

## THE SECOND TEMPLE ORIGINS OF THE HALAKHAH OF BESAH

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Philip Davies has been a friend and scholarly companion for decades. I have relied heavily upon his judgment in many matters. In celebration of his work on Second Temple times, I offer this proposal that the principal parts of the Rabbinic Halakhic category-formation of Besah, spelled out in the Mishnah-Tosefta-Yerushalmi-Bavli, ca. 100–600 C.E., originate in that period, probably early in that age. What the Mishnah does is concretize and realize the detailed results of a thought-process moving from abstract speculation to material articulation in transactions in the here and now. Here we shall reconstruct that thought-process, stage by stage.

### *The Category-Formation, Besah, its Origins and Its Generative Problematic*

The Halakhic category-formation, Besah (a.k.a. Yom Tob, festival), represented in the Mishnah, Tosefta, Yerushalmi, and Bavli, deals with the preparation of food on the festival day itself. Scripture explicitly permits doing so. The pertinent verse, allowing cooking on the festival days, lays the foundations for the category-formation. But the problematic of the legal topic emerges not from the base-verse but from the hermeneutics of the Rabbinic sages—we know not when or where they flourished nor do their names ever surface anywhere—and their mode of thought in interpreting Scripture's facts.

For once the Torah says that on the festival day (in context, Passover, but therefore also, Pentecost and Tabernacles) one may cook but not constructively work, the festival day is both treated as like the Sabbath (not work) but also not like the Sabbath (cook). This distinction is expressed in the language of Scripture, in the view of David Instone-Brewer:

The origin of the distinction between work on a Sabbath and on a Yom Tob was originally based on Torah vocabulary. On Yom Tob the Torah prohibits 'servile labor' ('abad) but on Sabbath it also prohibits all other 'labor' (melakah). I am impressed by how consistent this distinction is in the Torah.

The word ‘abad appears several times with regard to Yom Tob (Lev.23.7f, 21, 25, 35f; Num. 28.18, 25f; 29.1, 12, 35) while melakah is used only with regard to Sabbaths except re the Day of Atonement when both are prohibited, e.g., Lev. 23.28-31.<sup>1</sup>

Scripture clearly recognizes the species of the genus, work, in its philology.

That philologically establishes a genus comprised by two species, and the processes of analogical thinking take over. Hence the category-formation, cooking on the festival-day, takes shape around the hermeneutics of comparison and contrast: how is the festival like the Sabbath, how unlike, and what are the issues that present themselves when we ask? What we have before us is a perfect model of how a category-formation takes shape in response to a theory of interpretation, a hermeneutics, that imparts structure and order and cogency to the category-formation. It is a hermeneutics that makes of the given information consequential knowledge, transforming facts into well-formed principles. I cannot point to a better example of the interplay of category-formation, hermeneutics, and the exegesis that is guided by hermeneutics and required to work out problems set forth within the category-formation at hand. Nor does it surprise that Besah is a great favorite of those that love Halakhic study.

How, exactly, does the hermeneutics of the category-formation take shape through a process of analogical-contrastive thinking? Things are like one another, so follow the same rule, or they are unlike, so the rule for the one is opposite the rule for the other of the species of the genus. In the present case, the issue throughout is, how is the festival day different from the Sabbath, as the fact that one may cook on that day indicates it is different? Does the difference mean that the rules of sanctification that govern on the Sabbath do not pertain at all, or do they apply in a different (commensurate) way?

To state matters simply: the category-formation is defined by the topic, cooking on the festival. The hermeneutics derives from the analogical-contrastive thinking that generates the questions just now set forth.

*The Hermeneutical Foundations of the Halakhah of Besah:  
The Thought Processes Reconstructed*

What fuses the Halakhic data into a category-formation? For the purpose of exploring this question we must reconstruct the thought processes that produced out of the datum of Scripture the category-formation of Besah. In that reconstruction, we encounter the work of the unnamed sages who, long before the Mishnah assembled the work of category-formation into a

1. Email correspondence, 19 January 2004. My thanks to him for his valuable observation.

systematic law code, thought through in abstract terms what would take on concrete form only in the Mishnah (along with the Tosefta).

