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ARTICLES

Crafting Legal Language: *Four or Five* in the Mishnah and the Tosefta

TZVI NOVICK

THE "NATURE," OR SOCIAL FUNCTION, of the Mishnah is a vexed and unresolved problem in rabbinics scholarship. Scholars have looked to the structure, content, and style of the Mishnah for clues to its intended role.[1] Some attention has also been devoted, in this connection, to aspects of the Mishnah's terminology, particularly in comparison with that of the Tosefta.[2] This essay takes the latter tack but brings a new data set, and more importantly a new methodology, to bear on this problem. I examine, with the insights of pragmatics, the usage of the phrase ארבע(ה) חמש(ה) "four or five," with the meaning "a few," in the Mishnah and the Tosefta.[3]

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1. See the excellent overview of these parameters, with a broad survey of prior scholarship, in Yaakov Elman, "Order, Sequence, and Selection: The Mishnah's Anthological Choices," in *The Anthology in Jewish Literature*, ed. D. Stern (New York, 2004), 53–80. On the implications for the Mishnah's intended function of its predilection for casuistic law, see Elizabeth Shanks Alexander, "Casuistic Elements in Mishnaic Law," *JSQ* 10 (2003): 189–243. On the significance of the Mishnah's stylized syntax, see Jacob Neusner, *A History of the Mishnaic Law of Purities, part 21* (Leiden, 1977), 298–330.

2. See in particular Natan Braverman, "Concerning the Language of the Mishnah and the Tosephta" (Hebrew), in *Proceedings of the Ninth World Congress of Jewish Studies* (1986): D1:31–38; Shelomo Morag, "Language and Style in *Miqṣat Ma'asé Torah*—Did *Moreh ha-Ṣedeq* Write this Document?" (Hebrew), *Tarbiz* 65 (1996): 216; Alexander Samely, *Rabbinic Interpretation of Scripture in the Mishnah* (New York, 2002), 18 and n. 55. See also Robert Brody, *The Geonim of Babylonia and the Shaping of Medieval Jewish Culture* (New Haven, Conn., 1998), 167.

3. I do not mean to suggest that *four or five* is synonymous with *a few*, but only that their meanings overlap enough for my purposes, in that both (1) indicate a small quantity, but (2) do not quantify precisely. See also *infra* at n. 12. In the rabbinic sources the words *four* and *five* are joined sometimes asyndetically, sometimes by the conjunctive particle, sometimes by the disjunctive particle, and sometimes in parallel, juxtaposed clauses. These variations do not convey any

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The phrase occurs in both corpora, but with strikingly different nuances. The differences provide new evidence for the claim that the Mishnah is a more precisely crafted legal work, and more self-consciously directed toward application, than the Tosefta. In the conclusion I offer corroborative evidence from the usage of other phrases with the form *x or x + 1*.

SEMANTICS AND PRAGMATICS OF *A FEW*

Four or five "a few" is a scalar term; that is, one can locate it on a scale of terms running from "strong" to "weak." In this case, the scale would look something like: <all, many, a few, very few, none>. Thus *many* is "stronger" than *a few* because "Reuben may eat many candies" entails "Reuben may eat a few candies," whereas "Reuben may eat a few candies" does not entail "Reuben may eat many candies." It is important to distinguish between the semantic meaning of a scalar term and the pragmatic implications associated with its use. *A few* excludes *none* as part of its semantics: if Reuben claims to have "a few candies," and Simon discovers that he has none, he may *contradict* Reuben and say, "You have none." By contrast, *a few* excludes *many* only by implication, or, technically, by an *implicature* arising from the use of *a few*. That is, if Reuben says he has "a few candies," we will ordinarily assume, given speakers' general tendency to make their contributions as informative as possible, that he does not have many candies. Reuben might, however, immediately follow up by saying, "In fact, I have *many* candies," and he will not thereby have *contradicted* his previous statement. He will, rather, have canceled the implicature arising from that statement.[4] In other words, the lower bound of *four or five* is an inherent feature of the term's meaning, whereas its upper bound arises from the assumption that the speaker of

difference in meaning. According to J. N. Epstein (*Mavo le-nusaḥ-ha-mishnah* [Hebrew; 2nd ed., Jerusalem and Tel Aviv, 1964], 2:1073), asyndetic *four, five* is original, and scribes introduced the conjunctive particle under the influence of the phrase *payment of four and five*, which describes the penalty for stealing and then slaughtering or selling a sheep or ox. This phrase is discussed in the appendix. In many cases (e.g., tMeg 3.17 [twice], 18), *four or five* picks out the precise quantities four and five, to the exclusion of other numbers, lesser and greater. I have excluded these cases from my analysis.

