safruta* (Mosad HaRav Kook, Jerusalem, 1955), pp. 224–245. On scholarly discussions of the principles specifically addressed in this article, see n. 13.

⁶ On the origins of the conceptual distinction between the categories of ritual and civil, see M. Elon, *Jewish Law: History, Sources, Principles* (The Jewish Publication Society, Philadelphia, 1994), pp. 122–123.

⁷ Cf. Groner, *Legal Methodology* (as in n. 1), p. 46.

⁸ However, exceptions to the two rules abound; see *Talmudic Encyclopedia*, vol. 9 (in Hebrew) (Herzog Institute, Jerusalem, 1972–), pp. 298–300.

⁹ The following is a sampling of citations of the principles from medieval works. *Sheiltot* cites both principles, albeit separately; citations are according to *Sheiltot de Rab Ahai Gaon*, ed. S. K. Mirsky (Sura / Yeshiva University / Mosad HaRav Kook, Jerusalem, 1959). For the principle concerning Rav, see vol. 1, p. 63; vol. 2, p. 2; vol. 4, p. 254; the principle concerning Shemuel is cited in vol. 1, p. 132; vol. 4, p. 256. Both principles are cited together in *Seder Tanaim ve-Amoraim*, ed. K. Kahan (Hermon, Frankfurt, 1935), p. 21; and Rav Natronai bar Hilai Gaon in *Teshuvot Rav Natronai bar Hilai*, ed. R. Brody (Ofek, Jerusalem, 1994), p. 182. The Shemuel principle is cited alone in *Halakhot Pesukot*; see N. Danzig, *Introduction to Halakhot Pesuqot with a Supplement to Halakhot Pesuqot*, 2nd edn (in Hebrew) (The Jewish Theological Seminary, New York / Jerusalem, 1999), pp. 116 and 605, and is also quoted by Rav Sar Shalom in *Teshuvot Rav Sar Shalom Gaon*, ed. R. S. Weinberg (Mosad HaRav Kook, Jerusalem, 1975), p. 145 = *Otzar ha-Geonim*, Gittin, ed. B. M. Lewin (Mosad HaRav Kook, Haifa and Jerusalem, 1941), p. 25. Several anonymous responsa also cite the principles; see *Otzar ha-Geonim*, Gittin (as above), pp. 30, 39,

for the principles is minimal. Both principles appear twice in the same *sugya* in *Bekhorot* 49b—and only in *some* editions of the Babylonian Talmud¹⁰—and the rule concerning Rav appears by itself in *Bavli Niddah* 24b. In fact, scholars have shown the degree to which Babylonian talmudic *sugyot* do not exhibit a consistent tendency to favour Shemuel's ruling in civil matters or Rav's in ritual matters, calling into question the amoraic origins of the principles¹¹ or, at least, amoraic unanimity regarding these principles.¹² In the following, I analyse citations of the legal principles in the primary textual witnesses of *Niddah* and *Bekhorot* and in the works of the Geonim and Rishonim to propose an approximate timeframe for the establishment of each principle.¹³

'Hilkheta ke-Rav be-issurei'

The 'Sugya' in 'Niddah' and the Textual Evidence

The principle *hilkheta ke-Rav be-issurei* is cited in *Bavli Niddah* 24b.¹⁴ The *sugya* there deals with the question of whether a woman, after miscarrying (a deformed male foetus with two backs and two spinal cords) is unclean, as a woman is after natural childbirth (of a non-deformed male child). Accord-

and 139. See also *Hilkhot Rav Alfai, Ketubbot*, ed. N. Zaks (Mosad HaRav Kook, Jerusalem, 1969), p. 84; *Hiddushei ha-Rashba: Gitin*, ed. Y. Sakler (Mosad HaRav Kook, Jerusalem, 1986), p. 136, among others.

¹⁰ See below in the body of the article for a listing of the textual witnesses that include the principles and those that do not.

¹¹ See Halivni, *Rules* (as in n. 5), p. 98, where he builds on the lack of consistency in the talmudic evidence to hypothesise a later date for the establishment of these principles.

¹² On the lack of amoraic unanimity regarding these principles, see Y. Spiegel, 'Late (Saboraic) Additions in the Babylonian Talmud' (in Hebrew) (PhD diss., Tel Aviv University, 1976), p. 153–155 and n. 13.

¹³ According to C. Albeck, *Mavo la-Talmudim* (Devir, Tel Aviv, 1987), p. 195, the Rav principle may be of amoraic origin. E. S. Rosenthal, as quoted (in a personal communication) in M. Kahana, 'Shalosh Mahlokot Muhlatot be-Vatei Midreshoteihem shel Rav u-Shemuel', *Talmudic Studies* 2, ed. M. Bar-Asher and D. Rosenthal (Magnes, Jerusalem, 1993), p. 323, n. 65, treated the clause in Rav's name as relatively 'early', which may mean talmudic or even amoraic. Kahana, in his concluding remarks (p. 333) does not commit to the exact dating of the principles in question. However, he does suggest that both the Rav and Shemuel principles were probably conceived after a period in which a different method was used for adjudication, one based on amoraic school affiliation (see his analysis there). Assaf, *Tekufat ha-Geonim ve-Safruta* (as in n. 5), pp. 224–245, excluded these principles from his list of geonic legal principles, presumably because they appeared in the printed versions of the Talmud he used (see below in the body of the article for the evidence from various textual witnesses of the *Bavli*). It would be reasonable to assume, therefore, that he considered the principles amoraic or late talmudic. Y. Spiegel in 'Late Additions' (as in n. 12), pp. 153–155, stresses that the principles in question may in fact be post-talmudic, although he leaves open the possibility that the principles are amoraic, even if not agreed upon by all talmudic sages. E. Halivni in *Rules* (as in n. 5), p. 98, gives two possible conclusions. The first, that both principles were established at the end of the talmudic period (after Rav Ashi), and the second, that the Rav principle is late talmudic and the Shemuel principle is post-talmudic. E. R. Zaini in *Rabanan Saborai* (as in n. 5), p. 8, states unequivocally that all principles of adjudication (appearing in the Talmud and later) do not predate the saboraic period.

