

How Did Halacha Originate or Did the Rabbis Tell a “Porky”?¹

Definitions

Written Law

The Written Law is the Torah or Five books of Moses. Also known from the Greek as the Pentateuch.

(What status is the Tanach?)

Oral Law

An **Oral Law** is a code of conduct in use in a given culture, religion or community ..., by which a body of rules of human behaviour is transmitted by oral tradition and effectively respected, ...²

According to Rabbinic Judaism, the Oral Torah or Oral Law (תורה שבעל פה, lit. "Torah that is on the mouth") represents those laws, statutes, and legal interpretations that were not recorded in the Five Books of Moses, the "Written Torah" (תורה שבכתב, lit. "Torah that is in writing"), but nonetheless are regarded by Orthodox Jews as prescriptive and co-given. This holistic Jewish code of conduct encompasses a wide swathe of rituals, worship practices, God–man and interpersonal relationships, from dietary laws to Sabbath and festival observance to marital relations, agricultural practices, and civil claims and damages.

According to Jewish tradition, the Oral Torah was passed down orally in an unbroken chain from generation to generation of leaders of the people until its contents were finally committed to writing following the destruction of the Second Temple in 70 CE, when Jewish civilization was faced with an existential threat.³

Halacha

- all the rules, customs, practices, and traditional laws. (Lauterbach)
- the collective body of Jewish religious laws derived from the Written and Oral Torah. (Wikipedia)
- Lit. the path that one walks. Jewish law. The complete body of rules and practices that Jews are bound to follow, including biblical commandments, commandments instituted by the rabbis, and binding customs. (<http://www.jewfaq.org/defs/halakhah.htm>)

Whence Came the Written Law?

The modern scholarly consensus is that the Torah has multiple authors and that its composition took place over centuries. This contemporary common hypothesis among biblical scholars states that the

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² https://en.wikipedia.org/wiki/Oral_law

³ https://en.wikipedia.org/wiki/Oral_Torah

first major comprehensive draft of the Pentateuch was composed in the late 7th or the 6th century BCE (the Jahwist source), and that this was later expanded by the addition of various narratives and laws (the Priestly source) into a work very like the one existing today.

"The consensus of scholarship is that the stories are taken from four different written sources and that these were brought together over the course of time to form the first five books of the Bible as a composite work. The sources are known as J, the Jahwist source (from the German transliteration of the Hebrew YHWH), E, the Elohist source, P, the priestly source, and D, the Deuteronomist source. ... Thus the Pentateuch (or Torah, as it is known by Jews) comprises material taken from six centuries of human history, which has been put together to give a comprehensive picture of the creation of the world and of God's dealings with his peoples, specifically with the people of Israel." (Professor John Riches of the University of Glasgow)."⁴

The person or persons who "brought together" the sources into an integrated single document is called the Redactor (R). Richard E Friedman in his book *Who Wrote the Bible*, identifies R with Ezra who flourished from about 480–440 BCE. So we could say that the form of the Torah, "like the one existing today" was first created around about 450 BCE.

But it's only "like the one existing today". The oldest complete version of the text we have today is from about 1000 CE. There is almost 1500 years of opportunity for change of the Torah Ezra compiled to our Masoretic text. And the rabbis even admit that this Written Torah was changed. They describe some of the changes in the Talmud, where it is called *tikunei soferim*:

Tiqqūn sōferīm (תיקון סופרים, plural תיקוני סופרים *tiqqūnēy sōferīm*) is a term from rabbinic literature meaning "correction of scribes" or "scribal correction" and refers to a change of wording in the Tanakh in order to preserve the honor of God or for a similar reason. The rabbis mentioned *tiqquney soferim* in several places in their writings, with a total of about 18 *tiqquney soferim* in all.⁵

Evidence from older sources of the Torah in the Greek Septuagint, Samaritan Torah & the Dead Sea Scrolls suggest many more changes have occurred along the way to our Masoretic text.

Whence Came the Oral Law?

Talmudic answer: It was given to the people together with the Written Law; that is, from God through Moses to the people.

What evidence do we have for this?

Ans: The Mishna (*Pirkei Avot*) claims an unbroken chain by which the Oral Law was passed from leader to leader.

