Early Rabbinic Civil Law

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Throughout this study of *m. Baba*\(^{2}\) *Mesi*\(^{3}\)*, the focus has been on the Mishnah as an independent work that, by itself, reflects a particular world-view. Nevertheless, there is, in addition to the Mishnah, an extensive body of material that purports to be “Tannaitic” (i.e., its language is similar to that of Mishnaic Hebrew, and it cites as tradents individuals roughly contemporaneous with, or earlier than, the redaction of the Mishnah). For our purposes, this “Tannaitic” material falls into two categories: (1) the Tosepta and (2) the Halakhic midrashim (of particular relevance to this study of *m. Baba*\(^{2}\) *Mesi*\(^{3}\)* are the *Mekilta, Mekilta de-raibi, Sipra*, and *Sipre to Deuteronomy*). This appendix explores briefly both the question of the dependence of the Mishnah and the “Tannaitic” corpora upon one another (e.g., whether the texts not included in the Mishnah are dependent upon the Mishnah) and the implication of this material for our understanding of the redaction of the Mishnah against the background of a complex literary tradition. To the extent that it is possible to substantiate the claim that there was a body of material more or less contemporaneous

1 A third category includes the *bara'aitot* in the Babylonian and Palestinian Talmudim. These traditions are cited as fragments whose original context is uncertain. Thus, for instance, whether the Palestinian or Babylonian Talmud is citing from our Tosepta or midrashim when the wording is closely parallel is still subject to dispute (see, e.g., Epstein, *Siprut*, 245–6 [the Yerushalmi uses our Tosepta; the Babli an earlier version]; H. Albeck, *Introduction to the Talmud, Babli and Yerushalmi* [Hebrew] [Tel Aviv: Dvir, 1969], 63–7 [the Tosepta was not known to the redactors of the Talmudim]; for further bibliography and discussion of the dating of the Tosepta and midrashim see H. L. Strack, *Introduction to Talmud and Midrash*, ed. G. Stemberger, tr. M. Brokmuehl [Minneapolis: Augsburg-Fortress, 1992], 168, 174–5, 269, 272–3). Moreover, the *bara'aitot* show the traces of the Amoraic Hebrew (MH2) (this is clearest in the case of the Babylonian Talmud, see D. Goodblatt, “The Babylonian Talmud,” *ANRW* 2.19.2 [1974], 278, and bibliography thereto; for the Yerushalmi see B. Bokser, “An Annotated Bibliographical Guide to the Study of the Palestinian Talmud,” *ANRW* 2.19.2 [1974], 176, and M. Moreshet, “Further Studies of the Language of the Hebrew Bara'aytót in the Babylonian and Palestinian Talmudim” [Hebrew], in M. Z. Kaddari ed., *Archive of the New Dictionary of Rabbinic Literature: Volume II* [Ramat Gan: Bar Ilan, 1974], 56–68). This material must therefore be studied in the context of both the redactional and the linguistic history of the Talmud, and is beyond the scope of the present project.
with the Mishnah and independent of it, it is also possible to begin to ask what makes the Mishnah unique within early Rabbinic tradition, and how it functioned as one text (and one textual community?) among others.

1. *Tosepta.*

Because it is so extensive, and because it has such a close connection to *m. Baba' Meši'â*, the *Tosepta* to *Baba' Meši'â* demands special attention. Over all, the final form of the *Tosepta* follows the organization and structure of the Mishnah, showing that, as its name (toseptâ; “supplement”) implies, it is a supplement to the Mishnah that post-dates the final redaction of the Mishnah. Indeed, much of the contents of *t. Baba' Meši'â* glosses or supplements passages that appear in the Misnah. Thus, for example, T2:1–2 reads as follows:

T2:1

[A] R. Simeon b. Eleazar agrees in the case of vessels of trade that have been used that he is obligated.

[B] And which are “vessels of trade”?

[C] Bunches of suspended (?) needles and hooks, and strings of hatchets.

[D] And thus would R. Simeon b. Eleazar say: “All those [things] that they said: ‘Lo, they are his,’ when [is this the case]?

[E] “When he found them one by one, but if he found them two by two he is obligated to proclaim [them].”

T2:1

[A] And thus would R. Simeon b. Eleazar say: “One who saves from the mouth of the lion, or from the mouth of the wolf, or from the shore (?) of the sea, or from the shore (?) of the river,

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2 For bibliography and discussion see Strack (ed. Stemberger), 1992, 167–81.

3 Following the Schocken ms.: se-nitâmmē bā-hen. The reading of the Vienna and Erfurt mss., se-mistâmmē (editio princeps: Šmī̆mū), should mean “which one makes use of,” here too referring to the use the owner has had of the object before it was lost. A bāratâ in the Babli (B24a) presents an analogue to this tradition, which is cast in terms of whether “the eye has sated itself with respect to the lost object (i.e., whether the owner would be familiar enough with it to recognize and identify it). Recognition may be the issue in T2:1 as well (so Lieberman, *TK*, 9. 156), although the text of the bāratâ in the Babli may reflect specifically Babylonian Amoraic concerns (cf. the view attributed to R. Judah in the name of Samuel on B23b).

4 Erfurt, Schocken mss., *editio princeps*: “he is obligated to proclaim [it].”

5 Hebrew bâdē (construct state). See Jastrow, *sv. bdV*, who follows the gloss of the Babli, B24a, and translates “poles of peddlers for needles.” The point here is that these are goods that are sold from bunches (and, as Lieberman *TK*, 9, 156, notes, are produced more or less uniformly) and hence, unlike the rule of T2:1 [A], one is not required to proclaim them.

Appendix II: Mishnah and Tannitic Corpora

31 3

[B] “One who finds on the road (זיראתא; cf. Latin (via) strata) or in the open
place (פלתא), cf. Greek plateia),
[C] “lo, these are his,
[D] “for the owners have despaired of [finding] them.”

These two passages present clear references to an antecedent text (“R. Simeon b. Eleazar agrees” T2:1 [A]; “All these [things] that they said” [D]), but that text does not appear in the Tosepta. The Mishnah (M2:1), however, does offer such a base text:

[A] Which found objects are his, and which is he obligated to proclaim?
[B] Which found objects are his?
[C] [If] he found scattered fruit or scattered money ....
[D] lo, these are his....

[H] R. Simeon ben Eleazar says: “All vessels of trade he is not required to pro-
claim.”

Thus, T2:1 [A] qualifies the view of R. Simeon b. Eleazar as it is represented in
M2:1 [H]; and T2:1 [D] may plausibly be taken to refer to M2:1 [B–D], and to
explicitly cite M2:1[D]. T2:2 supplements the two preceding traditions attributed to
R. Simeon b. Eleazar with a third on the subject of the acquisition of lost objects
(introducing a principle, “despair” on the part of the owners, that is nowhere made
explicit in the Mishnah in connection with lost objects).7

These two passages reflect the most common aspect of the Tosepta (at least of t.
Baba' Meşi'a) with respect to the Mishnah: that of glossing8 and supplementing9