¹⁴ For the complete text of the *sugya* (according to the Vilna printed edition), see appendix A at the end of this article. What follows in the body of the article is a short summary of the major points of the *sugya*.

ing to biblical law, after giving birth to a son, a woman is unclean for seven days due to bleeding and is forbidden to have intercourse with her husband.¹⁵ Bleeding from the seventh to the fortieth day, however, does not render her unclean. This blood is called 'clean/pure blood' or '*demei tohar*', and she is permitted to have intercourse with her husband.¹⁶

According to Shemuel the woman in our case is unclean; according to Rav she is not. R. Yirmiya bar Abba intended to rule stringently like Shemuel. However, R. Huna suggested following the lenient ruling of Rav. At this point in the *sugya*, the Ashkenazi manuscripts (all dated between the twelfth and fourteenth centuries),¹⁷ the first printed edition (Soncino 1489), as well as a thirteenth–fourteenth century Oriental Cairo Geniza fragment¹⁸ (although truncated) cite the principle. The following table presents the relevant section of *Niddah* in two parallel columns, one for the Ashkenazi manuscripts (and first printed edition) and the other for the Oriental fragment:

<i>Oriental</i>	<i>Ashkenazi</i>
	אמר ליה רב הונא: מאי דעתך לחומרא?
	חומרא דאתי לידי קולא הוא,
[. . .] [יהבת לה דמי טהור?]	דקיהבת לה דמי טוהר!
	עביד מיהא כותיה דרב,
[. . .] [תא כרב באיסורי בין לקולא]	דקיימא לן הלכתא כרב באיסורי בין לקולא בין לחומרא.

Rav Huna said to him: 'What do you have in mind, to impose a stringency? This is a stringency which leads to a leniency since you will give her (days of) clean blood. Act (rather) according to Rav, since we hold that the law [= *hilkheta*] is according to Rav in ritual matters, whether this leads to leniency or stringency (in the law).'

If the principle of adjudication is part of the amoraic statement attributed

¹⁵ Lev. 12:2.

¹⁶ However, she is forbidden from contact with the sacred. On all this, see J. Milgrom, *Leviticus 1–16, The Anchor Bible* (Doubleday, New York, 1991), p. 749.

¹⁷ Mss. Munich 95 (1342), Vatican 111 (1381), and Vatican 113 (12th–13th c.); these manuscripts were checked using the Sol and Evelyn Henkind Talmud Text Databank, Saul Lieberman Institute of Talmudic Research, The Jewish Theological Seminary of America, New York and Jerusalem, 2002. The dates for the manuscripts are according to the catalogue of the Jewish National and University Library of the Hebrew University in Jerusalem.

¹⁸ Paris Alliance III A 93; a digital photograph of this fragment was checked using the website of the Friedberg Geniza Project (www.genizah.org). In the transcription of the fragment that follows in the body of the article, the following sigla are used:

(1) [. . .] = square brackets enclosing ellipses indicate a lacuna in the text due to a tear in the manuscript.

(2) ? ? = question marks enclosing a letter or letters indicate that the text in the manuscript is not clear.

to Rav Huna,¹⁹ it was not known and/or accepted by all Amoraim.²⁰ The length of the entire statement under discussion may suggest that the section including the principle is a post-amoraic addition to a (shorter) statement attributed to Rav Huna.²¹ If so, there are at least two possibilities for the original formulation of the amoraic statement.²² On the grounds of length alone, however, it is not conclusive that the section including the principle is not part of the original amoraic statement. A factor that suggests that the section, including the principle, is a post-talmudic addition to the text is the use of the term 'hilkheta' here. Indeed, scholars have suggested that the use of the word 'hilkheta' (or 've-hilkheta') may be of post-talmudic provenance in many talmudic passages.²³ However, the universal inclusion of the principle in the primary textual witnesses, combined with evidence of 'hilkheta' statements attributed to Amoraim,²⁴ indicates that such reasoning is inconclusive. Furthermore, if the clause under discussion is a post-talmudic addition to the text, it may be absent from the texts of *Niddah* quoted in the works of some medieval authorities.

The Geonim and Rishonim

Although some medieval authorities cite the principle of adjudication in their codes and commentaries when dealing with the case in *Niddah*, it is not clear whether all of them had the principle in their texts of the *sugya*. Among the works of the Geonim, *Halakhot Gedolot* simply records: 'and the law is

¹⁹ Spiegel, 'Late Additions' (as in n. 12), p. 154, entertains the possibility that the entire phrase is amoraic although Halivni, *Rules* (as in n. 5), p. 85, suggests that the section including the principle 'de-kaina lan ...' is not amoraic.

²⁰ See nn. 11–12.