1. **Moshe received the Torah from Sinai and transmitted it to Joshua, and Joshua to the Elders, and the Elders to the Prophets, and the Prophets transmitted it to the Men of the Great Assembly.**

⁴ <https://en.wikipedia.org/wiki/Torah>

⁵ https://en.wikipedia.org/wiki/Tiqqun_soferim

They said three things: Be deliberate in judgment, raise up many disciples and make a fence for the Torah.

2. **Simon the Just was from the remnants of the Great Assembly.** He would say, "On three things the world stands: on the Torah, on the service and on acts of lovingkindness."
3. **Antigonos, man of Sokho, received from Simon the Just.** He would say, "Do not be as servants who are serving the master in order to receive a reward, rather be as servants who are serving the master not in order to receive a reward; and may the fear of Heaven be upon you."
4. **Yose ben Yoezer, man of Tsreida, and Yose ben Yochanan, man of Jerusalem, received from them.** Yose ben Yoezer says, "May your house be a meeting house for Sages, become dirty in the dust of their feet and drink their words thirstily."
5. Yose ben Yochanan, man of Jerusalem, says, "May your home be open wide, may the poor be members of your household and do not increase conversation with the woman." ...
6. **Yehoshua ben Perachiah and Nitai of Arbel received from them.** Yehoshua ben Perachia says, "Make for yourself a mentor, acquire for yourself a friend and judge every person as meritorious."
7. Nitai of Arbel says: "Distance [yourself] from a bad neighbor, do not befriend an evildoer and do not despair of punishment."
8. **Yehuda ben Tabai and Shimon ben Shetach received from them.** Yehuda ben Tabai says, "Do not make yourself like the judges' advisers; and when the litigants are before you, they should be like evildoers in your eyes; and when they are excused from before you, they should be meritorious in your eyes - when they have accepted the judgment."
9. Shimon ben Shatach says, "Examine the witnesses thoroughly, but be careful with your words, lest from them they learn to lie."
10. **Shemayah and Avtalyon received from them.** Shemayah says, "Love work, hate lordship and do not become familiar with the government."
11. Avtalyon says, "Sages, be careful with your words, lest you become obligated in an obligation of exile and are exiled to the place of evil waters, and the students who follow after you will drink, and thus the name of Heaven is profaned."
12. **Hillel and Shammai received from them.** Hillel says, "Be of the disciples of Aharon, loving peace and pursuing peace, loving the creatures and bringing them closer to Torah."
13. He would say, "Spread a name, lose his name. And one who does not increase [knowledge] ceases. And one who does not study is liable to die. And one who makes use of the crown [of learning] passes away."
14. He [Rabbi Hillel] used to say: If I am not for me, who will be for me? And when I am for myself alone, what am I? And if not now, then when?
15. Shammai says, "Make your Torah fixed, say little and do much, and receive every person with a pleasant countenance."

I have highlighted in red the unbroken transmission of the Oral Law. Some observations that can be made.

- There is a pattern of associating a specific saying with a sage. (Qu: Why?) This is a form of "proof" that the sage existed & that because the later rabbis remembered the saying from that sage they would also have received the Oral Law from him.
- The sayings become more detailed & longer, the later we get in time. (Qu: Does this imply their memory is improving?)

- The highlighted “them” (Why is it not “him”?) in number 4 seems to imply that Simon the Just & Antigonus, man of Sokho were a Zug or pair that were contemporaneous in time. It may also suggest that the rabbis’ memory with regard to these two sages is quite vague or even empty of real content. There is no independent reference to Antigonus, man of Sokho other than the Talmud. (Qu: Anything else unique about Antigonus? Ans: only sage with a Greek name?)

What is evidence against claim?

1. Chinese Whispers

One is expected to believe the Oral Law was not changed in some 1500 years from the time of the Exodus to codification in the Mishna.

Even the rabbis of the Talmud admitted to changes to the Written Law & contemporary scholarship suggest there were many hundreds of changes. How could one expect there were not many more changes to the Oral Law? And if they were not written down until about 190 CE, how do we know what has changed & what has not? Therefore what of today’s Oral Law are the original words of God?