We deal with facts and modes of thought about those facts. Scripture provides the facts. The sages whose ideas were made concrete and specific in the Mishnah's Halakhah thought deeply about those facts and transformed them into the wherewithal of the category-formation before us.

What are the data and how are they interpreted? *The raw data derive from random rules about not using fire, hence not cooking, on the Sabbath. The interpretation, as is common in the Halakhah, rests on a procedure of comparison and contrast, that is, a process of analogical-contrastive thinking in a process of hierarchical classification.*

At the foundations of the matter is the simple fact that Scripture recognizes the genus, holy day (Sabbath, festival), on which servile labor may not be done—but Scripture again speciates also. Specifically, it defines the two species of the genus, Sabbath and festival, on the one of which cooking may not be done, on the other of which, cooking may be done. So, before us is an exercise in the analysis of speciation of a genus, the whole guided by the hermeneutics of comparison and contrast.

The governing principles are these: (1) food for use on the festival must be available and designated for that purpose, actually or potentially, prior to the festival. How does this relate to the matter of sanctification like that of the Sabbath? Just as one has to prepare food for the Sabbath in advance of the Sabbath, so one has to designate food for use on the festival in advance of the festival. Then cooking on the festival is not a secular act, done in a random manner, but an act of sanctification of the festival, as much as cooking in advance of the Sabbath is an act of sanctification of the Sabbath. Sanctification, by definition, requires an act of particularization: this and no other, for this act of sanctification, and no other.

Further, (2) may or may not one carry on the preparation of food on the festival in exactly the same way in which one does so on an ordinary day? Here again the hermeneutics of comparison and contrast yields the exegesis of the laws that comprise the category-formation. Is the festival day unlike the Sabbath and therefore the act of cooking is entirely secular? Or is it holy like the Sabbath, and therefore the act of cooking must be done in a manner that distinguishes it from the same act done on a weekday? Here again, the theory of interpretation that sets like beside like and under the same rule, and unlike opposite unlike and therefore under the contrasting rule, governs.

Next, (3) may or may not one prepare what is required for the preparation of food, that is, secondary or tertiary acts of labor, in the way in which one may do so on an ordinary day? Just as the differentiation between cooking on the festival and cooking on an ordinary day plays its role, so we ask about secondary or tertiary acts of labor: may these be done in the ordinary manner or must they be done in a differentiated way?

Finally, (4) may or may not one do such acts of labor at all? Here the issue is obvious. The Sabbath supplies the governing analogy. The tractate asks about distinguishing the actual preparation of food, which the Written Torah permits, from acts of labor required for food but not directly pertaining thereto; acts of labor indirectly involved in food preparation. The analogy of the Sabbath is ever present. And introducing that analogy represents the key initiative of hermeneutics.

Designating food before the festival for use on the festival, on the one side, and linking the status of the household to the status (e.g. as to location) of his possessions, on the other, form the principal laws that are worked out in detail here. In advance, the householder must designate for use on the festival what he is going to prepare on the festival. That represents an act of particularization, this batch of food for this festival in particular, and it is entirely familiar to us in another context altogether. The Temple and its offerings define that context, where, we recall from the Halakhah of Pesahim, the animal to be used for a Passover offering must be designated for that purpose. Once the animal is designated, without appropriate rite it cannot then be used for some secular purpose or some other sacred purpose. An animal for use as a sin-offering must be linked to that particular sin; the farmer who presents it must have in mind the inadvertent transgression that the animal expiates. A general statement that the animal expiates generic sin will not serve. Insisting on that same procedure in connection with the bulk of food and utensils for food preparation used for the festival treats the food for the table as comparable to the food for the altar. The same rule governs the identification and particularization of both, each for its respective purpose.