²¹ See n. 22. On the length of a phrase as evidence for dating the timeframe in which it was authored, see S. Friedman, 'A Critical Study of *Yevamot Y* with a Methodological Introduction' (in Hebrew), *Texts and Studies: Analecta Judaica*, vol. 1, ed. H. Z. Dimitrovsky (The Jewish Theological Seminary of America, New York, 1977), p. 303.

²² The following are two possibilities:

(a) אמר ליה רב הונא: מאי דעתך לחומרא? חומרא דאתי לידי קולא הוא, דקיהבת לה דמי דמי טהרה.

(b) אמר ליה רב הונא: מאי דעתך לחומרא? חומרא דאתי לידי קולא הוא, דקיהבת לה דמי דמי טהרה; עביד מיהא כותיה דרב.

²³ See B. M. Lewin, *Rabanan Savorai ve-Talmudani* (Achiever, Jerusalem, 1937), pp. 46–53; Spiegel, 'Late Additions' (as in n. 12), p. 163; D. Ephrat and Y. Elman, 'Orality and the Institutionalization of Tradition: The Growth of the Geonic Yeshiva and the Islamic *Madrasa*', *Transmitting Jewish Traditions: Orality, Textuality and Cultural Diffusion* (Yale University Press, New Haven and London, 2000), p. 133, n. 7; N. Danzig, 'From Oral Talmud to Written Talmud: On the Methods of Transmission of the Babylonian Talmud and its Study in the Middle Ages' (in Hebrew), *Bar-Ilan Annual 30–31: In Memory of Prof. Meyer Simcha Feldblum* (2006), p. 68. For R. Brody's hesitation regarding the categorical late dating of 'vehilkheta' texts, see 'Sifrut ha-Geonim ve-ha-Tekst ha-Talmudi', *Talmudic Studies I*, ed. Y. Sussman and D. Rosenthal (Magnes, Jerusalem, 1990), pp. 266–267, nn. 129–130; and R. Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (Yale University Press, New Haven and London, 1998), p. 180 and the literature cited there.

²⁴ On this phenomenon, see A. Cohen, *Ravina and Contemporary Sages: Studies in the Chronology of Late Babylonian Amoraim* (in Hebrew) (Bar Ilan University Press, Ramat Gan, 2001), p. 161, n. 81 and p. 187, n. 17.

like Rav' when discussing the case in *Niddah* 24b.²⁵ It may be that the author(s) of the code ruled like Rav because of the principle of adjudication. Alternatively, it may be that the text of *Niddah* did not contain the principle, and the author(s) of the code ruled in accordance with Rav because the talmudic argumentation indicates that Rav's opinion is preferred.²⁶ Note that the absence of the principle from the ruling in *Halakhot Gedolot* is not, perforce, evidence of the absence of the principle from the text of *Niddah* used by the author(s) of *Halakhot Gedolot*. When discussing a case in *Niddah* 16a,²⁷ *Halakhot Gedolot*²⁸ states:

והילכתא כרב דקימא לן דכל היכא דפליגי רב ושמואל באיסורי
ולא פסיקא הילכתא, הילכתא כוותיה דרב וכל הילכתא דפליגי
רב ושמואל בדיני הילכתא כשמואל.

And the law is like Rav, since we hold that in all cases in which there is a dispute between Rav and Shemuel in ritual matters and no legal ruling is made, the law is like Rav; and in all cases in which there is a dispute between Rav and Shemuel regarding civil matters, the law is like Shemuel.

None of the primary textual witnesses for *Niddah* 16a, however, include the principles.²⁹ We see, therefore, that the inclusion or exclusion of principles from (some) geonic works is not dependent on the presence or absence of the principles in the Talmud text.

Maimonides (12th–13th c. Spain and Egypt)³⁰ rules like Rav, and R. Abraham ben Isaac Av Bet Din (Raavad II, 12th c. Provence)³¹ rules in accordance with Rav and does not cite the principle. Nachmanides (12th–13th c. Spain and Israel)³² does not mention the principle when discussing our case although he acknowledges that the law is according to Rav with regard to biblical legislation (= *'min ha-Torah'*).³³ R. Abraham ben David of Posquières

²⁵ *Halakhot Gedolot*, ed. N. Dessler (Machon Yerushalayim, Jerusalem, 5752), p. 446 and p. 650; *Halakhot Gedolot*, ed. Es. Hildesheimer, vol. 3 (Es. Hildesheimer, Jerusalem, 1972–1987), p. 224 and p. 365.

²⁶ This is so according to both of the possibilities suggested for the original amoraic formulation in n. 22.

²⁷ The case there is regarding a woman who has not examined herself at the onset of her menstrual cycle and at some later point checks herself. Rav states that if she examines herself at a later date, she can rely on what she sees then. Accordingly, if she sees a spot of menstrual blood, she can consider herself in her cycle, whereas not seeing a spot determines that she is not in her cycle. Shemuel, however, rules that even if at this later date she does not see a spot, she should still consider herself as if in her menstrual cycle from the time at which the menstruation would have begun.

²⁸ *Halakhot Gedolot*, ed. N. Dessler (as in n. 25), p. 443. So, too, *Halakhot Pesukot*, 2nd edn, ed. S. Sasson and N. Danzig (Sifre Mekhon Ahavat Shalom, Jerusalem, 1998), p. 357.