7 See above, Chapter III, n. 77.
8 I distinguish between glosses and supplements by using the former term to refer to exam-
amples where the Tosepta either cites and comments upon what appears to be our Mishnah, or
in which there is a close paraphrase of the Mishnah. See, for example, the following (I include
line-references to the edition of Lieberman for convenience): T1:2, ll. 3–6 (M1:1–2; extend-
ing the ruling of the Mishnah); T2:20, ll. 42–5 (M2:7 [E–H]); T2:22, ll. 52–4 (M2:8 [D–
E]); T2:28, ll. 69–71 (M2:10 [J–K]); T2:29–30, ll. 75–9 (M2:11); T3:5, ll. 10–4 (M3:3–5;
cf., however, the discussion in section II.B.2); T3:12, ll. 40–1 (M3:12 [A–B]); T3:17–9, ll.
59–66 (M4:5; cf. m. Kel. 12:7, and section III.A.1); T3:20–1, ll. 67–71 (M4:6); T3:24, ll.
75–8 (M4:9 [G–H]); T4:2, ll. 2–5 (M5:2 [D]); T5:13, ll. 30–3 (M5:5 [E]); T5:14, ll. 35–8
(M5:6 [A–C]); T6:8–9, ll. 21–5 (M5:8 [A–B]; see Lieberman, TK, 9, 237–8); T6:16, ll. 51–
2 (M5:11 [B–C]; note, however, that where the Mishnah uses שפק, the Tosepta uses ליבן,
cf. the use of liberarios, from Latin, librarius, in Greek documents from the Judean Desert [P.
Babatha 15.39 (and the note thereto, p. 64), 17.43, 18.37, 20.45, 21.33 (only partially legi-
ble), and 22.39]); T7:19, ll. 77–8 (M6:7 [D–E]); T8:13–5, ll. 36–44 (M7:8); T8:15, ll. 44–9
(M7:9 [J–K]; see Lieberman, TK, 9, 266 to l. 44); T8:20–1, ll. 57–64 (M8:1); T8:27, ll. 90–
1 (M8:6); T9:31–2, ll. 75–8, 80–2 (M9:9, 8); T10:5–6, ll. 11–8 (M9:12 [G–J]); T11:1, ll. 1–
3 (M10:1); T11:7, ll. 22–6 (M10:4 [E–L]).
9 Supplementation through passages that may be alternative formulations of material found
in the Mishnah will be discussed presently. Included below are some examples where t. B.
what appears to be the Mishnah. To that extent, at least, the Tosephta seems to reflect a post-Mishnaic "commentary" on the Mishnah. However, I use the rather indefinite "what appears to be the Mishnah" and "seems to reflect" because, in fact, the relationship between the Mishnah and the Tosephta is quite complicated. In the first place, there are numerous passages that reflect alternative formulations to the material in the Mishnah, which cannot be accounted for solely as later commentary. Compare, for instance, T3:7 and T3:8 with M3:6. The Mishnah reads as follows:

[A] One who deposits produce with his fellow—
[B] even if it is perishing, lo, let this one not touch it.
[C] R. Simeon b. Gamaliel says: "Let him sell [it] before the court,
[D] "because of [the principle of] returning a lost object to its owners."

The two passages from the Tosephta both show distinct linguistic connections with the Mishnah (verbal parallels with the Mishnah are in italics):

T3:7

[A] One who deposits produce with his fellow—
[B] and they rotted:
[C] "wine and it went sour, oil and it went rancid,
[D] even if it is perishing, let him not touch it.

T3:8

[A] One who deposits produce with his fellow—
[B] "and they rotted:
[C] "wine and it went sour, oil and it went rancid,
[D] "even if it is perishing, let him not touch it."

For the strongest formulation of the the view of the Tosephta's dependence on the Mishnah and its significance see, e.g., J. Neusner, The Tosephta: An Introduction (South Florida Studies in the History of Judaism 147: Atlanta: Scholars, 1992), xviii-xix, xxii-xxv. It should be noted, however, that here as elsewhere Neusner distinguishes between material in the Tosephta of varying degrees of closeness to or dependence on the text of the Mishnah. Cf. S. Friedman, "The Primacy of Tosephta in Mishnah-Tosephta Parallels—Shabbat 16, 1: *kol kitbê qôdeš*" [Hebrew], Tarbiz 62 (1993), 313–38, whose interest is in locating texts in which the Tosephta is primary.
Appendix II: Mishnah and Tannitic Corpora

[C] Therefore, the householder may make them tithes for produce in another place.

[D] R. Simeon b. Gamaliel says: "In a case where they are perishing, let him sell [it] before a court.

[F] And the Sages say: "He values it as money in a court,

[G] "[and] he sells it to others but he may not sell it to himself."

[E] "because he is like one returning a lost object to its owners."

Either of these two formulations might arguably have constituted an expansion of the Mishnah (although in the case of T3:8 we would have had to account for the differences in the attributions between M3:6 and T3:8; cf. Chapter II.D.2, above). However, unless we suppose that the author of the Tosepta chose to rework M3:6 twice (and in rather different ways), T3:7-8 taken together, and T3:8 in particular, suggest that other material, not included in the Mishnah but going over the same ground in similar language, was available for use in the Tosepta.11

The use of supplementary or alternatively formulated material is not limited to individual traditions, but to larger clusters of traditions as well. The use of nominative absolute ("article + participle") series in the Tosepta offers a case in point.12

11 Precisely because the language and treatment of legal problems in the Tosepta are so similar to the Mishnah, true "alternative" material is difficult to differentiate from glosses. For possible examples, in addition to the preceding, see, e.g., T2:3-9, ll. 6-18 (M2:1-2; T2:3 disagrees with M2:2 in the case of jars of oil or wine); T2:15, ll. 30-33 (cf. M2:5; M4:7 [H]); T2:16, ll. 33-4 (cf. M2:7 [A-D]); T2:17, ll. 34-7 (cf. M2:6); T3:25, ll. 90-5 (cf. M4:11 [A-C]; what was anonymous in the Mishnah is attributed to R. Judah and the case of the proselyte is handled somewhat differently); T4:2, ll. 9-12 (cf. M5:3 [E-G]); T4:5, ll. 18-20 (cf. M5:2 [A-B]); T4:11, ll. 31-5 (cf. M5:4 [A-C]); T6:16, ll. 44-50 (cf. M5:7 [K-L]); T8:7, ll. 14-21 (cf. M7:2-3); T8:19, ll. 54-6 (cf. M7:10 [E-G]); T10:3-4, ll. 6-11 (cf. M9:12). (For T1:5-9, cf. n.15 below. See also T3:13-4, ll. 42-7, in which a different text for M4:1 [A] and apparently [F] is presupposed, and in which R. Simeon is said to agree with the rule that "a garment acquires a golden dinar, against M4:2 [E] and T3:16 [see further the note to M4:1 in Appendix I, and section III.A.1].)

12 For these series see T4:11-3, ll. 31-9, ha-mōšēb ‘et hābērō ... (for the formula cf. M5:4 [A]; T4:14-22, ll. 38-70, ha-nōten mā‘ōt lē-hābērō ... (for the formula cf. M5:4 [B]; T4:18 has two statements attributed to R. Judah); T5:7-12, ll. 15-30, ha-tām bēhēnā ... (cf. M5:4 [E]; attributions to Symmakhos [L] in T5:7, 8 [cf. M6:5 [I-J]], one, T5:17, in dispute with R. Yose); T5:22-6, ll. 58-67, ha-malweh ‘et hābērō bē-ribbit [one double attribution to R. Meir, T5:22; T5:23, which does not share the opening formula, includes a statement attributed to R. Simeon b. Gamaliel]; T7:1-12, ll. 1-57, ha-tōkēr ‘et ha-pō‘ēl pō‘alīm (T7:1, 3, 4, 5, 7, 8) hāmōr (T7:7 [L 39], 10, 11, 12) sēpēnā (T7:2) (for the formula cf. M6:1-5; 7:1-2; attributions: R. Dosa [L], T7:1 [for this dating of R. Dosa, see W. Bacher, 'Agrādōt ha-tannāmim, tr. A. Z. Rabbinowitz, 2 ed. (Dvir: Tel Aviv, 1928), vol. 2, pt. 2, p. 84]; R. Simeon b. Eleazar [L], T7:7; Symmakhos in the name of R.
These series tend to address cases not specifically referred to in the Mishnah. It is tempting, in light of the discussion of the series in *m. Baba' Meši'aw* (above, section II.B.2), to see this as further confirmation that such a series on contracts was utilized by the redactor of *m. Baba' Meši'aw* as a source, and to see in the series in the Tosepta analogues to or extensions of the same series used in the Mishnah. Nevertheless, the *ha-hôker* series in T9:10–8 may imply otherwise. While some of this material may supplement chapter 9 of *m. Baba' Meši'aw*, other passages in this series may well be reworkings of material in the Mishnah (compare, e.g., T9:11 and M9:3; T9:13 and M9:5). If that is so, then the possibility must be allowed that at least some of the series in *t. Baba' Meši'aw* have been constructed using the Mishnah as a model.