The hermeneutics begins with a philosophical question and shades over into reflection upon a theological issue. The philosophical question is, how do we classify what is potential? Do we deem it as actual, in that the acorn contains within itself the potentiality of the oak, so the acorn is classified as an oak in nuce? Or do we deem what is potential as distinct from what is actual? Readers familiar with Aristotle's deep thought about the classification of causation will find themselves right at home here. The Halakhah takes the position that the egg may not be eaten, meaning, we differentiate the potential from the actual.

*The Theology of the Category-Formation, Besah:  
Working Back from Concrete Rule to Abstract Reflection*

From the thought processes that yielded the Halakhah, let us now turn to the identification of the theological issues that animated the Halakhic inquiry. Once more we find ourselves in a pre-literary realm, where we have neither

named authorities nor texts, only the results in the Halakhic documents of rigorous theological reflection about abstract issues.

The theological question concerns the divisibility of the sacred time, which is to say, do we differentiate what is sacred for one reason from what is sacred for another, the time that is sacred as the festival from that which is sacred as the Sabbath, in the present case? Or does the festival flow naturally into the Sabbath? At issue is whether what is legitimate on the festival is legitimate also on the Sabbath, a deeply reflected-on question indeed. The answer carries us into the conception of commingling. We recall that space may be commingled, so that on the Sabbath ownership may be shared to a common courtyard or alleyway; owners relinquish their private ownership for the common good of establishing a shared domain, and a fictive, symbolic meal of commingling accomplishes that task. In the case of commingling time, the Halakhah both differentiates the holiness of the festival from the holiness of the Sabbath and also commingles them. It does so by treating them as not continuous but subject to melding. That yields a number of concrete rules, all of them based on the differentiation of contiguous spells of consecrated time.

First, one may prepare food on the festival, and what is left over may be used on the Sabbath, on which one of course does not prepare food. So, the Halakhah is explicit. While on a festival day one is permitted only to prepare food for that same day, he may not prepare food for use after the festival; on the day of the festival he may prepare food for the festival itself, and if he leaves something over, he has left it over for the Sabbath.

Second, one may not prepare on the festival food specifically for use on the Sabbath that follows immediately.

Third, if one starts preparing food on Thursday for the festival that falls on Friday, he may continue adding food to the mixture on Friday, leaving over more food for the Sabbath. And before the eve of the festival day, that is, on Thursday, he may prepare a cooked dish and rely on it to prepare food on Friday for the Sabbath. The preparation of this dish—the fusion-meal or *‘erub-tabshilin*—marks the beginning of the individual’s cooking of food for the Sabbath. Once he has begun, on Thursday, to prepare food for the Sabbath, he may continue that preparation, even on the festival day itself. And for that purpose, a single dish is sufficient. That represents a commingling of time effected through a meal, comparable to the commingling of space effected through the meal.

Through these closely linked rules, the Halakhah states that we respond both to the unity and the diversity of sacred time. All consecrated time bears the same traits, for example, the prohibition of labor. But within that genus, we speciate sacred time on which one may prepare food from that on which one may not. Just as we noted in connection with the intermediate days of

the festival, we move from the concrete to the abstract, so here too we do the same. That is, from the fact that on the intermediate days festival offerings are presented, we proceed to the abstract conception that in some ways, these days on which it is permitted to work are differentiated from other days on which it is permitted to work because on these days offerings correspond to the level of sanctification accorded to those intermediate days.

That is to say, the differentiation at the one point is generalized into elements of differentiation elsewhere. Here too we both treat as continuous and differentiate the sacred time marked by the festival, on the one side, and the Sabbath, on the other. Just as on the one occasion we may cook and on the other we may not—cooking, then, representing the indicator in the household, comparable to the offering in the Temple—so on the one occasion we may not prepare food for the other occasion. But we may both use on the Sabbath food left over from the festival and also prepare in advance a single stew or broth that will serve both. Preparation in advance of the festival for both the festival and, *en passant*, the Sabbath, is certainly permitted. In sum, we both differentiate and homogenize.