²⁹ As per the Lieberman Institute database (as in n. 17): Mss. Munich 95 (Ashkenazi, 1342), Vatican 111 (Ashkenazi, 1381), 113 (Ashkenazi, 12th–13th c.), and 127 (Ashkenazi, 14th–15th c.). The dates for the manuscripts are according to the catalogue of the Jewish National and University Library of the Hebrew University in Jerusalem.

³⁰ *Yad Ha-Hazaka, Hilkhot Issurei Biah*, 10:11.

³¹ *Sefer Ha-Eshkol*, 2nd edn, ed. S. Albeck (Wagschal, Jerusalem, 1984), p. 119.

³² *Hilkhot Niddah Ha-Shalem le-ha-Ramban* (Machon Maarava, Jerusalem, 1993), p. 12.

³³ He adds that in 'these times' (= *'bi-zeman ha-zeh'*), however, the woman is to be considered unclean.

(Raavad III, 12th c. Provence) rules in accordance with Shemuel (!), specifically stating that he rules stringently because 'we are not expert in these forms [of foetuses, i.e. with two backs and two spinal cords]' (= 'she-ein anu bekiin be-izurot halahu').³⁴ One could reason that were expertise prevalent, Raavad would have ruled leniently according to Rav. Among these Spanish and Provençal authorities, it is not clear, therefore, if the principle was in their copies of *Niddah* 24b or not. Their rulings, like the ruling in *Halakhot Gedolot*, may be based on a version of the *sugya* that included the principle, or, in the absence of the principle, on the indication of the *sugya* that Rav's opinion is preferable.³⁵ In contrast, Rabenu Hananel (11th c. North Africa)³⁶ and R. Solomon ibn Aderet (13th–14th c. Spain)³⁷ both cite the entire principle of adjudication when discussing our *sugya*. R. Isaac of Vienna (12th–13th c. Ashkenaz)³⁸ states explicitly that the principle originates in our chapter of *Niddah*.³⁹

Two authorities⁴⁰ question whether all medieval commentators had the principle in their texts of *Niddah* 24b because when discussing a case in *Niddah* 16a,⁴¹ the Tosafists⁴² and Rabbi Asher ben Yehiel⁴³ state that the principle originates in *Bekhorot*.⁴⁴ They do not refer to the occurrence of the principle in *Niddah* 24b, a citation much closer in proximity to their case. The evidence, however, is not conclusive. It may be that due to the appearance of both clauses in (their versions of) *Bekhorot* (see below), the *sugya* there served as the regular reference point for the legal principles. Moreover, in another place,⁴⁵ Rabbi Asher cites the entire *sugya* in *Niddah* 24b, including the clause.

In summary, the textual evidence for *Niddah* 24b does not lend itself to determining if the principle is part of an original amoraic statement, a post-amoraic addition to an amoraic statement, or a post-talmudic addition to the Talmud text. Moreover, the evidence from the Geonim and Rishonim does not assist in making this determination. We shall see that the nature of the evidence for the principle *hilkheta ki-Shemuel be-dinei*, however, is dramatically different, enabling a degree of accuracy when dating that principle.

³⁴ *Sefer Baalei Ha-Nefesh, Shaar Ha-Perisha* (Wagschal, Jerusalem, 1954), p. 10.

³⁵ See nn. 22 and 26.

³⁶ See E. Hurvitz, 'Perush Rabenu Hananel le-Masekhet Niddah', *Ha-Darom* 51 (1981), p. 61.

³⁷ Both in his *Hiddushei Ha-Rashba, Niddah* (Agudat Torat Chessed, Jerusalem, 2005), p. 40 and in his *Torat Ha-Bayit* (A. Walden, Jozefow, 1921), vol. 3, p. 54.

³⁸ *Or Zarua, Niddah*, ed. M. Y. Weiner (M. Y. Weiner, Jerusalem, 1973), pp. 32, 40, and 54.

³⁹ He also correctly cites the 8th chapter of *Bekhorot*.

⁴⁰ R. Aharon Shemuel Kaidnavor (17th c. Poland, Germany, Lithuania), *Tiferet Shemuel*, on *Piskei Ha-Rosh, Nid.*, 1:1, section 1; ad. loc., R. Yom Tov Lipmann Heller (16th–17th c. Poland), *Maudanei Yom Tov*, on *Piskei Ha-Rosh*, section 6 (both printed with *Piskei Ha-Rosh* in standard editions of the Talmud). See also the comments in *Tiferet Shemuel* on *Piskei Ha-Rosh, Bek.* 8:5, section 1, and the comments of Spiegel, 'Late Additions' (as in n. 12) p. 154, n. 7.

⁴¹ See n. 27.

⁴² See *bNid.* 16a, s.v. *ve-Rav*.

⁴³ See *Piskei Ha-Rosh, Nid.* 1:1. See n. 78.

⁴⁴ Spiegel, 'Late Additions' (as in n. 12) p. 155, n. 7, suggests that in *Nid.* 1:1 perhaps Rosh's comment originally did not include the citation to *Bekhorot*, which may have been added later.

⁴⁵ *Piskei Ha-Rosh, Hullin* 4:3.