The relationship of *t. Baba' Meši'aw* to *m. Baba' Meši'aw* is further complicated by the fact that the Tosepta incorporates material that has no direct relationship to the subject matter of the Mishnah at all, but is included (presumably) for reasons particular to the redaction of the Tosepta. The material that does not directly refer to the Mishnah (whether because it supplements, presents alternative formulations, or deals with material that is not in the Mishnah) cannot be assigned one date. On the one hand, there is at least one “alternative” passage that seems to reflect later (Amoraic) concerns, and that appears also in statements attributed to Amoraim. On the
other hand, it is sometimes (although rather rarely) possible to suggest that the Mishnah presupposes material preserved in the Tosepta.\textsuperscript{17}

\textbf{Appendix II: Mishnah and Tannitic Corpora}

\begin{itemize}
\item Not be a reworking of the Mishnah, but in fact may be based on an alternative formulation. Y1:6 [8a] cites the view of the Amora R. Eleazar that "If the borrower admits, lo, let this one [the finder] return it [to the lender]." This is precisely the clause that appears in T1:5 (in the view of R. Meir) and the equivalent appears repeatedly in T1:6–9. Whatever the relationship between the Tosepta and the Yerushalmi in general, here the Yerushalmi does not appear to be aware of the T1:5 in its entirety: the Yerushalmi quotes a \textit{b\=araita}' mentioning only a view attributed to R. Meir (\textit{t\=eni b\=e-\=tem r. m\=e\=\textit{y}r}) that deals only with the question of the effectiveness of documents without explicit liens but shows no knowledge that the distinction raised by R. Eleazar (i.e., whether or not the borrower confirmed the debt) is to be attributed to R. Meir. That distinction is only raised—and rejected—as an Amoraiic opinion. (According to the text of the Leiden ms. and the \textit{editio princeps}, R. Meir allows that, like T1:5, documents without explicit lien clauses can only be used to exact payment from non-alienated property [however, \textit{P\=en\=e mo\=e\=h, ad loc.}, understood this citation as implying that documents with explicit lien clauses too are limited to exaction from non-alienated property and therefore deemed this problematic; so too, apparently, Lieberman, \textit{TK}, 9, 144, to l. 12, who refers to this version as corrupt]; in the Escorial ms. the views of R. Meir and the Sages are apparently reversed [cf., however, Lieberman, \textit{Yerushalmi Neziqin}, 130, to ll. 66–8, who suggests that the Yerushalmi be emended to juxtapose two versions of R. Meir's view].) By contrast to the Yerushalmi, a close analogue to T1:5 is cited at B13b to resolve an Amoraiic debate between R. Yohanan and R. Eleazar (B13b), as well as Samuel (B13a), about precisely the same issue: whether or not the dispute in M1:6 between R. Meir and the Sages refers to a case in which the borrower confirmed the debt (and this issue is given considerable anonymous discussion at B12b–14a). Hence Lieberman, \textit{TK}, 9, 144, saw T1:5 as a Babylonian \textit{b\=araita}? Perhaps, in light of the fact that in both the Babli and Yerushalmi Palestinian figures are said to refer to this issue, we should see T1:5 as reflecting Amoraiic (even if Palestinian) tradition.

The view about "despair [on the part of] the owners" attributed to R. Simeon b. Eleazar, referred to above (T2:1 [D]), may reflect Amoraiic concerns as well (cf. Chapter III.B.1). For further examples from elsewhere in the Tosepta see Epstein, \textit{Siprut}, 252–3.

\textsuperscript{17} I have not found convincing examples in \textit{t. B. Me\=s}. Cf. S. Friedman, \textit{Talmud A\=rukh: BT Bava Me\=\textit{zu VI, Commentary} [Hebrew]} (Jerusalem: JTSA, 1990), 225–7 who suggests that T7:10 has been modified in the formulation of M6:5 (cf. the discussion of M6:5 in Chapter II.B.2); \textit{idem}, 1993, 313–8; and the arguments of B. De Vries, \textit{Me\=\textit{h\=a\=r}\=\textit{i\=m b\=e-siprut ha-salm\=\textit{ud}} (Jerusalem: Mossad Harav Kook, 1968), 15–20 (M4:10 and T3:16), 20–5 (M6:1 and T7:1, assuming that R. Dosa in T7:1 is Yabnean [cf. n. 11 above]); also 51–3 (M6:6–7 and T7:15, although De Vries himself admits that T7:15 could easily have been taken as glossing the Mishnah, pp. 52–3). One possible example may be M4:11 [A–C] and T3:26:

\begin{itemize}
\item M4:11
\begin{itemize}
\item [A] One does not mix produce with produce (for sale)—
\item [B] even new [produce] with new—
\item [C] it goes without saying new [produce] with old.
\end{itemize}

\item T3:26
\begin{itemize}
\item [A] One does not mix produce with produce (for sale)—
\item [B] even new [produce] with new, or old with old—
\item [C] and it goes without saying new with old and old with new.
\end{itemize}
\end{itemize}
What this implies is that *t. Baba' Meši'ā*, like the Mishnah, is constructed out of source material in order to supplement *m. Baba' Meši'ā*. In practice, it may be difficult or impossible to isolate strata of the Tosepta that necessarily predate the redaction of the Mishnah. Nevertheless, the incorporation into the Tosepta of material that cannot merely be explained as later commentary is important, because it draws attention to the likelihood that there was more material available to the redactors of the Mishnah (at least of *m. Baba' Meši'ā*) than that which appears in the Mishnah alone. To that extent we are justified in asking whether the final form of the Mishnah does not reflect conscious (as well as unconscious) choices of what to say and how to say it.

2. Halakhic midrashim.  

The relationship of the Halakhic midrashim to the Mishnah is more difficult to trace than that of the Tosepta. Unlike the Tosepta, which is organized around the Mishnah the midrashic texts are organized both formally and stylistically around verses in Scripture, and it is the Biblical text, at least on the surface, that provides the occasion for the midrashic comments and the context for the presence or absence of

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[D] Even [if he had produce that sells at] a še'ā to the dinār, and [at] a še'ā to a dinār and a tērisīt (cf. Latin *tressis*, a three-as coin),

[E] let him not mix them and sell them at a še'ā to the dinār.

[F] One does not mix new wine with new or old with old, and it goes without saying new with old or old with new,

[G] nor harsh [wine] with mild,

[H] and R. Judah permits harsh with mild because it improves it.

[I] And thus would R. Judah say: "One kind that improves its fellow is permitted; two kinds that improve one is prohibited.