2. Evidence from Torah

This is what happens before Moses goes up Mt Sinai:

When Moses went and told the people all the Lord’s words and laws, they responded with one voice, “Everything the Lord has said we will do.” Moses then wrote down everything the Lord had said.⁶

All God’s words & laws said to Moses was passed on to the people & then written down. There was no room for an Oral Law as everything was written down. I suppose one could argue that this was not the whole of the Torah & therefore there is plenty of wriggle room for an Oral Law to be related at another time.

3. Evidence from Josiah⁷ (2 Kings 22-23)

The temple was in disrepair & in the eighteenth year of Josiah’s reign, he ordered the complete repair of the temple. During the renovation they discover a lost scroll:

Then Hilkiah the high priest said to Shaphan the scribe, “I have found the Book of the Law (סֵפֶר הַתּוֹרָה) in the house of the LORD!” And he gave it to Shaphan, who read it.⁸

Josiah reads the scroll, rends his clothes, repents for the his people’s sins, cleans out the temple & destroys idols throughout the land. Then the whole nation enters into a covenant:

Then the king summoned all the elders of Jerusalem and Judah. And he went up to the house of the LORD with all the people of Judah and Jerusalem, as well as the priests and the prophets - all the people small and great - and in their hearing he read all the words of the Book of the Covenant that had been found in the house of the LORD. So the king stood by the pillar and made a covenant before the LORD to follow the LORD and to keep His commandments,

⁶ Exodus, Ch24 v3-4

⁷ c.649-609 BCE

⁸ 2 Kings, Ch22 v8

decrees, and statutes with all his heart and all his soul, and to carry out the words of this covenant that were written in this book. And all the people entered into the covenant.⁹ The people only heard the scroll read out. The covenant was to uphold what was read out to them from the scroll. No Oral Law was read out & no covenant to uphold any Oral Law was entered into. Then a surprising revelation is made:

The king commanded all the people, “Keep the Passover of the LORD your God, as it is written in this Book of the Covenant.” No such Passover had been observed from the days of the judges who had governed Israel through all the days of the kings of Israel and Judah.¹⁰

The Mishna has a section – Pesachim - devoted to a detailed set of instructions on the proper procedures for celebrating the Passover but as the King, priests & people appeared to have no idea about the festival, it implies that all of this Oral Law about the practice of Passover would have to have been devised after the reintroduction of the festival in Josiah’s reign. This implies an enormous break in the chain of transmission of the Oral Law.

4. Evidence from Nehemiah

From Nehemiah, Ch8 v1-8:

The entire people assembled as one man in the square before the Water Gate, and they asked Ezra the scribe to bring the **scroll** of the Teaching of Moses (סֵפֶר תּוֹרַת מֹשֶׁה) with which the LORD had charged Israel. On the first day of the seventh month, Ezra the priest brought the Teaching (הַתּוֹרָה) before the congregation, men and women and all who could listen with understanding. He read from it, facing the square before the Water Gate, from the first light until midday, to the men and the women and those who could understand; the ears of all the people were given to the **scroll** of the Teaching (הַסֵּפֶר הַתּוֹרָה). Ezra the scribe stood upon a wooden tower made for the purpose, and beside him stood Mattithiah, Shema, Anaiah, Uriah, Hilkiyah, and Maaseiah at his right, and at his left Pedaiah, Mishael, Malchijah, Hashum, Hashbaddanah, Zechariah, Meshullam. Ezra opened the **scroll** (הַסֵּפֶר) in the sight of all the people, for he was above all the people; as he opened it, all the people stood up.¹¹