'Hilkheta ki-Shemuel be-dinei'

The 'Sugya' in 'Bekhorot' and the Textual Evidence

The Babylonian Talmud in *Bekhorot* 49a–49b⁴⁶ cites both principles of adjudication. There the *sugya* deals with a question about the redemption of the firstborn. According to biblical law, the firstborn son (of the mother) must be redeemed one month after birth for five *shekalim* from a member of the priestly class.⁴⁷ According to rabbinic law, the father redeems his son.⁴⁸ The *sugya* at *Bekhorot* 49a–49b deals with the question of a father who gives the redemption money to a priest before the thirtieth day⁴⁹ with the intention that the money apply after the thirtieth day. The Talmud asks whether the son is redeemed if the money that was received by the priest no longer exists on the thirtieth day? Rav states that the son is redeemed and Shemuel that he is not.

The *sugya* in *Bekhorot* has come down to us in two separate textual traditions.⁵⁰ The Ashkenazi tradition is the textual tradition represented in Ashkenazi manuscripts, all dated between the twelfth and fourteenth centuries,⁵¹ and in the first printed edition of *Bekhorot* (Venice 1522). The Oriental tradition is represented primarily by one important Oriental Cairo Geniza fragment,⁵² which has been dated to as early as the second half of the tenth century (!).⁵³

The Ashkenazi tradition and the Oriental tradition each preserve a different text of our *sugya*. The Ashkenazi tradition presents the two principles of adjudication stating twice (!) (with minor variations): 'even though we hold that in every dispute between Rav and Shemuel the law is according to Rav

⁴⁶ For the complete text of the *sugya* (according to the Vilna printed edition), see Appendix B. What follows in the body of the article is a short summary of the first part of the *sugya*.

⁴⁷ *Nun.* 18:15–16.

⁴⁸ *tKidd.* 1:11 and *bKidd.* 29b.

⁴⁹ On biblical terms for 'one month' consistently interpreted in rabbinic literature as 'thirty days', see S. Stern, 'Fictitious Calendars: Early Rabbinic Notions of Time, Astronomy, and Reality', *JQR* 87 (July–October 1996), p. 114.

⁵⁰ So, too, the entire chapter (*Bekhorot* chapter 8) in which the *sugya* is contained; see J. Milgram, 'A Critical Commentary to *Bekhorot* Chapter VIII: Part I' (in Hebrew) (PhD diss., Bar Ilan University, 2006), pp. 7–8 and the citations in the following footnotes.

⁵¹ Mss. Munich 95 (1342), Vatican 119 (13th–14th c.), Vatican 120 (14th c.), and Florence (1177). The information presented here is taken from: Milgram, 'Critical Commentary' (as in n. 50), pp. 3–8. For a synoptic edition of these texts, see *ibid.*, pp. 267–270.

⁵² This Oriental Cairo Geniza fragment, 2661/32 (Heb. c. 17), is housed in the Bodleian Library of the University of Oxford; see Milgram, 'Critical Commentary' (as in n. 50), pp. 4–5 and 7–8.

⁵³ I would like to thank Mrs T. Leiter of the Hebrew Paleography Project at The Hebrew University in Jerusalem for analysing this Geniza fragment and providing me with its approximate date based on data I collected during a trip to the Bodleian Library. Additional manuscripts, also analysed by Leiter based on data I collected during a trip to the British Library and the Cambridge University Library, preserve combinations of the two text traditions (Oriental and Ashkenazi). London 402 (Add. 25717), housed in the British Library, is a 13th-century Ashkenazi manuscript and preserves elements of the texts found in both traditions as do two Cambridge University Geniza fragments dated to the 10th century (which when combined make up part of the text of *Bek.* 46b): TS F1 (1) No. 81 and TS F2 (1) No. 85; on London 402 and the two Cambridge Geniza fragments, see Milgram, 'Critical Commentary' (as in n. 50), pp. 4–5 and 7–8.

in ritual matters and according to Shemuel in civil matters, here the law is in accordance with Shemuel'. The Oriental tradition, however, does not contain either occurrence of this long statement. The following table presents the relevant section of *Bekhorot* 49b in two parallel columns, one of each tradition, highlighting the differences between the traditions.⁵⁴

<i>Oriental</i>	<i>Ashkenazi</i>
... רב אמר בנו פדוי רב אמר בנו פדוי ...
	ואף על גב דקיימא לן דכל היכא דפליגי רב ושמואל הלכתא כרב באיסורי וכשמואל בדיני הכא הלכתא כוותיה דשמואל.
... תנן מת הבן בתוך שלשים יום תנן מת בתוך שלשים יום ...
... תא שמע בחזקת שלא נפדה תא שמע בחזקת שלא נפדה ...
... תאני תנא קמיה דרב יהודה תני תנא קמיה דרב יהודה ...
	ואף על גב דקיימא לן כרב באיסורי וכשמואל בדיני הכא הלכתא כותיה דשמואל.

The principles of adjudication are needlessly repeated twice (the boxed text) in the Ashkenazi tradition of this short *sugya* and, as mentioned, both occurrences are missing from the Oriental tradition.⁵⁵ These factors alone are enough to suggest that the sections in question are not original to the Talmud text.⁵⁶ There is no reason to suspect accidental skipping in the text of the Oriental tradition due to homoioteleuton, as there are no similar words or phrases that may have caused the scribe to drop the lengthy statement (and surely not twice!). Furthermore, an intentional erasure of the clause in the Oriental branch seems highly unlikely as it contains a legal ruling.

It is likely, therefore, that the statements represent additions to the Ashkenazi tradition as opposed to erasures from the Oriental tradition. This conclusion seems reasonable because the general tendency among scribes is to

⁵⁴ In the texts of *Bekhorot* cited below in the body of the article, I use ellipses when abbreviating the texts.