4. The distinction between semantic meaning and pragmatic implicature as presented here traces to the work of H. P. Grice, in particular his "Logic and Conversation," *Syntax and Semantics 3: Speech Acts* (1975): 41–58, reprinted in idem, *Studies in the Way of Words* (Cambridge, Mass., 1989), 22–40, as adapted by neo-Gricean linguists, e.g., Laurence R. Horn, "Toward a New Taxonomy for Pragmatic Inference: Q-Based and R-Based Implicature," *Meaning, Form and Use in Context: Linguistic Applications*, ed. D. Schiffrin (Washington, D.C., 1984), 11–42.

the term is obeying the ordinary rules of conversation. We may express this difference by saying that *four or five* is lower-bounded semantically but upper-bounded only pragmatically. Whenever the term occurs, it perforce excludes anything smaller than "four or five," but it does not necessarily exclude quantities larger than "four or five"; contextual features, such as Reuben's second statement ("In fact, I have many candies") may block the exclusion of larger quantities.

In the discussion that follows, I will refer to instances of *four or five* (and like phrases) that do exclude larger quantities, that is, instances in which the "but not more" implicature goes through, as "upper-bounded," and instances that do not, that is, instances in which the implicature is in one way or another canceled, as "non-upper-bounded." Consider, for example, the numerical phrases in the following verse (Isa 17.6): "Only gleanings shall be left of him, as when one beats an olive tree: two berries or three on the topmost branch, four or five on the boughs of the crown" (NJPS). The word *only* in the NJPS translation has no lexical correlate in the Hebrew. It has been added by the translator to clarify that the phrases "two or three" and "four or five" in the verse are upper-bounded: only a few berries will remain, not many. Contrast Isaiah's prophecy with the law prescribed in Deut 17.6: "A person shall be put to death only on the testimony of two or more witnesses; he must not be put to death on the testimony of a single witness" (NJPS). The NJPS translation renders the phrase *shenayim 'edim o sheloshah 'edim*, (literally "two witnesses or three witnesses"), as "two or more witnesses." It thus conveys, correctly, that "two or three" in this verse does not carry the upper-bounded implicature, "but not many"; for why, indeed, would many witnesses be less credible than a few? The phrase merely provides concrete exemplification.[5]

UPPER-BOUNDED *FOUR OR FIVE*

In employing "two or three" in a non-upper-bounded sense, Deut 17.6 conforms to the accepted usage in biblical law: phrases of the form *x or x + 1*, when they occur in legal passages in the Bible, are never upper-bounded.[6] The absence of upper-bounded *x or x + 1* from the Bible's legal

5. For early recognition of the distinction between upper-bounded and non-upper-bounded uses of phrases of the form *x or x + 1*, see Tosafot, bShab 60b s.v. השתא; bYom 23a s.v. שתים; bNid 37b s.v. ארבעים. On the formulation *x or x + 1* in the Bible, see the extensive bibliographic appendix in Robert H. O'Connell, "Telescoping N + 1 Patterns in the Book of Amos," *VT* 46 (1996): 71–73, to which add Yair Zakovitch, "The Pattern of the Numerical Sequence Three-Four in the Bible" (Hebrew; Ph.D. diss., Hebrew University, 1977).

6. See Bernard S. Jackson, *Essays in Jewish and Comparative Legal History* (Leiden, 1975), 153–71.

register is likely no coincidence. Upper-bounded *x or x+1* creates a boundary but leaves the boundary vague: Isaiah asserts that *only* "four or five" berries will remain on the crown, not more, but he does not say precisely how many berries one can expect to find. The vagueness extends beyond Isaiah's failure to commit to either four or five. Presumably, he would not deem his prophecy falsified even if six berries remained, or seven; "four or five" stands for any suitably small number. Such imprecision is perfectly acceptable in the rhetorical register of prophecy.[7] But undefined boundaries become problematic in legal texts, insofar as such texts present themselves as guides for decision.

When one turns to the Tosefta, however, one regularly finds upper-bounded *four or five* in statutes, as in the following example:

> If in (the vineyard) there were four or five (ארבעה או חמשה) vines, he harvests them and brings them into his house, and he is exempt (from various charity obligations).[8] (tPeah 1.10)

If only a few vines have grown in the vintner's vineyard, so that the vintner decides to eat the grapes rather than to press them for wine, the gathering of these grapes does not have the legal status of a harvest, and therefore the charity obligations ordinarily associated with harvesting are not incurred.[9] As in Isaiah's prophecy, "four or five" here means: a few, and not many. If a sufficiently large number of vines were harvested,

7. Not surprisingly, later rabbinic interpreters, coming to the book with reading assumptions quite different from those of Isaiah's own audience, showed less tolerance for imprecision. Thus Lamentations Rabbah (*petiḥta* 30) records a debate about how many people are described in this verse: one view says five (2+3), another nine (4+5), and another fourteen (2+3+4+5). Cf. 2 Kgs 9.32 "He looked up toward the window and said, 'Who is on my side, who?' And two or three (*shenayim sheloshah*) eunuchs leaned out toward him" (NJPS). Targum Jonathan renders the phrase straightforwardly: "two or three counselors." But a passage in the Tosefta Targum (Rimon Kasher, *Targumic Toseftot to the Prophets* [Hebrew; Jerusalem, 1996], 144), evidently unwilling to accept either (or, willing to accept neither) the phrase's imprecision or its verbosity, breaks it in two: "two grandees and three counselors."