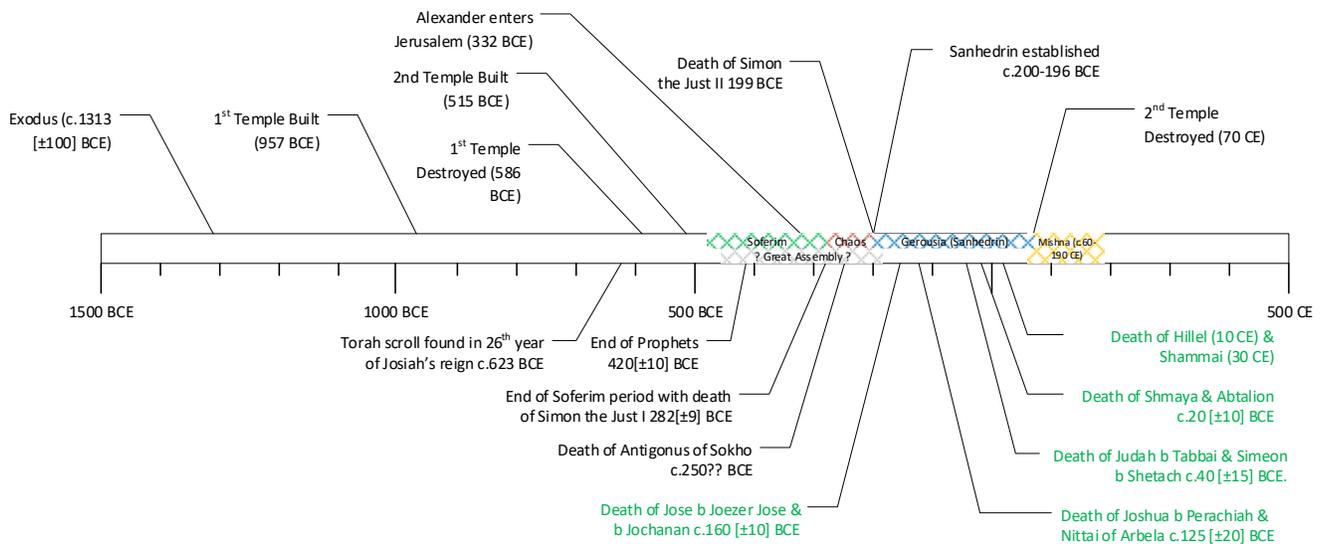
After the people heard the reading of the scroll, they swore an oath to obey the law as read out to them from the scroll. This was a reestablishment of the covenant at Sinai. They did not swear an oath to obey an Oral Law as they heard no Oral Law read out. So at the time of Ezra & Nehemiah the people swore an oath to obey the Written Law only. Even if there was an Oral Law, the people did not swear an oath to obey it. At no time in the future is there any record of the people undertaking to obey the Oral Law. That could be for two reasons: there was no Oral Law or it was not considered obligatory to follow it.

5. Questionable Timeline

⁹ 2 Kings, Ch23 v1-3

¹⁰ 2 Kings, Ch23 v21-22

¹¹ Nehemiah, Ch8 v1-8



In the displayed timeline I have shown key events that will help us analyze the claim in the Perkei Avot of the unbroken chain of transmission of the Oral Law. The dates are the best I could find but some are highly uncertain. The Zuggot or pairs identified in Pirkei Avot as the leaders who transmitted the Oral Law are shown in Green. I have shown the period of the Men of the Great Assembly which Wikipedia estimates as 458 – 186 BCE but some historians suggest that the “Men of the Great Assembly” is a legend.¹² It is far more likely that in the Persian period (i.e. up to Alexander’s conquest in 332 BCE) the priesthood & aristocracy, known as the Soferim, ruled by interpretation of Ezra’s Written Law or Torah the people had sworn to uphold. Any situation not covered in the Written Law could be dealt with utilizing the relevant section of Deuteronomy 17:

⁸ If cases come before your courts that are too difficult for you to judge—whether bloodshed, lawsuits or assaults—take them to the place the Lord your God will choose. ⁹ Go to the Levitical priests and to the judge who is in office at that time. Inquire of them and they will give you the verdict. ¹⁰ You must act according to the decisions they give you at the place the Lord will choose. Be careful to do everything they instruct you to do. ¹¹ **Act according to whatever they teach you and the decisions they give you.** Do not turn aside from what they tell you, to the right or to the left. ¹² Anyone who shows contempt for the judge or for the priest who stands ministering there to the Lord your God is to be put to death. You must purge the evil from Israel. ¹³ All the people will hear and be afraid, and will not be contemptuous again.

In other words, the Soferim had God’s authority to develop new law when not already covered in the Written Law.