⁵⁵ In the second occurrence, the text is also partially missing from two Ashkenazi manuscripts, Munich 95 and Vatican 119, as well as from the first printed edition (on Vatican 119, see n. 59). Kahana ('Shalosh Mahlokot', as in n. 13, p. 323, n. 65), without access to the text of the Geniza fragment, correctly proposes that the lack of universal inclusion of the principles in the (other) textual witnesses, as well as the recurrence of the long statement twice in this short *sugya*, suggest these statements are not original to the Talmud text. Also, without access to the Geniza fragment, R. Kalmin in *Sages, Stories, Authors and Editors in Rabbinic Babylonia* (Scholars, Atlanta, Georgia, 1994), pp. 45-46, n. 2, questions whether these statements are original to the Talmud text on stylistic grounds. On the concentration of textual variants in one location as evidence of the late addition of a text, see Friedman, 'A Critical Study' (as in n. 21), pp. 305-306.

⁵⁶ On texts missing from some textual witnesses of the Talmud as evidence of the late addition of a text (when not attributable to error), see Friedman, 'A Critical Study' (as in n. 21), pp. 306-307.

add where an unclear issue must be clarified,⁵⁷ such as in the ruling in our *sugya*. Accordingly, here the additions contribute a conclusion to the text in a place where it may have been in doubt. All of these combined data indicate that the double occurrence of the principles of adjudication is not part of the original talmudic argumentation but instead represents additions to an already redacted Talmud text.⁵⁸ Originally placed in the margin as a note indicating how to rule, copyists thought it was a note to be added to the text. Some copyists added it in one place and others in another place, culminating in some texts including it twice. Other copyists, seemingly uncomfortable with the double occurrence, truncated the second occurrence in their copies.⁵⁹

The Geonim

Although *Halakhot Pesukot*,⁶⁰ *Hilkhot Reu*,⁶¹ and *Halakhot Gedolot*⁶² all rule in accordance with Shemuel's position—that the child is *not* redeemed—it is not clear if the text of *Bekhorot* that is reflected in these works included the additions or not. For, it is possible to rule in favour of Shemuel for at least two reasons based on the argumentation of the *sugya*. First, the multiple attempts in the *sugya* to uphold Rav's position are refuted in favour of Shemuel. Second, R. Judah, a student of both Rav and Shemuel, concludes the discussion in favour of Shemuel. Most of the manuscripts of our *sugya* include R. Judah's instruction to the Tanna to alter⁶³ his tradition to match Shemuel's: דְּתַנִּיא מִי שְׁפָדָה,⁶⁴ 'teach: his son is not redeemed!' In fact, the first printed edition of *Halakhot Gedolot* rules that the son is not redeemed, אֵינוּ פְּדוּי דְּתַנִּיא מִי שְׁפָדָה,⁶⁵ 'For it is taught in a *baraita*: He who

⁵⁷ On this, see M. L. West, *Textual Criticism and Editorial Technique* (B. G. Teubner, Stuttgart, 1973), p. 22.

⁵⁸ E. Halivni, however, in *Rules* (as in n. 5), pp. 84 and 98, without examining the primary textual witnesses, treats both versions of *Bekhorot* (known to him through the works of the Rishonim) as equal representations of an original Talmud text. See his conclusions in n. 13.

⁵⁹ Ms. Vatican 119 abruptly ends the second occurrence of the long statement in the middle of a word, כָּל הַיְכָא ד, possibly suggesting that the scribe, uncomfortable with the double occurrence of the long phrase in our *sugya*, stopped midway. See also n. 55.

⁶⁰ *Halakhot Pesukot* (as in n. 28), p. 147.

⁶¹ *Hilkhot Re'u*, ed. A. L. Schlossberg (Serf, Versailles, 1886), p. 34.

⁶² *Halakhot Gedolot*, ed. N. Dessler (as in n. 25), p. 673 (based on the first printed edition); *Halakhot Gedolot*, ed. Es. Hildesheimer (as in n. 25), vol. 3, p. 291.

⁶³ On the different uses of *teni*, see J. N. Epstein, *Mavo le-Nusah ha-Mishna* (Magnes, Jerusalem, 1974), pp. 509–588.

⁶⁴ Mss. Munich 95, Vatican 120, Florence, and the Oxford Geniza fragment. The exclusion of this sentence from the first printed edition, Vatican 119, and London 402 seems to have been caused by scribal error (homoioteleuton) due to the appearance of the word *paduy* (underlined) at the end of two phrases as in the following: וְאֵת אֲמַרְתָּ בְּנֵי פְּדוּי תִּנִּי אֵין בְּנֵי פְּדוּי.