8. All translations from the Tosefta in this essay are my own and are based on the text of Saul Lieberman's critical edition (*Tosefta* [3rd ed.; New York, 2001]), or, where the latter is unavailable, on that of M. S. Zuckermandel (2nd ed.; *Tosephta* [Jerusalem, 1937]). For alternative English translations, see Jacob Neusner, *The Tosefta* (Peabody, Mass., 2002). Other quotations from rabbinic literature use MS Kaufman of the Mishnah, MS Munich 95 of the *Bavli*, J. H. Weiss's critical edition of the Sifra, and H. S. Horowitz's critical edition of Sifre Zuta to Numbers; the translations are again my own.

9. See Saul Lieberman, *Tosefta kifshutah* (3rd ed.; New York, 2001), 1:138.

the charity obligations would apply.[10] We are not, however, told what, precisely, constitutes a sufficiently large number.

Upper-bounded *four or five* occurs again in tKet 5.7. According to mKet 5.7, a "rebellious" woman (a woman who refuses to cohabit with her husband) is penalized by deduction of seven *∂inar*s per week from her *ketubah*. The Tosefta introduces a qualification:

> This was the original law, but our rabbis (later) decreed that the court should warn her for four or five weeks, one after another (i.e., consecutively), twice a week, and (if she continues to rebel) beyond that, she loses the entire payment (due upon divorce or widowhood), even if it is a hundred *maneh*s.[11]

To make sense of the words "beyond that" and of the contrast between the original law and the innovation, we must assume that "four or five weeks" indicates a limited amount of time. But the precise limit is again left vague.

In some linguistic contexts, the numerical scale is inverted, so that *four or five* excludes large numbers semantically but small numbers pragmatically. A familiar context for this phenomenon is golf. While in basketball, where higher scores are better, to say that one scored 72 points is to *assert* (semantically) that one did not score 71, but only to *imply* (pragmatically) that one did not score 73, in golf, where lower scores are better, to say that one shot a 72 is to assert that one did not shoot a 73 but only to imply that one did not shoot a 71. In the following instance of upper-bounded *four of five* from tKer 1.20, a scale reversal of this sort occurs:

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10. The vintner may be able to avoid the charity obligations even when he harvests a large total of vines, provided that he gathers only a few vines at a time, and always for the purpose of eating the grapes rather than pressing them for wine. Cf. tPeah 1.11.

11. In place of "four or five" in MS Vienna, MS Erfurt reads "four," as do the *Bavli*, the *Yerushalmi*, and most medieval commentators (see Lieberman, *Tosefta kifshutah* 3:266–67). The multiple attestations of "four" may indicate that "four or five" in MS Vienna is erroneous, but, because "four or five" is the *lectio difficilior*, and altogether consistent with the Tosefta's usage elsewhere, and because MS Erfurt commonly transmits secondary readings, it seems preferable to follow MS Vienna. On the reliability of MS Erfurt, cf. Adiel Schremer, "The Text-Tradition of the Tosefta: A Preliminary Study in the Footsteps of Saul Lieberman" (Hebrew), *JSIJ* 1 (2002): 11–43 (suggesting that it preserves original readings more often than Lieberman allowed), and Shamma Friedman, *Tosefta Atiqta: Pesaḥ Rishon: Synoptic Parallels of Mishna and Tosefta Analyzed with Methodological Introduction* (Hebrew; Ramat-Gan, 2002), 79–86 (suggesting that it preserves *fewer* original readings than Lieberman believed). On the transmission of *four or*

> A drunkard cannot serve (in the Temple) and is liable to death (should he do so). Who is a drunkard? One who drank a quarter-*log* of forty-day-old or older wine. If he drank more than a quarter-*log* of wine (fresh) from the press, he is exempt. If he drank less than a quarter-*log* of four- or five-year-old (בן ארבע בן חמש שנים) wine he is liable.

If the wine that the priest drinks is less than forty days old, he is not deemed a drunkard. If the wine is forty days old, then the priest is deemed a drunkard only if he drinks a quantity equal to or greater than a quarter-*log*. But if the wine is four or five years old, he is liable even for quantities smaller than a quarter-*log*. Thus *four or five* marks an upper bound excluding younger wines; if the wine that the priest drinks is less than four or five years old, liability only arises when the quantity of wine drunk exceeds a quarter-*log*. The problem of boundary imprecision noted above occurs here as well. If the wine is less than a few years old, the consumption of less than a quarter-*log* will not qualify the priest as drunk—but precisely how old can the wine be before the quarter-*log* minimum falls out? The ambiguity is less troubling in this case than in the ones above because the Tosefta does at least inform us that forty-day-old wine is subject to the quarter-*log* standard. But one can still draw the line at any point from forty-one days until (probably) four years less a day, and the Tosefta does not say where.

It is possible that upper-bounded *four or five*, in the first two passages (tPeah 1.10; tKet 5.7), is supposed to indicate not "some suitably small number" (so that it is roughly synonymous with *a few*, and vague) but "not only four but also five" (so that it is roughly synonymous with *five*, and precise).[12] Likewise in the last passage (tKer 1.20), it would indicate not "some suitably large number" but "not only five but also four." But the more precise interpretation is hardly inevitable. As noted above, when Isaiah uses the phrase, he probably does not mean to exclude the possibility that, say, six berries will remain on the crown; he is claiming only that the crown will not preserve *many* berries. Arguably, however, when

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five and like phrases, see also Shamma Friedman, *Talmud Arukh: BT Bava Metsi'a VI, Commentary* (Hebrew; Jerusalem, 1990), 125, n. 2, 183, n. 84.