T3:26 [A–D] may plausibly be taken as expanding upon, and adding specificity to, M4:11 [A–B]. The immediate context suggests this as well, since what follows in T3:27 seems clearly to gloss M4:11 [E] ("One does not mix wine sediments [M4:11 [E]] .... How?... Even when they said: 'He gives him his sediments' [M4:11 [E]] ...."; see Lieberman, *TK*, 9, 187). However, what appears in M4:11 [D] as an abrupt note is rather clearer in T3:26. Is it possible that M4:11 [C] is the result of the abridgement of a fuller (if redundant) source reflected in T3:26 [F–H]? If so, that "source," as it appears in the Tosepta, occurs in a context that itself may have been reworked in terms of the Mishnah.

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18 For bibliography and discussion see Strack (ed. Stemberger), 1992, 269–99.
material. Hence, for instance, if a midrashic text engaged in exegesis of verses relevant to the topic of the Mishnah does not appear close to the Mishnah, it is not clear to what extent this may reflect a pointed relationship (e.g., conscious ignoring by author, redactor, or traditions of one text, of the other text) or a non-relationship (e.g., different schools with different traditions, or different texts pursuing different questions). Even the citation of non-exegetical traditions, frequently precisely or closely paralleled in the Mishnah—perhaps the best reason for seeing these collections as post-Mishnaic—do not in every case refer to the Mishnah. Hence, exclusive focus on the evidence for the relationship of these Midrashic collections in their present form to our Mishnah may obscure what, from the point of view of both literary and social history, is the more important phenomenon: the existence of multiple forms of expression that, for all their commonalities, reflect multiple agendas.

Among the midrashim, the Mekilta (and the Mekilta de-Rabbi) offers the most extensive material for comparison to m. Baba’ Meṣi’a. Strikingly, the relationship with the Mishnah is uneven, and depends upon the section of the Mekilta. Although various pericopae of m. Baba’ Meṣi’a regarding depositaries are manifestly dependent upon exegesis of Exodus 22:6–14 (see Chapter II.A.1 above), the Mekilta on these verses (Něziqin 15–6, pp. 298–307) overlaps remarkably slightly with m. Baba’ Meṣi’a. Strikingly, none of the material brought with an explicit citation formula derives from m. Baba’ Meṣi’a. The Mekilta certainly presupposes certain

19 For citations (with formulae such as mi-kā’n āmrā or mi-kā’n ātta āmēr) see Epstein, Nūsah, 728–51; see further E. Z. Melamed, The Relationship between the Halakhic Midrashim and the Mishna and Tosefta [Hebrew] (Jerusalem, 1968); see further the discussion in idem, An Introduction to Talmudic Literature [Hebrew] (Jerusalem, 1973), 233–58. (On the basis of such citations S. Lieberman, Sipre Zutta (The Midrash of Lydda) [Hebrew] [New York: JTS, 1968], 11–64 [see, already, Epstein, Nūsah, 739–46], that Sipre Zut. cites a different mishnah collection.)


21 For the possibility of isolating sources based on attributions in the Mekilta see (the somewhat obscure) discussion in Epstein, Siprū, 580–1 (following 572–80), and J. Neusner, A History of the Jews in Babylonia (Studia Post Biblica VI: Leiden: Brill, 1965–70), 192–6. Both suggest a special connection between tractates Něziqin and Pisha’, in contrast (for our purposes) to Kaspa’. To some extent this is borne out by the connection with m. B. Meṣ as well (compare Něziqin 15–6 with Kaspa’19, 20, for which see below).

22 A similar lack of connection may be argued for M4:10 and Mek. Něziqin 18 (ed. Horovitz-Rabin, p. 311), which shares with M4:10 the bare assumption that there is hōnāyā in connection with both words and money (p. 311, ll. 3–4). The entire Mishnaic construct of recision of sale for over- or under-charge (M4:3–10) is absent in the Mekilta. Exposition of what the Mishnah calls “verbal hōnāyā” is restricted in the Mekilta to the case of the proselyte (following Ex. 22:20: “... and the gēr shall you not oppress ...”), and is formulated rather differently than M4:10 [D–E] (cf. T3:25, for still another formulation).

23 Mek. Něziqin 15, p. 299, l. 1 (cf. m. Šebu. 6:6); p. 301, l. 10 (cf. m. Šebu. 6:1); p. 302, ll. 2, 8 (cf. m. Sānh. 1:1 [without the view of R. Judah the Patriarch cited in l. 9]; t. Sānh. 1:1; t. Šebu. 3:8, and see Epstein, Nūsah, 738); Něziqin 16, p. 304, l. 6 (m. Šebu. 7:1); 304, l. 7 (cf.
principles that are also present in the Mishnah: that liability of “reaching out the hand” (Ĕlîhîth yyâd) arises when the depositary made use of it only for “for his needs” (lê-sorêkô);\(^{24}\) that the liabilities of paid and unpaid depositaries are to be distinguished;\(^{25}\) that loss (‘âbêdâ) is treated as equivalent to theft;\(^{26}\) and that borrowers assume liability only when the object has entered their possession and are not liable for damages that occur with the owner present.\(^{27}\) Yet, precisely because these are basic to the Rabbinic construction of civil law they need not imply that the Mekilta has utilized the Mishnah.\(^{28}\)

Two units of material of this portion of the Mekilta require further discussion. The first involves the Hillelite-Shammaité dispute over whether the depositary is liable for intention alone (cf. M3:12 [E–G]). The Mekilta (Nëziqin 15, p. 300, ll. 12–5) reads as follows:

1. “That he did not reach out his hand to the work of his fellow” (Ex. 22:7):
2. ["Reaching out"] for his need.
3. You say it [Scripture refers to use] for his need?
4. Perhaps it [refers to use] only for its (?) need and not for its (?) need?\(^{29}\)

\(^{24}\) Mek. Nëziqin 15, p. 300, ll. 11, 12–5; 16, p. 304, ll. 1–5 (the text of these passages is difficult; see the apparatus of Horovitz, pp. 300, 304, and below, nn. 29–30); cf. M3:9.

\(^{25}\) Mek. Nëziqin 16, pp. 304, ll. 8–305, l. 2; p. 307, ll. 1–8; cf. M7:8 [E, G]. See also Mek. Nëziqin 15, p. 301, ll. 4–8 (“Scripture comes to distinguish between depositaries”), without specifying what distinction is implied.

\(^{26}\) Mek. Nëziqin 16, p. 305, ll. 3–5; cf. M3:1 [B]; M7:8 [G]. The formulaic “I have only theft [i.e., from Ex. 22:11, “And if it should be stolen ...”], whence [do I know] loss?” (Ên li ‘elâ ... minayîn) asks for the derivation of a known rule. (E. Z. Melamed and, apparently, Epstein treated this as a citation formula: see Melamed’s addenda to Epstein, Siprut, 739–40; the Epstein, Melamed edition of Mekîlta de-raîbi, p. xxx; and Epstein’s own listing of this formula, Násab, 747. All these relate to Mekîlta de-raîbi, but the same should apply to the other texts.)

\(^{27}\) Mek. Nëziqin 16, p. 306, ll. 10, 15–6; cf. M8:1, 3. The presence of the owner as removing liability is explicit.

\(^{28}\) Since the Mishnah sometimes reflects further developments on these themes that are not dealt with in the Mekîlta (e.g., M3:9: whether the owner designated a place and whether the object broke while in the hands of the depositary; M8:1, 3: in what way the owner is “with it/ him” (îmhô [M8:1]; the transfer of possession through agents of the owner or borrower [M8:3]), one might also argue that the Mekîlta here is more “primitive” and therefore preserves the source from which the Mishnah is drawn. Nevertheless, these conceptions are basic and need not show literary dependence.