⁶⁵ *Halakhot Gedolot*, ed. N. Dessler (as in n. 25), p. 673; the first printed edition of *Halakhot Gedolot*, Venice 1548, represents an independent branch of this geonic halakhic work; the Vatican manuscripts represent another branch. On the branches of *Halakhot Gedolot*, see Danzig, *Introduction* (as in n. 9), pp. 186–189 and Brody, *Geonim* (as in n. 23), pp. 223–224. Here it seems that the correct reading is preserved only in one branch, the first printed edition, and that the erasure in the Vatican branch is due to a scribal error (homoioteleuton) because of the word *paduy* at the end of two statements, as underlined in the following citation: וְהִיכָא דְּפָרִיק לִיה בְּנֵי תַלְתִּין יוֹמִין: אֵינוּ פְּדוּי דְּתַנִּיא מִי שְׁפָדָה אֵת בְּנֵי בְּתוּךְ שְׁלִישִׁים הָרִי זֶה אֵינוּ פְּדוּי. See the critical apparatus in *Halakhot Gedolot*, ed. Es. Hildesheimer (as in n. 25), vol. 3, p. 291.

redeems (i.e. pays the redemption money) his son within thirty days, behold he is not redeemed'. This source cites the emendation of the *baraita* by R. Judah as the *baraita* itself (!), indicating that, at least for this source, R. Judah's emendation was accepted. Therefore, it cannot be concluded whether the text of *Bekhorot* that was used by the authors of these codes included the textual additions or not. Although a study of the geonic rulings for this *sugya* is not conclusive, a study of the literature of the Rishonim, cited below, supports the thesis that here we are dealing with additions to the Talmud text.⁶⁶

The Rishonim

Maimonides⁶⁷ and Nachmanides⁶⁸ rule (leniently) in accordance with the opinion of Rav, indicating that their texts did not include the textual additions. This is significant. Due to the close ties between medieval Spain and the Geonim of Babylonia,⁶⁹ it is possible that Spanish scholars had access to older (and superior) texts of the same type as the Geniza tradition.⁷⁰ In contrast, most of the Franco-German medieval authorities, including the Tosafists,⁷¹ Rabbi Eliezer of Metz (12th c. France),⁷² Rabbi Isaac of Vienna (12th–13th c. Ashkenaz),⁷³ Rabbi Moses of Coucy (13th c. France),⁷⁴ and Rabbi Israel Isserlein (14th–15th c. Ashkenaz),⁷⁵ clearly use texts of *Bekhorot* that include the additions. The most notable exception among Ashkenazi authorities is Rabbi Asher ben Yehiel (13th–14th century),⁷⁶ who spent the latter part of his life in Spain.⁷⁷ As attested to in his discussion of our *sugya* in *Bekhorot*, the version of the *sugya* he used did not include the principles of adjudication.⁷⁸

⁶⁶ Spiegel, 'Late Additions' (as in n. 12), pp. 154–155, has already noted that in our case, the evidence found in the literature of the Rishonim is useful for determining whether certain authorities had the textual additions in their Talmud texts or not. Some of the evidence cited there is repeated below.

⁶⁷ *Yad Ha-Hazaka, Hilkhot Bikkurim*, 11:18; see ad. loc. the comments of Rabbi Joseph Korkos (*Mahari Korkos*), who, in explaining Maimonides' position, states that he saw manuscripts that did not include either occurrence of the clause (in *Mishneh Torah*, ed. S. Frankel, Kehilat Bene Yosef, New York, 1975–2007) and compare to the comments of *Shittah Mekubetzet* on our *sugya* (in the margins of standard Talmud printings of *Bekhorot*), who states that 'some old books' do not contain the principles (note 1).

⁶⁸ *Hilkhot Bekhorot le-Haramban*, ed. B. Auerbach (B. Auerbach, Jerusalem, 1993), pp. 92–93.

⁶⁹ On this, see most recently Brody, *Geonim* (as in n. 23), p. 134.

⁷⁰ These texts would not (necessarily) be of the same type as those reflected in the geonic codes cited above. On the contention that multiple versions of Talmud texts existed in geonic Babylonia, see Brody, 'Sifrut ha-Geonim' (as in n. 23), p. 237–238.

⁷¹ Some discussions of the Tosafists demonstrate that the principles of adjudication were in their texts of *Bekhorot* and others prove that the principles were not in their texts. See *Git.* 60b, s.v. *ve-hashta*; *Nid.* 16a, s.v. *ve-Rav*; *B. Kam.* 70a, s.v. *ametaltelin*, and my discussion in the body of the article.

⁷² *Sefer Yereim* (Yeshivat Chevrat Ahavat Shalom, Jerusalem, 5733), no. 140, p. 58b–59a.

⁷³ *Sefer Or Zarua* (H. L. and Y. H. Shapira, Zhitomir, 1862), vol. 1, no. 521, p. 147.

⁷⁴ *Sefer Mitzvot Gadol*, Positive Commandment no. 144, p. 371 (n.p., Jerusalem, 1991).

⁷⁵ *Sefer Terumat ha-Deshen*, vol. 1, no. 269 (Sh. Avitan, Jerusalem, 1990), p. 218.

⁷⁶ See nn. 40 and 78.

⁷⁷ On this, see A. Freimann, 'Ascher b. Jehiel: sein Leben und Wirken,' *Jahrbuch der Jüdisch-Literarischen Gesellschaft* 12 (1918), pp. 250–264.

⁷⁸ In *Piskei Ha-Rosh, Bek.* 8:5, Rosh rules like Rav, indicating that the addition was not in his text. Note, however, that in *Piskei Ha-Rosh, Nid.* 1:1, Rabbi Asher cites 'and we hold the law

The evidence of the Rishonim coincides, therefore, with the manuscript findings. The Oriental tradition of the Talmud text does not include the ruling in favour of Shemuel, and Spanish authorities did not rule in accordance with him.⁷⁹ The Ashkenazi tradition of the Talmud text includes an explicit ruling in favour of Shemuel, and the Franco-German Rishonim, with only one exception (Rabbi Asher ben Yehiel),⁸⁰ rule in accordance with Shemuel. In light of this evidence, however, it should not be concluded that the textual additions were made by medieval Ashkenazi scribes. Although the evidence is concentrated in Ashkenazi manuscripts and in the works of Ashkenazi medieval authorities, it would seem counterintuitive that the principles of adjudication, so often found in geonic works,⁸¹ would be added to the Talmud text in Ashkenaz and not in some way to the texts used by Spanish Rishonim. The numerous appearances of the principles in geonic works suggest their common usage in geonic legal culture, indicating that the textual additions to *Bekhorot* were made in Babylonia during the geonic period.