12. Lieberman, *Tosefta kifshutah*, 1:703, n. 43, suggests that the analogous phrase *two or three*, on which see *infra* at n. 29, is, in the Tosefta and *Yerushalmi*, "merely a turn-of-phrase . . . and the sense is: three." In support of Lieberman's claim, consider tMa'asS 5.5, which records the case of a dying man who indicates that there is a pouch of second tithe food in the house. After his death, "two or three" (שנים שלשה) pouches are found. The legal rule, as formulated, assumes that precisely three sacks have been discovered: "the larger one is deemed second tithe, and the two smaller ones are profane." But I find no other unambiguous evidence in support of Lieberman's claim.

upper-bounded *four or five* occurs in legal contexts, the reader is supposed to assume that "not only four but also five" (or, in the case of scale inversion, "not only five but also four") is meant. In any case, even if upper-bounded *four or five*, when employed in legal contexts, indicates a precise boundary, the usage is inapt, and prone to misinterpretation.

In all, upper-bounded *four or five* occurs in seven out of the sixteen pericopes in which the phrase is found in the Tosefta.[13] By contrast, of the twelve instances of *four or five* in the Mishnah, only one can plausibly, but probably should not, be construed as upper-bounded.[14] We will return to that instance after examining the occurrences of non-upper-bounded *four or five* in the Mishnah and the Tosefta.

NON-UPPER-BOUNDED *FOUR OR FIVE*

In the following example, from mYad 2.3, *four or five* is non-upper-bounded: it does not exclude amounts greater than a few, but merely serves as an example:

> One may wash four or five hands, one next to the other or one on top of the other, so long as (the hands) are loose, so that the water can enter among them.

By pouring water over hands, one renders them ritually pure. The water must reach all parts of the hand. The Mishnah permits the pouring of water over many peoples' hands at once, so long as the hands are held in

13. The sixteen Tosefta pericopes, in some of which *four or five* occurs more than once, but always with the same sense in any given pericope, are Peah 1.10; Demai 4.19; 7.15; Shab 4.8; Pes 4.10; 5.11; Yom 1.5; Ket 5.7; BK 10.1; 11.9; BM 8.6; Ker 1.20; Nid 2.1; Toh 11.11; Yad 2.7; TevY 2.16. The seven containing upper-bounded *four or five* are Peah 1.10; Demai 4.19; Shab 4.8; Yom 1.5; Ket 5.7; BK 11.9; Ker 1.20. Scale reversal occurs in three of these: Demai 4.19; BK 11.9; Ker 1.20. There is arguably a seventeenth pericope in which *four or five* occurs, and this one, too, would be upper-bounded. According to all manuscripts, *four or five* occurs in tKil 3.1, but Lieberman (*Tosefta*, 1:213; *Tosefta kifshuta*, 1:621–22) would emend to *five, five*. Lieberman persuasively demonstrates how this emendation is supported by the *Yerushalmi*'s explanation of the Tosefta, but it is by no means certain that the *Yerushalmi*'s explanation is correct. Moreover, the version of the Tosefta quoted in the *Yerushalmi* has "a vineyard" rather than "four or five vines"; thus, even if the *Yerushalmi* correctly explains the version that it quotes, one cannot conclude that it offers the best explanation of the version found in the Tosefta. But in deference to Lieberman's emendation, and because a vineyard is often defined in tannaitic sources in terms of precisely five vines (see, e.g., tMa'asS 5.15), and because I cannot provide a wholly persuasive explanation of the pericope as it stands, I have excluded tKil 3.1 from my tabulations.

14. The twelve instances in the Mishnah are Shab 15.3; 18.1; Yev 13.1; Ket 11.3; BK 4.1; BM 2.9; 2.10; San 6.1; Hul 12.3; Parah 1.2; 2.5; Yad 2.3.

such a way that the water can reach all parts of each hand. The Mishnah does not seem to be limiting this license to only "four or five," and not more. This inference, that "four or five" here is non-upper-bounded, but merely constitutes an example, is largely a product of common sense, but the Mishnah helps us to this conclusion by explicitly indicating the underlying logic of the law: any number of hands can be washed together so long as "the water can enter among them."[15] Thus Maimonides, in his commentary to this pericope, reasonably extends its license, without argument, to "many people."[16]

In other cases, the upper-bounding implicature associated with *four or five* is canceled by the identification of another boundary higher (and inevitably more precise) than *four or five*. Thus, for example, tDemai 7.15 describes the case of an Israelite who sells land to a priest on the condition that the priest transfer to the seller the priest's tithe.

> If he says, "On condition that the tithe belongs to me for four or five years," this is permissible. "Forever," this is forbidden.