\(^{29}\) The question marks reflect uncertainty as to whether to read lê-sorêkâh (“its need”) or lê-sorêkô (“his need”) (see the variants and notes by Horovitz, Rabin, ll. 11ff.). Nor is what is meant here clear. Perhaps what is at issue is use of the object in a way that does benefit the
Appendix II: Mishnah and Tannitic Corpora


[6] For the house of Shammai obligate [the depositary] for the thought of the mind (leb) as for the deed,

[7] as it is said “For every matter of transgression;”

[8] and the house of Hillel only obligate from the moment he has reached out his hand.

[9] Therefore it is said: “That he did not reach out his hand to the work of his fellow;”

[10] [“Reaching out”] for his need.\(^{30}\)

Formally, the citation of the Bible with the formula še-neʾemar (“as it is said” [7]) is typical of passages in the style of the Mishnah.\(^{31}\) This, in and of itself, should raise the possibility that the Mekilta here quotes another text. The force of [1–5] is that “For every matter of transgression” (Ex. 22:8) specifically implies that that “transgression” consists of unauthorized use for the depositary’s own benefit. The point of [6–10] seems to be to support this conclusion with the citation of a known “Houses” dispute (“For the house of Shammai obligate ..., but the house of Hillel only obligate ...” [6, 8]), on the assumption that it is the Hillelite view that is to be followed.\(^{32}\) If the Mekilta quotes a “mishnaic” text here, however, it does not quote (or even paraphrase) M3:12 directly: to the extent that the “mishnaic” form is retained from source material, it is a source that attached the dispute to Scriptural verses that is presupposed. However, no verses appear in the Mishnah.\(^{33}\) Whether the Mekilta quotes an “early” or “late” tradition here seems ultimately insoluble, but the possibility that a post-Mishnaic development is being quoted should be considered.\(^{34}\)

depository, but that is for the good of the object. See, e.g., T2:22, which apparently permits the use of lost objects [and this is theoretically extended afterwards to deposits] in a way that will not damage them. Unless we take the Tosepota to be in fundamental disagreement with M2:8 (and this remains a possibility; in that case, M2:8 permits “use” only when it is required for the object itself), perhaps we should interpret M2:8 [E–F] in this manner (cf. M2:8 [A], which may be taken as permitting one to read a found book since the finder must roll it anyway [B]).

\(^{30}\) Reading le-sorēkō here (cf. M.Friedman (אִי שלום), Mēkiltā dē-rabbi yišmāʾēl ′im pēruš mēʾyr ṣāyyin [Vienna, 1870], 91b n. 25; J. Z. Lauterbach, Mekilta de-Rabbi Ishmael [Philadelphia: JPS, 1935], 3, 117, l. 55).

\(^{31}\) See, e.g., Halivni, 1986, 34.

\(^{32}\) Following the Hillelite view, Ex. 22:8 does not obligate the depositary for intention alone, but rather for an act, much like [1–5]. However, if Horovitz, p. 300, l. 4 (note) (see also Lieberman, Yerushalmi Neziqin, 144–5 and n. 18), is correct that the expression “come and swear to me that you did not have it in your mind (labbēkō) to sell them” (Mek. Neziqin 15, p. 300, l. 4) presupposes the Shamaitic view about intention, the assumption that the Hillelite view is correct is not inevitable in the Mekilta: 33 See the note to M3:12 in Appendix I. Cf. Epstein, Nūalah, 738, who lists this under the rubric of citations of the Mishnah (but notes that it is in “different language”).

\(^{34}\) Cf. Y3:13 (9b); y. Sebu. 8:1 (38c), in which the attachment to verses is carried out anonymously and in Aramaic, suggesting a late formulation; in B44a this is cited as a bārāʾātā.\(\)
The second passage relates to the conditions under which the loss or damage to an animal due to attack by wild beasts (M7:9 [A–F, H]) or brigands (M7:9 [G, K], or death "according to its manner" (kē-darkāh, M7:10 [A–E]) is deemed ʿones (in the terminology of the Mishnah). Here the Mishnah seems to reflect an underlying exegesis of Exodus 22:9 ("... and it dies, or it is broken, or it is taken captive ...") that is also attested in the Mekila.\(^{35}\)

\[1\] "and it dies,"
\[2\] that its death be at the hands of heaven;
\[3\] "or it is broken,"
\[4\] that a beast broke it,
\[5\] "or it was taken captive,"
\[6\] that brigands took it captive.

Granting this fact, it is certainly possible (although not inevitable) that the Mishnah here is dependent upon a midrashic source preserved in the Mekila. Even assuming that this is so, however, whether or not M7:9–10 depends upon the larger context of the Mekila in its present form remains difficult to decide. It is possible that when the Mishnah considers how many dogs or wolves qualify as ʿones (unavoidable accident), and what role the actions of the "depositaries" play in their own liability, it is developing the statement attributed to R. Ishmael\(^{36}\) in the Mekila that: "there is a tearing (ṣērēpā [i.e., by wild animals]) that he pays and a tearing that he does not pay."\(^{37}\) On the other hand, this passage in the Mekila, in which R. Eliezer (in agreement with R. Aqiba) defines violent death or capture that could have been avoided "as a kind of theft," that is, for which the paid depositary is liable but an unpaid depositary is not, may go against the basic notion of ʿones in M7:9–10 [D].\(^{38}\) Arguably, this might mean that the redactor of the Mishnah used, but knowingly differed from, a text extant in the Mekila. In fact, however, beyond the definitions of "death," "breaking," and "capture," there is little unambiguous evidence of knowledge and borrowing between the Mekila and the Mishnah. It seems more likely that

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\(^{35}\) Mek. Nēzāqīn 16 (Horovitz-Rabin, p. 303, ll. 4–5). For ʿones in M7:9–10 see the note to M7:9 in Appendix I. In context, M7:9–10 does not gloss Scripture, but rather the Scriptural terminology in M7:8 [G]. (See also Sections II.A.1, n. 34; II.C.1, n. 105; III.B.2, nn. 102, 104.)

\(^{36}\) So, the Oxford ms. and the parallel in Yalqūt sīmōnt (see the variants to Horovitz, Rabin, p. 303, l. 10); so also Friedman (Yiḥud), 92b, n.

\(^{37}\) If so, M7:9–10 does not appear to reflect the explicit development this rule is given below in Mek. Nēzāqīn 16, p. 306, ll. 2–8, in which "a tearing that he pays" is glossed: "such as the tearing of a cat, a fox, or a marten (nēmīyā [Jastrow, s.v.])," i.e., small animals; as opposed to "a tearing that he does not pay," glossed by a list of larger or deadlier animals (cf. M7:9 [H], a close parallel to this list, to be discussed below). By contrast, the Mishnah uses number as a criterion: e.g., one or more wolves (M7:9 [A–C]), two or more dogs (M7:9 [D–F]).