That leads us to a profound issue: doing actions connected with preparing food on a festival day in a different manner from on ordinary days. That is an issue familiar from the principle, in connection with the Sabbath, that if on the Sabbath one carries something from one domain to another in an other-than-ordinary manner, he is not culpable. Now, when it comes to food-preparation, encompassing bringing food from place to place, one brings jars of wine not in a basket but on his shoulder; similarly, anyone who takes straw should not hang the hamper over his back—instead, he is to bring it by carrying it in his hand. What is at issue here? If we say that on the festival those acts that are permitted may be carried out in a routine way, as they are done in ordinary time, then we maintain that the secular breaks into sacred time, the act of cooking on the festival (encompassing also secondary and tertiary stages in the process) is comparable to the act of cooking on a weekday. In this aspect the festival is distinguished from the Sabbath and therefore in this aspect is secular.

If we say that on the festival those acts that are permitted must be done in a manner different from the way they are done in ordinary time, we are saying that the sacred time of the festival is different from the sacred time of the Sabbath, but remains sacred time, subject to restrictions upon secular behavior even when actions in the category of the secular are permitted to be carried out. The law takes the latter view. It recognizes the genus, sacred time, and its species, Sabbath distinct from festival. That explains why many of the acts that are permitted in connection with food preparation must be carried out in a manner that distinguishes the same action from the way it is done on an ordinary day. We deal, then, with two subdivisions of sacred

time, each sharing traits with the other, while distinguished from the other: we distinguish the sacred from the sacred.

The difference between the holiness of the festival and the Sabbath is intrinsic and substantive. The difference between the intermediate days of the festival and utterly profane time is notional and circumstantial: hard work vs. routine work—if work is done, it is done in the usual way. The issue, then, is how do we differentiate secular time that is distinguished at the cult from secular time that is not, hence the intermediate days of the festival from ordinary days? Here, by contrast, we differentiate the sacred from the sacred, and that explains why what work is permitted is done in a manner that registers the difference between the holy day on which it is performed and the manner of doing the same work on an ordinary day. When the Sabbath concludes, followed by a festival day, the liturgy that marks the distinction between the Sabbath and other time—the rite of differentiation or *Habdalah*—states the matter very simply. At the end of the Sabbath prior to a weekday, the prayer praises God for distinguishing the holy from the ordinary. At the end of the Sabbath prior to a festival day, the same prayer praises God for distinguishing the holy from the holy. The *Halakhah* says no less, but spells out the meaning of the theological distinction, which is shown in rich detail to make a huge difference.

*The Origin of the Category-formation, Besah,  
in Second Temple Times*

The system of thought, the construction of the category-formation—all is complete in its theoretical, generative principles *before* the Mishnah, with the *Tosefta*—comes to detailed expression long before. Once the category-formation has taken shape around the hermeneutics of analogy and contrast to the Sabbath, everything else coheres. And then, and only then, the concrete issues raised in the Mishnah come to the surface. The category-formation shows itself able to identify a boundless range of relevant problems and to solve those problems in a consistent way. I cannot point to a more perfect example of the workings of a well-crafted native category-formation, the power of a hermeneutics of such a category-formation to reproduce itself in case after case. And now, it suffices to observe, the *Bavli*'s sages have in no way participated in this process. They have inherited its outcome and have made themselves worthy heirs indeed. But theirs is not the category-formation, theirs are not the generative principles that have given it shape, to them uniquely do not belong the modes of thought that have defined its particularization.

Prior to the translation, by the Mishnah, of theory into law, of hermeneutics into topics and the consequent topical exegesis problem by problem, the thought-processes instantiated in the *Halakhah* had completed their work.