One might at first interpret "four or five years" as upper-bounded—four or five years, but not, say, seven or eight—but the subsequent clause establishes that "four or five years" is merely an example, and that a land sale conditioned by a tithe transfer of any span of time short of perpetuity is subject to the same license.[17]

The most common, and counterintuitive, way of canceling the upper-bounded implicature in the corpora is by the use of "even" (אפילו). Before explaining this use, let us consider two examples.

> If one returns the animal and it flees, one returns an animal and it flees, even four or five times, he is obligated to return it, for it says, "you shall surely return them" (השב תשיבם). (mBM 2.9)

From a superfluous word in Deut 22.1, the Mishnah infers that the obligation to return a lost animal extends even to situations where it repeatedly

15. For other examples in which the pragmatic upper bound of *four or five* is canceled by the identification of the rule's logic (a logic incompatible with limitation to only a few), see tToh 11.11; tTevY 2.16.

16. See Joseph Kafaḥ, *Mishnah im perush Rabenu Moshe ben Maimon* (Jerusalem, 1959), 6:509.

17. The unquoted continuation of tDemai 7.15 provides a reason for its law that further clarifies the cancellation of the upper-bounding implicature. For another example of cancellation of the upper-bounding implicature by identification of a higher boundary, see mShab 18.1, and see the amora Samuel's interpretation

flees. The commonsense assumption that "four or five" is non-upper-bounded, and that the obligation to return persists no matter how often the animal flees, is confirmed by Rava's interpretation of the verse in the *Bavli*:

> A rabbi asked Rava, "Why not say, השב is one time, תשיבם a second time?" He replied, "השב (implies) even a hundred times." (bBM 31a)

Non-upper-bounded *four or five* recurs in mSan 6.1:

> One person stands at the entrance to the court with kerchiefs in his hand, and one mounts a horse at a distance such that he can see him. If one (of the judges) says, "There is an argument for his acquittal," then this one waves the kerchiefs, and the horse runs and stops (the condemned). And even if he (the condemned) says, "I have an argument for my acquittal," we bring him back, even four or five times, as long as there is substance to his words.[18]

"Four or five" does not limit the scope of the final stipulation; the execution is stayed as often as the criminal raises a reasonable argument for acquittal. This interpretation is supported by the parallel comment in the Tosefta (tSan 9.4):

> They recount (the votes) again one time, a second time, a third time, whether there is substance to his words or not. From then on, if there is substance to his words we listen to him, and if not we do not.

The phrase "from then (i.e., from the fourth time) on" (מיכן ואילך) in the Tosefta corresponds to "four or five" in the Mishnah, and thus confirms that the latter is non-upper-bounded. There are, of course, differences between the two pericopes—most importantly, the Mishnah seems to re-

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of "four or five" in this pericope: "four or five, as people say, but if one wants one can remove even many (טובא)" (bShab 126b–127a). Samuel's comment is particularly precious evidence for the pragmatics of tannaitic *four or five*, as it derives from a roughly contemporary informant.

18. The difference in formulation between mBM 2.9 ("one returns the animal and it flees, one returns an animal and it flees, even four or five times") and mSan 6.1 ("we bring him back, even four or five times") should be noted. The more prolix formulation of mBM 2.9 gives rhetorical force to the *figura etymologica* (השב תשיבם) of the verse from which the law derives. The formulation in mSan 6.1 is more concise because its law does not rest on a verbal repetition in the verse. Indeed, the Mishnah employs the prolix formulations for *four-five* laws only when it derives them from *figurae etymologicae* (mBM 2.9; 2.10; Hul 12.3). This pattern supports Friedman's (*Tosefta Atiqta*, 77 n. 264) inference about the origin of the law stated in mBK 8.1.

quire "substance" from the beginning—but the structural parallel between the phrases "four or five" and "from then on" nevertheless counts as some evidence for a non-upper-bounded interpretation of the former.[19]

In mBK 2.9 and mSan 6.1, non-upper-bounded *four or five* is preceded by the word *afilu* "even." Indeed, of the eleven certain instances of non-upper-bounded *four or five* in the Mishnah, nine are preceded by *afilu* or the synonymous *af*.[20] It stands to reason that this word plays some role in canceling the upper bound. This possibility seems at first counterintuitive, since *even* typically functions not to cancel upper bounds, but to highlight them. Thus, for example, when Reuben says, "I like even Simon," his use of "even" conveys the fact that, in Reuben's view, Simon is the least likeable person in the relevant set.[21] Nevertheless, what appears to be happening in the above sources is that *even* cancels the upper bound by changing the implicit question to which the law constitutes a response. Thus, in mSan 6.1, to say that the condemned is returned "four or five times" would be to answer the question "How many times must the condemned be returned?" The law would then be dictating: four or five times, but no more. With "even four or five times," the pericope positions itself as answering a different question: "Must the condemned man be returned if he

19. Cf. also mBM 2.10 and tBM 2.24. Note should be taken here of an odd difference between the Mishnah and Tosefta, on the one hand, and the tannaitic midrashim, on the other. The standard formulation in the Mishnah and Tosefta is that one may/must perform the relevant action "even four or five times." See, e.g., mShab 15.3; mḤul 12.3; tNid 2.1. In the tannaitic midrashim, by contrast, one finds instead: "(even) if you did it four or five time, do it again." See Sifra *Kedoshim* 4.8 (ed. Weiss, 89a); *Behar* 5.1 (ed. Weiss, 109a). Are we to suppose that the latter form is more exaggerated, and hence better suited to the informal rhetoric of the tannaitic midrashim?