\(^{38}\) See the discussion of negligence in Section III.B.2, n. 104. A further example of legal differences between the two texts is discussed in the preceding note.
for these definitions both the *Mekilta* and the Mishnah have utilized earlier common material.\(^{39}\)

In tractate *Kaspā* \(^2\) of the *Mekilta*, the relationship to the Mishnah is somewhat more pronounced but is not uniform. The *Mekilta* to Exodus 22:24–5 (*Kaspā* \(^2\) 19, pp. 315–7) may be dependent upon the Mishnah. The material brought with the *mi-kānu ḫāmrā* formula is closely related to *m. Baba* \(^2\) *Mesī'a* \(^2\) and here appears to underlie the exegesis itself rather than to reflect a later redactional overlay.\(^{40}\) In addition, where the *Mekilta* prohibits loans of produce to be repaid in produce, as well as loans of either money or produce to be repaid in the other medium, it does so with a generality that does not appear in the Mishnah.\(^{41}\) In light of dependence on material much like the Mishnah here, it is possible that in this case the *Mekilta* generalizes the more nuanced rules, known from the Mishnah, into a legal maxim. (Since no clear literary relationship is demonstrable here, it is impossible to draw far-reaching

\(^{39}\) It is often presumed that short glossing passages in the Tannaitic midrashim (such as the passage quoted above) form an early stratum to which the later dialectical discussion is added (see, e.g., Albeck, 87–93; Neusner, *Purities VII* (*Negām. Sīfrit*), 197–202 considers this in connection with the Sīfrit: see also Halivni, 1986, 22–35, who discusses the antiquity of “simple” Scriptural exegesis in connection with the related question of the forms used for authoritative transmission of tradition). Even if this is not true as a general rule, here, at least, this presumption helps explain why common material exists in both texts but in rather different contexts. To this common material should perhaps be added the list of dangerous animals in M7:9 [H] and *Mek. Nēzāqīn* 16, p. 306, ll. 5–6 (see also *m. B. Qam.* 1:4). The Mishnah disagrees with the *Mekilta* over the case of the wolf (see the note to M7:9 in Appendix I).

\(^{40}\) (1) *Mek. Kaspā* \(^2\) 19, p. 316, 8–11 (cf. M5:11; there is a closer parallel with T6:16 in terms of both terminology [*liblār*, against *sōpēr* in the Mishnah] and the continued parallel between ll. 11–2 and T6:17; the relevant material in T6:16, however, appears as a fragmentary gloss to the Mishnah; cf. Epstein, *Nisāh*, 738). That there is a transgression on the part of the various parties to and facilitators of loans on interest is presupposed by the exegesis (“I only have a warning for the borrower and the lender; whence a warning for the guarantor, the witnesses and the scribe?”). (2) *Mek. Kaspā* \(^2\) 19, p. 317, ll. 3–4 (cf. M9:13 [E–G]; however, where the Mishnah opposes items for day and night use [a plow, a pillow], the *Mekilta* stays closer to the language of Ex. 22:25–6, and refers only to a garment [*kēśūt*, as in Ex. 22:26] for day or night). Here, too, what is common with the Mishnah is presupposed in the exegesis (“I only have a day-garment .... whence a night garment ...?”). (For the formula *’en li ḫela’ ... minayin*, cf. n. 26 above.)

\(^{41}\) *Mek. Kaspā* \(^2\) 19, p. 315, ll. 13–4. The most explicit statements in *m. B. Mes.* regarding loans of produce are one attributed to Hillel (M5:9 [D–G]) and another describing the customary practice of R. Gamaliel with his tenant farmers (M5:8 [C–F]). The latter, at least, is given as an example of supererogatory piety (and cf. the Amoraic conclusion about the view of Hillel, *b. B. Mes.* 75a). The Mishnah itself is somewhat more permissive: M5:8 [A–B] (loans of seed grain are permitted); M5:9 [A–B] (loans of produce of a kind that the borrower owns and can repay presently are permitted); the grey area between loans involving produce and sale are discussed in M5:1 and M5:7, and since the Mishnah permits contracts that can be construed as a sale, it is, again, more permissive than the bare rule of the *Mekilta*. 
conclusions; among other alternatives, it is also possible that this reflects a common stock of basic legal traditions attested in the *Mekilta* but developed in the Mishnah.)

By contrast, the *Mekilta* to Exodus 23:4–5, incorporates material that runs parallel to the Mishnah.42 Here it seems likely that we have an alternative formulation of material that also appears in the Mishnah, but the possibility that the *Mekilta* preserves material antecedent to the Mishnah, or even that it develops the Mishnah, cannot be ruled out.43 At the same time, the exegesis of Exodus 23:4 in particular reflects material and concerns that do not appear in the Mishnah such as the distance the finder needs to travel in order to undertake the obligation, or the applicability of these rules to gentiles.44


43 The case for direct influence is difficult to make. The strongest argument for dependence of the Mishnah on a midrashic substratum preserved in the *Mekilta* is the fact that it is precisely material that has an exegetical basis in Scripture that finds a parallel in the *Mekilta* here. (Cf. the suggestion, in Chapter II.A.1, that, on source critical grounds, M2:7 [together with M2:9–10] should be bracketed from M2:8 [and much of the rest of chapters 1–2 of the Mishnah], as dependent upon Scripture. Notably, however, none of M2:9, nor M2:10 [E–F] [which forms a unit with M2:9 [D–E]], finds a parallel in the *Mekilta*, suggesting a complex redactional history for M2:9–10. [For analogous material in *Sipre Deut.* §§222, 225 see below.] The matter is not so simple, however. Part of the parallel material is based on exegesis of Deut. 22:2 (rather than Ex. 23:4) incorporated into the *Mekilta*, so that it is at least possible that what accounts for the parallels is the later expansion of the *Mekilta* (although not necessarily on the basis of the Mishnah). It is true the view of R. Joshua (*Mek. Kaspa*’20, p. 326, ll. 2–3) might arguably form the basis of the anonymous position in M2:10 [J] ("It is a commandment from the Torah to unburden, but not to load"). However, if this is so, that view was understood differently in the *Mekilta* in its present form than in the Mishnah. In the *Mekilta* the rule that both unburdening and loading are required underlies the entire present form of the dispute. Even the view of the R. Joshua is glossed (p. 326, 3–6): "I have only unburdening, whence loading?..." (and although the derivation is based on reasoning, it is clear that loading also is "a commandment from the Torah": "For Scripture spoke in the case of the lesser [rule], to teach from it the case of the greater [rule]"). The dispute in the *Mekilta* is cross-referenced with a citation of the view of R. Simeon ("From here (mi-kâ’n) would R. Simeon b. Yohai say"); cf. the formula mi-kâ’n âmâr; and this may imply a citation of the Mishnah (cf. M2:10 [K] for the same view in different language). Thus it is possible that a citation (possibly from the Mishnah) underlies the reworking in the *Mekilta* of earlier material. See also Chapter II, n. 21, above, in which I suggested that p. 325, l. 14 "Do not unburden with him," [or] 'Do not load with him,' [or] 'Do not return to him his lost object,'" may reflect exegesis of the Mishnah. The reverse is also possible, but in that case the Mishnah has utilized its "source" (which comments on a verse dealing with an animal struggling under its load) in a way that makes M2:10 [D] relate to lost animals alone, and in a context where it may make better sense in reference to struggling animals.

44 See *Mek. Kaspa*’20, pp. 323, l. 10–324, l. 14. Some of this has a parallel in the Tosepta: T2:25 (cf. *Mek. pp.* 323, l. 10–324, l. 2 and p. 325, ll. 4–6); T2:26–7 (cf. *Mek.* p. 324, ll. 3–10, where on the face of it T2:25 agrees with R. Natan in the *Mekilta* ["your enemy" in Ex. 23:4 refers to an Israelite, not a gentile], although T2:26 continues that one is nevertheless
Appendix II: Mishnah and Tannitic Corpora

The *Sipre* to Deuteronomy 22:1–4 offers an important counterpoint to this last section of the *Mekilta*, in part because, as it has come down to us, the *Sipre* closely overlaps with the *Mekilta* (as well as the Mishnah), despite the fact that the two midrashic texts are conventionally held to come from different schools. Given the small size of the section under consideration and uncertainty as to the process by which this overlap came into being, it is not clear what the implications of this overlap are. If it is not the result of medieval interpolations and “correction” it suggests once again that in antiquity similar material could circulate in more than one form without implying direct dependence.