Conclusions

This article demonstrates the methodological advantages and limitations of analysing primary textual witnesses of the Babylonian Talmud and medieval Jewish legal literature for dating *kelalei pesak*. The evidence for the principle 'the law is like Rav in ritual matters' is inconclusive: this principle was established at some indeterminable time (no earlier than the amoraic period). The evidence for the principle 'the law is like Shemuel⁸² in civil matters', however, is conclusive. The evidence provided by an Oriental Geniza fragment of *Bekhorot* and corroborated by the writings of Spanish Rishonim shows that this principle was established in the post-talmudic period.⁸³

is like Rav in matters of ritual, as is cited in *Bekhorot*, chapter *Yesh Bekhor*' (= chapter 8). This seeming contradiction was addressed by later authorities who commented on *Piskei Ha-Rosh* (see above in the body of the article and n. 40). Spiegel, 'Late Additions' (as in n. 12), p. 155, n. 12, suggests that perhaps Rosh's comment originally did not include the citation to *Bekhorot*, which may have been added later. Alternatively, it would seem that either Rosh used different texts of the Talmud when writing his rulings for *Bekhorot* and *Niddah*, or he copied the ruling in *Bekhorot* from Ramban, on tractates not commented on by Rif where Rosh follows Ramban, see D. Zafrani, 'Darkhei Hahoraah shel ha-Rosh' (PhD diss., Tel Aviv University, 1981), p. 185 and the literature cited there.

⁷⁹ Even though we possess no Spanish textual witnesses for the *Bekhorot* text, the testimony of the Rishonim of Spanish origin indicates that their texts matched the Oriental tradition and did not contain the additions.

⁸⁰ As noted (in the body of the article and n. 77), Rabbi Asher also lived in Spain. Therefore, he may have had access to Talmud manuscripts of the same type as the Geniza tradition.

⁸¹ See n. 9.

⁸² On the amoraic origins of a different principle related to Shemuel, *halakha ke-divrei ha-mekel be-evel*, see J. Milgram, 'Dugmah Mi-perush Bikorti le-perek Yesh Bekhor (perek chet demasechet Bekhorot): Sugyat "Met Ha-ben be-tokh sheloshim"', *Bekhorot 49a*, *The Wisdom of Batsheva: Dr Beth Samuels Memorial Volume*, ed. B. Wimpfheimer (Ktav Publishing, Hoboken, 2009), pp. 30–39.

⁸³ It is conceivable that the notions that Rav's ruling is followed in ritual matters and Shemuel's in civil matters precede their earliest explicit formulations in the Talmud. However, based on the evidence currently available, such a contention cannot be proved.

APPENDIX A

Niddah 24b

תני תנא קמיה דרב המפלת בריית גוף שאינו חתוך ובריית ראש שאינו חתוך יכול תהא אמו טמאה לידה ת"ל אשה כי תוריע וילדה זכר וגו' וביום השמיני ימול וגו' מי שראוי לברית שמנה יצאו אלו שאינן ראויין לברית שמנה א"ל רב וסיים בה הכי ושיש לו שני גבין ושני שדראות רבי ירמיה בר אבא סבר למעבד עובדא כוותיה דשמואל אמר ליה רב הונא מאי דעתך לחומרא חומרא דאתי לידי קולא הוא דקיהבת לה דמי טוהר עביד מיהא כותיה דרב דקיימא לן הלכתא כרב באיסורי בין לקולא בין לחומרא.

APPENDIX B

Bekhorot 49a-49b

איתמר הפודה את בנו בתוך שלשים יום רב אמר בנו פדוי ושמואל אמר אין בנו פדוי דכולי עלמא מעכשיו אין בנו פדוי לאחר שלשים יום ואיתנהו למעות ודאי בנו פדוי כי פליגי לאחר שלשים יום ונתעכלו המעות רב אמר בנו פדוי מידי דהוה אקידושי אשה התם לאו אע"ג דנתעכלו המעות הוה קידושי הכא נמי לא שנא ושמואל אמר לך התם בידו לקדשה מעכשיו הכא אין בידו לפדותו מעכשיו ואע"ג דקיימא לן דכל היכא דפליגי רב ושמואל הלכתא כרב באיסורי וכשמואל בדיני הכא הלכתא כוותיה דשמואל תנן מת בתוך ל' יום אע"פ שנתן לכהן יחזיר לו חמש סלעים טעמא דמת הא לא מת בנו פדוי הכא במאי עסקינן דאיתנהו למעות תא שמע בחזקת שלא נפדה עד שיאמרו לו שנפדה התם נמי דאיתנהו למעות בעינייהו תני תנא קמיה דרב יהודה הפודה את בנו בתוך שלשים יום בנו פדוי אמר ליה שמואל אמר אין בנו פדוי ואת אמרת בנו פדוי ואע"ג דקיימא לן כרב באיסורי וכשמואל בדיני הכא הלכתא כותיה דשמואל.