These thought-processes originate in analogical-contrastive thinking, and they generally, if not invariably, focus on topics that, in general, sustain that inquiry, which accounts for *Besah* and explains, also, the inert character of *Berakhot*, an exception.

The governing and generative analogy—the festival day is like the Sabbath but not wholly so—then came to expression in concrete cases of an exemplary character. That is what shapes the entire presentation of the *Halakhah*, which, in organization and in detail is the work of the *Mishnah*, complemented in detail by the *Tosefta*. The details produce points of contention, where named sages figure, but the basic hermeneutic never changes and produces only cogent results. The uniformity of the exegetical problems, their close cohesion to the generative problematics of the category-formation, makes the presentation a model of coherent thought: mode, problematic, outcome.

No wonder the framers of some of the *Tosefta*'s compositions, those that cross topical boundaries but hold together diverse illustrations of a single principle in common, put their best energies into showing the deeper unities of the law, those that penetrate beyond the surface of the topical divisions of the *Mishnah*. The character of the *Halakhah* itself, as set forth by Moses in the Torah and analyzed by the Rabbinic sages, invited just such an initiative. The category-formation, *Besah*, turns out to form a whole, the sum of which is greater than the parts, with its remarkable power to invent new problems and propound deep questions, metaphysical questions of the sacred. The category-formation begins, as we saw earlier, in Scripture. But in the category-formation, *Besah*, we deal with one of the triumphs of the *Halakhic* hermeneutics of analogical-contrastive reasoning and the Rabbinic theological imagination.

The generative premises of the *Halakhah* outlined earlier, concerning intentionality, for example, form a natural connection to the topic at hand, but every one of them works well, also, in other contexts altogether, and none is particular to the topic, let alone insinuated by Scripture's meager statement on the topic, of festival cooking. What we have before us is a quite independent development of a subject rather casually stated by Scripture. All of the complexities, and the premises that generate them, derive from other minds altogether, even though, one may fairly claim, all of the participating intellects concur on everything important within the governing logic that comprehends the law of Scripture and the *Halakhah* commencing therein but not defined thereby.

What is relevant specifically to our inquiry is this simple fact: the entire thought process was fully articulated before a single concrete *Halakhic* rule of the *Mishnah* (or the *Tosefta*) was composed. Some time (using that chain as a reference point) between the men of the Great Assembly and the Houses

of Shammai and Hillel, a vast enterprise of sustained, systematic thought transformed Scripture's data into the Halakhah's system, its fully executed category-formations, and with that topical program in hand, the named sages of the first and second century attended to the details.

The category-formation, *Besah*, was fully designed, its Halakhic issues completely discerned, before—I think, long before—the composition of the Mishnah in the two hundred years prior to 200 C.E., and to a particular authority in *Besah* is attributed by name not a single one of the generative principles of the Halakhah. The pre-70 Houses of Shammai and Hillel are given positions on the conflicting principles we outlined earlier; they are not credited with discovering those principles, only negotiating the conflicts between them. They identified the interstitial problems and solved them, leaving space for refinement and conflict about what did not really matter.

Can we identify the stages in the process of Halakhic realization? I believe so, and would outline these stages as follows:

(1) Some time from the promulgation of the Torah, encompassing the law distinguishing cooking from other forms of labor and the festival from the Sabbath, theological issues of sanctification and differentiation within the realm of the sacred confronted the heirs of the Torah.

(2) They framed these issues within the analytical program of philosophy concerning intentionality and deed, the genus and the species, analogy and contrast, potentiality and actuality.

And (3) with the upshot—a system of thought calculated to guide the realization of thought in concrete social reality—the category-formation comprised by the topic, *Besah*, took shape in full rationality and in acute detail. When we do not know, but it is certainly a work of Second Temple times, probably early in that period, given the participation of the Houses of Shammai and Hillel and other first century authorities in the detailed exposition of the law. Still, in the end, it is a labor of logic, therefore unbounded by particularities of time, space, and circumstance.