In general, where Scriptural verses are relevant, the *Sipre* to Deuteronomy shows a substantial amount of overlap with the *m. Baba Mesi‘a*, even leaving aside outright citations (*mi-kān ṭattā ṭomēr*), but once again, the precise relationship with the Mishnah is not clear. Thus, for example, in the case of the *Sipre* to Deuteronomy 22:3 (“Even the garment (*šalma*) was included among these, and why did it go out ...” §224, p. 257) it might be argued that M2:5, which parallels this exegesis in classic “midrashic” style, finds its source here. The matter is not so simple, however, since in what immediately precedes, the *Sipre* presents “mishnaic” material as “exegesis”:

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46 See, e.g., L. Finkelstein, “Prolegomena to an edition of the Sifre on Deuteronomy,” *PAAJR*3 (1931–2), 26–7 (and p. 32 for *Sipre* §222), who views this as a scribal process.

47 See §222 (p. 255–6) (cf. M2:9); §225 (p. 257, 12–3) (cf. M2:10); §266 (p. 286, 10–2) (cf. M7:4 [A–C] and *m. Ma‘al. Š*. 2:8); a version of the dispute of M7:5 [C–D] follows immediately in ll. 12–3.

48 Cf. Section II.A.1 above.
"And so shall you do to his ass" (Deut. 22:3)—

[1] If it was an ass, it produces and eats (cf. M2:7 [E]);

[2] [if it was] a garment (kesût), he shakes it out once in thirty days:

[3] he should spread it out in accordance with its needs, but not for his honor;

[4] silver vessels and copper vessels, he uses them according to their need, but not so as to wear them down ([3–5] = M2:8 [D–F]);

[5] [if] wooden vessels he makes use of them so that they do not rot.

None of this is either required by the Biblical verse itself or explicitly derived by the Sipre (cf. the dialectical exegesis of salmâ, “garment,” in the sequel), and seems to reflect the application of a list of rules, much like those of the Mishnah, to the interpretation of the verse. If a hypothetical proto-Sipre serves as the source for M2:5, that exegetical work, too, appears to have been reworked. Perhaps it is more likely that here both the Mishnah and the Sipre draw on a stock of common material. Nevertheless, there are passages that might be taken to reflect the influence of the Mishnah upon the Sipre.

Where it does overlap with m. Baba Meşi’a² (in only a small number of passages), the midrashic collection that is closest is the Sipra, which includes extended blocks of material essentially parallel to the Mishnah. While this may reflect the utilization

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49 In both the Mishnah (M2:7 [G–H]) and the parallel to Sipre in Mek. Kaspâ’20 (p. 325, ll. 2–3), this is attached to the end of Ex. 23:4 (“and you shall return it to him”).

50 With the presence of [6] (cf. B30a), the list does not derive (at least not in an unmediated way) from M2:8.


52 See, e.g., §262 (p. 284, ll. 13–5): “R. Simeon says: ‘Whence [do we know] that he should not say to him ...’” (cf. M5:10 [O–P]). Although the statement is formulated exegetically, the use of “whence” (minayin) suggests that this may be a citation (see above n. 26). Significantly, in §263 a parallel to M5:10 [E–N] is formulated exegetically with none of the markers of a citation. This looks suspiciously as though M5:10 [E–P] has been reused in Sipre Deut. §§262–3. Equally suspicious is the dispute of Eleazar Hisama and the sages, formulated exegetically and introduced with the formula minayin (cf. M7:5 [C–D]), following immediately after the citation of a parallel to M7:4 (mi-ka’n ‘attâ ‘ômêr) (Sipre 266, p. 286). Sipre Deut. §279 (p. 296, ll. 10–1) (cf. M9:12) may be another example of this (utilizing mêlâmêd and minayin). If my interpretation of these passages is correct, then, as noted above in connection with the Mekîta (n. 40 and the text thereto, and nn. 43–4), “citations” may function not merely as later appendages, but even as the material underlying the present form of the Sipre. (See also §276 [p. 294] which seems to be dependent upon m. Šebû. 7:1; cf. Mek. de-rasbi, p. 212.)

53 Sipra Qêôdim II:9–12 (88c–d) (cf. M9:11–2); 8:2 (91a) (cf. M4:10 [C–E]); Bê-har III:1–9 (107c–d) (M4:9, M4:3–6; III:8 includes the interpretive gloss to M4:6 [C], “for this is the manner of the market ...,” that also appears in T3:20); 4:1–2 (107d) (cf. M4:10; T3:25); V:1–2 (109b–c) (M5:1; cf. M2:10 [E], M5:11 [B]).
Appendix II: Mishnah and Tannitic Corpora

of the Mishnah on the part of the Sipra,\(^54\) in at least one set of passages it is clear that the Sipra disagrees with the ruling of the Mishnah.\(^55\) Whatever its connection to m. Baba’ Meši’a\(^7\), the Sipra is thus not in every case slavishly dependent upon the Mishnah.\(^56\) At any rate, the sample of material from the Sipra is too small for any comprehensive conclusions about the relationship between the Sipra and the Mishnah.

Finally, in addition to the foregoing, mention should be made of the Mekilta de-rašbi, which is particularly problematic, and will not receive extended discussion here. The difficulties stem not least from the fact that the text is only partially reconstructed (from fragments, most notably from the Firkovitch collection).\(^57\) Based on the extracts relevant to m. Baba’ Meši’a,\(^58\) the Mekilta de-rašbi seems to postdate and make use of the Mishnah\(^59\) and, it appears, the Mekilta as well.\(^60\) This is in keeping

\(^{54}\) This is clearest in connection with Sipra Bē-har III:1–3 (107c): “Whence [do we know] that there is no hōnayyā for lands?... for slaves?... for consecrated goods?... for documents?...” (see M4:9; cf. the discussion of Mek. de-rašbi to Ex. 22:8 and 9 below n. 59). The Sipra here derives the rules of hōnayyā from Lev. 25:14ff., which deals explicitly with the sale of land, and then excludes land from the rules of hōnayyā. This rather bizarre result may stem from the fact that the rules of hōnayyā (including the list of excluded items) precede the exegesis. (Cf. Qēdōšim II:9 [88c–d], which similarly derives the rule that other forms of “wage” must be paid on time, as in M9:12; but the Sipra includes “lands” on the list, unlike the Mishnah.)

\(^{55}\) Sipra Bē-har V:1 (109b) (one does not pick up the load that has fallen off the animal five times) may be in pointed disagreement with M2:9 [D], 2:10 [E] (“even four or five times,” cf. n. 43 above, on Mek. Kaspā’20, p. 325, l. 9, “not a rabsan”; it should be pointed out that the legal problem here may be slightly different [the animal is not struggling under a load; cf., however, the language of Sipre to Deut. §225, p. 258] and that the sequel states that one does support one’s fellow [the case to which the fallen load is compared] “even four or five times”); V:2 (109b): although it is followed by a parallel to M5:1, the Sipra reads first: “from him you may not take [interest], but you may be a surety for him;” cf. M5:11 [A–B]: “And these transgress a negative commandment: the lender, and the borrower, and the surety, and the witnesses.”


\(^{57}\) For a description of the mss. used in the Epstein, Melamed edition see Melamed’s introduction, xxxiii-xliv; literature on additional fragments is cited in Strack (ed. Stemberger), 1992, 282.

\(^{58}\) I have only made use of those passages that are based on ms. Firkovitch: Mek. de-rašbi to Ex. 22:6–14 (ed. Epstein, Melamed, pp. 199–207); 22:20 (p. 210); 22:24 (pp. 211–2).