20. The only Mishnah pericopes in which neither *afilu* nor *af* occurs are mYad 2.3, discussed above, and mBK 4.1. The latter is a casuistic law in which the homologies between the protasis and the apodosis make clear that "four or five" serves an exemplary rather than a boundary-drawing function. It is probably no coincidence that mYad 2.3, the Mishnah pericope that takes the least pains to cancel the upper-bounding implicature of *four or five*, is the only case of *four or five* that occurs in both the Mishnah and the Tosefta (tYad 2.7). It appears that mYad 2.3 constitutes, from the perspective of formulation, a toseftan pericope that has been only incompletely transformed into the mishnaic idiom.

21. See Lauri Karttunen and Stanley Peters, "Conventional Implicature," *Syntax and Semantics 11: Presupposition* (1979): 23–33; Paul Kay, "Even," *Linguistics and Philosophy* 13 (1990): 84; Scott A. Schwenter, "Additive Particles and Scalar Endpoint Marking," *Belgian Journal of Linguistics* 16 (2002): 119–34. Cf. the first instance of *even* in mSan 6.1: "And even if he (i.e., the condemned) says, 'I have an argument for my acquittal,' we bring him back." The implication is that the condemned is the person to whom we might have been least likely to attend. See also Samely, *Rabbinic Interpretation*, 248–49.

raises an argument in his favor?" The answer, "even four or five times," is simply a rhetorically exaggerated "yes," and there is no implication that "four or five" is meant to limit the extent of the obligation.[22]

I noted above that upper-bounded *four or five* appears to occur in one case in the Mishnah, in mParah 2.5. This pericope takes up the problem of red heifers that are not altogether red.

> R. Akiva says, "Even if there are four or five [non-red hairs] (אפילו ארבע אפילו חמש), so long as they are dispersed, they may be plucked [and the animal remains valid]." R. Eliezer says, "Even fifty."

Given R. Eliezer's position, it appears that R. Akiva really means to limit to some small number of hairs the license to pluck. But there are a number of important differences between this case and the instances of upper-bounded *four or five* in the Tosefta. First, there is nothing about R. Akiva's statement itself that suggests that he is dictating an upper bound; the inference depends entirely on the fact that R. Eliezer identifies a higher value. Second, R. Akiva employs the word *even*, which otherwise occurs exclusively in connection with non-upper-bounded *four or five*. These facts suggest that R. Akiva does not mean to lay down an upper bound on the amount of hairs that may be plucked. Indeed, the fact that he explicates what is for him the relevant legal factor, namely, dispersion, suggests that, on his view, the heifer may be plucked no matter how many non-red hairs it has, so long as they are dispersed. This analysis receives considerable support from the account of R. Akiva's view in Sifre Zuta to Num 19.2 (ed. Horowitz, 301):

> R. Akiva says, "Even if there are in it many [hairs], it is valid, so long as they are removed with a brush. But if there were two in one depression, it is invalid, because it has the appearance of a bald spot."

If the parallel passages may be understood as attributing the same view to R. Akiva, then "four or five" in mParah 2.5 is equivalent to

22. This explanation can also be put in terms of information structure. The upper bound marked by *even* is presupposed, not asserted. When Reuben says, "I like even Simon," he will typically be speaking to an audience that already knows that Simon is unlikeable. What he is *asserting* is a fact not so much about Simon, or even about his relationship to Simon, but about his own friendliness. Likewise, the utterance "The condemned man is returned even four or five times" is not about returning four or five times, or even about the condemned man being returned four or five times, but about returning the condemned man. The process of pragmatic implicature works most directly on the focus of the sentence; *even*, by shifting the focus from "four or five times" to "the condemned man is returned," prevents the upper-bounded implicature from going through.

"many" in Sifre Zuta to Num 19.2, and is therefore likely non-upper-bounded.[23]

CONCLUSIONS

The data analyzed above point to two ways in which the Mishnah constitutes a more carefully drafted document than the Tosefta. First, and most importantly, almost half of the occurrences of *four or five* in the Tosefta are upper-bounded, and thus establish vague (or at least inaptly colloquial) rules. The Mishnah, by contrast, though it makes regular use of the phrase, never (with one possible exception) employs it in its upper-bounded sense. Second, the Mishnah consistently marks its non-upper-bounded *four or five* with *even*, and thus minimizes the possibility that a reader would construe it as upper-bounded.[24] Non-upper-bounded *four or five* in the Tosefta is much less regularly marked.[25] These differences do not, of course, allow us confidently to specify the social function(s) of the Mishnah, not only because of the small size of the data set but also because the Mishnah's bracketing out of upper-bounded *four or five* would

23. On this account, R. Eliezer should be interpreted not as lifting an upper bound decreed by R. Akiva (for in fact R. Akiva decrees none), but as doing away with the dispersion requirement. Arguing against the identification of R. Akiva's view in the Mishnah with that recorded in Sifre Zuta are the numerous differences between the two sources with respect to the representation of other views, in particular R. Eliezer's.