\(^{59}\) In addition to the outright citations utilizing formulae, listed by Melamed on pp. xxviii-xxx (nos. 41, 43, 64 (kēsad), [66, from Midra‘ ha-gadōl]), see, e.g., Mek. de-rašbi to 22:8 (44a l. 19–44b l. 4, pp. 202–3), which derives exceptions from the rules of 22:8 for land, slaves, and documents, in precise correspondence to M4:9 [A–E] (cf. m. Šebu. 6:5): “These are things that do not have hōnayyā: slaves, documents, lands and consecrated goods.... an unpaid depositary does not swear, a paid depositary does not pay.” The derivations have no clear exegetical basis in the verse itself, and it seems clear that the midrash is based on the existence of a list of exemptions and not the reverse (cf. Chapter II.A.2 above; and see Mek. de-rašbi p. 204, 45a,18–23, where these are mechanically excluded again from Ex. 22:9). Moreover, the
RABBINIC CIVIL LAW AND SOCIAL HISTORY

with the characterization of Epstein (i.e., that the Mek. de-rašbi frequently utilizes other “Tannaitic” texts, and therefore is “late”). However, if the Mekila de-rašbi is to be classified with the other Halakhic midrashim as essentially a Tannaitic text,

Mek. de-rašbi continues with a near parallel to T2:15, which is, in turn, a variant of M2:5 (both are properly exegeses of Deut. 22:3 and relate to lost objects, here incorrectly attached to the word šalmâ in Ex. 22:8, suggesting that the verse exegesis, whatever the literary source, was available for citation). For the Mek. de-rašbi on Ex. 22:7, 10 (41b l. 21–44a l. 9 [pp. 201–2]; 45b l. 22–46a l. 1 [p. 205]) see C. Levine, “The Concept ‘Šelihut Yad’ in the Mechilta De Rashbi” [Hebrew], BLA 18/19 (1981), 98–116, who argues that the midrashic text here reflects exegesis of M3:9 and 12 (cf. de Vries, 1968, 48–51). Like the Mekila, the Mekilta de-rašbi presumes the various rules for depositaries (see, e.g., p. 201, 41b ll. 2–17; p. 206, 46a ll. 13–8; 46a l. 20–46b l. 10); however, the Mek. de-rašbi presents a derivation of the rules only as an afterthought, in connection with Ex 22:14 (p. 207, 47a ll. 6–12; cf. y. Sebu. 8:1 [38b]). Here (unlike the Mekila) the midrash may presuppose the wording of M7:8 [C–H]: the borrower “pays for everything” (as in M7:8 [F]); the unpaid depositary is “exempt from everything” (cf. M7:8 [E]); and the paid depositary “swears for part and pays for part” (cf. M7:8 [G–H]).

There is substantial overlap in theme, and frequently in language between the two Mekilot. See, e.g., p. 200, 40b. 25 (Mek. Nēzāqin 15, p. 299, 2); 41a, 1ff. (Mek. p. 299, 4); p. 201, 41b, 18–21 (Mek. p. 300, 7–12); pp. 201–2 (Mek. p. 300, 14–5); pp. 202–3 (Mek. pp. 300–1); pp. 203–4, 44b, 6–45a, 5 (Mek. p. 301, 9–10); p. 204, 45a, 5–13 (Mek. p. 302, 1–13); p. 205, 45b, 8–9 (Mek. Nēzāqin 16, pp. 302, 17–303, 3); p. 205, 45b, 16–7 (Mek. p. 303, 17–8); p. 205, 45b, 17–20 (Mek. p. 303, 18–9); pp. 205–6, 46a 6–13 (cf. 45b, 13–4) (Mek. p. 304, 6); p. 206, 46a, 13 (Mek. p. 305, 3); p. 206, 46a, 18–20 (Mek. p. 305, 8–9); p. 206, 46a, 25–46b, 5 (Mek. p. 306, 9–11); p. 206, 46b, 5–10 (Mek. p. 306, 11–2); p. 210, 30a, 2–5 (Mek. Nēzāqin 18, p. 311, 3–5). It is not always possible to tell whether this overlap reflects common exegetical tradition or the use by one text of the other. At least sometimes, however it appears that the Mek. de-rašbi has utilized the Mekila. Thus, for instance, when the Mek. de-rašbi specifies the exceptions to Ex. 22:8 (pp. 202–3, 44a, l. 19–44b, l. 4; cf. preceding note), it may be amplifying the conclusion in Mek. Nēzāqin 15, p. 301, ll. 2–3, that the verse refers to “moveable property against which there can be no liens (le-ën lāhem ʿarḥāyītā); Mek. de-rašbi p. 204, 45a, ll. 5–9 may be a quotation of Mek. Nēzāqin 15, p. 302, ll. 1–5 (although, since the statement attributed to R. Nathan in Mek. de-rašbi does not fit with that attributed to R. Jonathan in the Mekila, this is perhaps an independent formulation of similar material). The Mek. de-rašbi continues (ll. 9–12) with a statement attributed to R. Simeon, as does the Mek. ll. 10–3. The contents of these statements are different, but it may not be accidental that the Mekila echoes the first part of m. B. Qam. 9:7, while the Mek. de-rašbi echoes the conclusion of m. B. Qam. 9:7 and 9:8. Both passages conclude with similar exegeses of “to his fellow” (Ex. 22:8; Mek. l. 13; Mek. de-rašbi ll. 11–3).

See Epstein, Siprut, 738 (=Epstein, Melamed edition, introduction, p. xxv), given, unfortunately, without substantiation. De Vries, 1968, 142–7, lists some seven examples in which, he argues, the Mek. de-rašbi depends upon the Mek.

Cf. C. Levine, “Exegesis of the Mishna in the Mechilta de Rashbi and its Relation to Amoraic Teaching” [Hebrew], BLA 16–17 (1979), 59–69, who defines the Mek. de-rašbi as a kind of Amoraic text. If true, this would not, of course, exclude the possibility that the Mek. de-rašbi might preserve early Tannaitic material (even as the Babylonian or Palestinian Talmud.
its close relationship with the Mishnah forms an important counterpoint to the Mekilta.63

In the preceding discussion of the Halakhic midrashim, I have noted a number of examples in which material in one or another of the exegetical collection is revised or juxtaposed with other material in the process of redaction. Beyond that, the results of this section confirm (in a general way and not without exception, see the discussion of Mek. Kaspā 19, 20 above) the conventional distinction between so-called “Aqiban” midrashim (Sipra, the legal portions of Sipre Deut.; the Mek. de-rašbi is classed in this category as well) and the “Ishmaelite” midrashim (Mekilta), with the former deemed closer to the Mishnah.64 There is some reason to think that in their final form all of the Halakhic midrashim discussed here reflect the influence of the Mishnah. This should not, however, obscure the existence—also noted in connection with the Tosepta, whose association with the Mishnah is unmistakable—of independent formulations of similar material whose existence cannot be attributed solely to borrowing from the Mishnah. To the extent that this is correct, this appendix points to “redaction” as a mode of Rabbinic text-production in general, and not merely of the Mishnah. Hence the argument made in the body of this study (especially Chapter II) that the question of sources and redaction is itself of central importance to understanding the Mishnah as both literary and social product. This question focuses attention on the Mishnah as produced in the context of a wider intellectual community, in which there may well have been considerably more material than that to which we have access, at the same time as it underscores the role of choice, juxtaposition and subtle redaction of traditional materials into a coherent Mishnah. At the same time, to the extent that influence of the Mishnah on other texts can be substantiated, it is also possible to attempt to trace the transformation of these “traditional materials” into the Tradition.