24. Of course, even the marked non-upper-bounded *four or five* can be misinterpreted as upper-bounded, and the *Bavli* regularly does so in its commentary on the Mishnah. See, for example, R. Ḥisda's commentary to mShab 18.1 in bShab 126b. The problem with non-upper-bounded *four or five* is that it is more concrete than it needs to be; it relies on pragmatics for what it ought to encode into its semantics. Far clearer is a formulation that omits anything that might be construed as an upper bound, like מיכן ואילך "from then on" in tSan 9.4. Cf. also mSuk 1.1 = tSuk 1.1: "A sukkah larger than twenty cubits is invalid, (but) R. Yehudah validates it." As no other information is provided about R. Yehudah's view, the student reasonably infers that he sets no upper bound on the height of a sukkah. The *Bavli* (bSuk 2b) cites a tannaitic source with a different version of R. Yehudah's view: "R. Yehudah validates until forty or fifty cubits" (Munich 95) or "R. Yehudah validates even until fifty" (Vat. Ebr. 134). The source history is complicated by the occurrence of a different version of this source in ySuk 1:1 (51c) and by the occurrence of analogous variations in connection with the height of an eruv (mEruv 1.1; bEruv 2b; yEruv 1.1 [18b]). But it seems reasonable, given the above discussion, to suppose that R. Yehudah's view was originally enunciated in terms of "until forty or fifty cubits," in the non-upper-bounded sense, and m/tSuk 1.1 reformulated his view, for the sake of clarity, by dropping the numbers.

25. *afilu* marks only three cases of non-upper-bounded *four or five* in the Tosefta (tPes 4.10; tBK 10.1; tNid 2.1).

have served it well whether it was supposed to function as, for example, a school text, or whether it had, alternatively or additionally, a forensic function. But the pattern of use in the Mishnah does point to something more than simply stylistic consistency. It suggests a certain self-consciousness about the status of the Mishnah as an object of close interpretation. It assumes (or constructs) an audience that will parse it and probe it in an attempt to draw out its consequences for concrete cases, whether hypothetical or actual.

The pericopes in which upper-bounded *four or five* occur in the Tosefta are not directly paralleled in the Mishnah; we can therefore point with confidence to no case in which the Mishnah may be said to have confronted and avoided upper-bounded *four or five*. But a case involving a similar phrase may be instructive. The topic in the pericopes quoted below is the process by which water was drawn for the preparation of the red heifer's ashes. To guarantee the purity of the process, women would retire to designated courtyards in order to give birth to and raise sons, who would later draw the water.

mPar 3.2	tPar 3.2
ומביאין נשים עוברות ויולדות שם ומגדלות שם את בניהן ומביאין שוורים ועל גביהן דלתות ותנוקות היו יושבין על גביהן	ומביאין נשים מעוברות ויולדות שם ומגדלות שם בניהן **עד שיהיו בני ז ח שנה** ומביאין שורים ועל גביהן דלתות ותינוקות יושבין על גביהן
And they would bring pregnant women and they would give birth there and raise there their children. And they would bring oxen, with platforms upon them, and the children would sit upon them.	And they would bring pregnant women and they would give birth there and raise there their children **until they were seven or eight years old**.[26] And they would bring oxen, with platforms upon them, and the children would sit upon them.

26. The Tosefta in fact reads not ז ח "seven or eight" but שמונה עשרה "eighteen." But medieval witnesses to the text clearly indicate that שמונה עשרה is a corruption arising from the confusion of ז with י, thus ז ח > י ח > יח. See Saul Lieberman, *Tosefeth Rishonim: A Commentary* (Hebrew; New York, 1999), 3:215; Martin S. Jaffee, *Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE–400 CE* (New York, 2001), 114 and n. 50. For evidence from a piyyut by Qallir in favor of the emendation, see Menachem Schmeltzer, "Some Examples of Poetic Reformulations of Biblical and Midrashic Passages in Liturgy and Piy-

The pericopes are a verbatim match, save that the Mishnah omits "until they were seven or eight years old." The latter phrase is probably an upper bound: it addresses the concern that, if the sons grow too old, they may experience a seminal emission and thus contract ritual impurity.[27] There seems to be no way of adjudicating whether the Mishnah deleted the phrase or the Tosefta added it, but the difference, in any case, reinforces the above findings about the usage of *four or five* in the Mishnah and the Tosefta.[28]

It is not the case that mishnaic law altogether shuns upper-bounded *x or x + 1*. But where it occurs, the context is generally not, in the strictest sense, legal. Thus, for example, there is, to my knowledge, only one case of upper-bounded *two or three* in the Mishnah, in mShevi'it 3.9.[29] The pericope begins by noting that, while small stones cannot be removed from the field during the sabbatical year, as this constitutes improvement of the field, "shoulder-stones" may be removed, because their removal may be understood as being for the purpose of using them in construction rather than for the purpose of improving the field. The Mishnah wonders how big a stone must be to qualify as a shoulder-stone. R. Meir's view is that the stone must be too large to grasp in a single hand. R. Yose disagrees: "shoulder-stones, as their name implies, stones carried two or three on the shoulder." R. Yose is probably stating an upper bound.[30] But it should be observed, first, that he is not, strictly, legislating but rather defining, and, second, that he does not simply stipulate a definition but arrives at it through interpretation of a common noun ("as the name implies"). For both reasons, the use of the more conversational upper-bounded term is less surprising.[31]

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yut," in *Porat Yosef: Studies Presented to Rabbi Dr. Joseph Safran*, ed. B. Safran and E. Safran (Hoboken, N.J., 1992), 221–22.

27. See the explanations cited in Lieberman, *Tosefeth Rishonim*, 3:215.

28. Lieberman, *Tosefeth Rishonim*, 3:215, assumes that the Mishnah is original and permits any child short of majority to draw water, while the Tosefta records a subsequent restriction. It seems to me more likely that the Tosefta reflects the original version, and that the Mishnah, in deleting "seven or eight," implicitly replaced the Tosefta's vague upper bound with a precise upper bound, namely, majority.

29. There appear, by contrast, to be at least two cases of upper-bounded *two or three* in the Tosefta, in tMa'as 3.11 and tBek 3.2. For discussion of an instance of *two or three* quoted in the *Yerushalmi*, see Leib Moscovitz, "'Lishan Matnita'" (Hebrew), *Asufot* 8 (1994): 34–35.

30. That is: but not so small that four or five could be carried on the shoulder.

31. Likewise, mYom 8.4 indicates that children should be taught to observe the strictures of the Day of Atonement "one or two years before [majority]" (קודם לשנה וקודם שתים). Though the phrase here is probably upper-bounded—one need

Appendix: Ex 21.37

The most common context for the co-occurrence of *four* and *five* in rabbinic literature is the phrase תשלומי ארבעה [ו]חמשה "payment of four and five." The phrase depends on Ex 21.37:

> When a man steals an ox or a sheep, and slaughters it or sells it, he shall pay five oxen for the ox, and four sheep for the sheep. (NJPS)

The reversal of the verse's numerical order in the rabbinic phrase *payment of four and five* is consistent with the tendency to list sequential numbers in ascending rather than descending order. But why does the verse itself list "five" before "four"? Before advancing an answer to this question, let us exacerbate the problem by taking note of a second word pair in the verse, *bakar/tso'n* "oxen / (collective) sheep." J and E, evidently taking syllable quantity (smaller to larger) as their ordering principle, generally set *tso'n* before *bakar*, while D and P, ordering instead on the basis of economic importance (greater to lesser), set *bakar* before *tso'n*.[32] Thus, with the sequence "five oxen . . . four sheep," Ex 21.37 violates not only the standard ordering pattern for numerals but also JE's general ordering pattern for *tso'n* and *bakar*.

Both violations occur in the apodosis of the law. A third word pair, *shor/seh* "ox / (single) sheep," occurs in both the protasis and the apodosis. All biblical instances of this pair, with one explainable exception, order *shor* before *seh*; this unanimity undoubtedly stems from the fact that the economic ordering principle prioritizes *shor*, while the syllabic ordering principle favors neither.[33] Thus it appears that the unconventional order-

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educate them one or two years before majority, but not three or four—the stipulation, insofar as it concerns education of minors, seems to belong to the sphere not of legal obligation but of best practice. The Tosefta has a precise parallel (tYom 4.2) that includes a variant of the upper-bounded phrase (בפני שנה ובפני שתים). Could the Mishnah's pericope be a carryover from the Tosefta?

32. See Bernard M. Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (New York, 1997), 43 and n. 48, 72 and n. 68; J. B. Segal, *The Hebrew Passover: From the Earliest Times to A.D. 70* (New York, 1963), 205 and n. 4.

33. See Ex 22.3; 22.8; 22.9; 34.19; Lev 22.23; 22.28; 27.26; Deut 14.4; 17.1; 18.3; Jg 6.4; Isa 7.25; 66.3). The one exception is Jg 6.4 "a sheep or an ox or an ass," (*seh va-shor va-ḥamor*). *Ḥamor* had to follow *shor* directly, in accordance with the common expression *shor va-ḥamor* (cf. Gen 32.6; 1 Sam 22.19; Isa 32.20). *Seh* could have either preceded *shor* or followed *ḥamor*; presumably, it was made to precede *shor* in order to preserve the ordering principle of syllable quantity (1–1-2). Cf. 1 Sam 22.19.

ings in the apodosis of Ex 21.37 are to be understood as corollaries of the conventional ordering of *ʃhor* and *ʃeh* in the protasis and the apodosis. However, the occurrence of *ʃhor* before *ʃeh* in the protasis can be brought to bear on the unconventional orderings in the apodosis only insofar as one assumes that the stylistic norm for casuistic law in the Covenant Code is direct rather than chiastic parallelism. This assumption is supported by one example.[34]

34. See Ex 22.4 (*ʃaδeh o kerem* . . . // . . . *ʃaδehu* . . . *karmo*).