There are three serious problems with the timeline. The first is the gap between the deaths of Antigonus (c.250 BCE) & the two Joses (c. 160 BCE). The 90 year gap seems to be too great, given the

¹² See <https://www.britannica.com/topic/Kneset-ha-Gedola> & Lawrence H. Schiffman, *From Text to Tradition - A History of Second Temple & Rabbinic Judaism*, Ktav Publishing House, Hoboken, NJ, 1991.

normal life spans in those days. The second serious problem is that the reference to Simon the Just in Pirkei Avot more than likely refers to Simon the Just II (d. 199 BCE).¹³ This makes more sense as it places Antigonus in the period of the Gerousia where the leaders of the Pharisees sat & means the gap between him & the two Joses is credible. However it means the gap between Simon the Just II and Simon the Just I is too large, especially as during the period marked in the timeline as “Chaos” there was no religious leadership & the land was governed by the Ptolmies in Egypt. The third serious problem with the timeline is that no leader is identified between the last prophets (c. 420 BCE) & Simon the Just I, a period of more than 200 years. This implies the rabbis who wrote the Mishna had no idea who transmitted the Oral Law in this period.

For all the above reasons, it seems established beyond all reasonable doubt that there was no Oral Law given to the people by Moses that was transmitted in tact over a period of some 1500 years to be recorded in the Mishna.

Why Oral Law?

Scholars much smarter than I, have suggested it was inevitable that the people developed customs, ritual practices & traditions that were not specified in the Written Law but were also not forbidden by it. This can be thought of as traditional law. The important point to note about the customary or traditional law is that it does not have the status of the Written Law because no one swore an oath to uphold it. It simply evolved naturally.

In a previous talk on the Sadducees & Pharisees, I described the work of Jacob Lauterbach in his two essays *The Sadducees and Pharisees* (1913) and *Midrash and Mishnah* (1915). New evidence in the more than 100 years since Lauterbach wrote his essays demonstrated that he got it wrong in claiming the Sadducees emerged as a group before the Pharisees. However I think he got it right in explaining how the Oral Law developed as a result of the power struggle between the Pharisees and Sadducees.

From the time Judah the Maccabee rededicates the temple in 164 BCE until the High Priest John Hyrcanus switches allegiance to the Sadducees in 110 BCE, the priesthood was in the hands of the Pharisees & thus they had the reins of power in their hands. Under the Pharisees there was no conflict between the traditional law & the Written Law because the Pharisees could accept & reject whatever traditional law they liked. John Hyrcanus persecuted & killed many of the leaders of the Pharisees. As a result the Pharisees used religious guerilla tactics against the Sadducees.

Their first line of attack was the following:

- As the Torah is the word of God, it is complete & perfect
- There cannot be anything missing from something complete & perfect
- Therefore no new law should be required as it must already be in the Torah

In opposing the new laws promulgated by the Sadducees, the Pharisees had made a figurative “rod for their own back” as in order to prove traditional law was on equal status to the Written Torah they had to somehow derive the traditional law from the Written Law. This was no easy task & the

¹³ See Jacob Z. Lauterbach *Midrash and Mishnah - A Study In The Early History Of The Halakah*, p.254 (in *Rabbinic Essays*, Hebrew Union College Press, 1951) and <https://www.britannica.com/topic/Kneset-ha-Gedola>

Pharisees developed complex rules & methodologies, known as hermeneutics, to “prove” their derivation. This process is called Midrash Torah by Lauterbach.

The Sadducees correctly recognized the Written Law as supreme & overriding the traditional law whenever there was a conflict between the two. The Talmud provides us with an example of such a conflict occurring. A traditional ritual developed on Sukkot in the Temple is known as The Beating of the Willow. There is nothing in the Written Law that can be remotely related to this ritual. The Sadducees held that if the ritual occurred on the Sabbath then it could not take place because the laws of the Sabbath are established in the Written Law whereas the beating of the willow is a traditional law. The Pharisees claimed that the beating of the willow should also take place on the sabbath. In order to justify this claim the Pharisees had to find a way to give the traditional law the same status as the Written Law. They did this by developing the concept of the Oral Law. Their reasoning went something like the following:

- The tradition of beating the willow has been known to be practised since time immemorial.
- Our ancestors would not have invented such a law.
- Therefore it must have been handed down at Mt Sinai with the Written Law but not recorded in the Written Law. We shall call this unrecorded law the Oral Law.
- As this Oral Law is also the word of God, it has equal status to the Written Law.

Conclusion

Question: What advantage did an Oral Law give the rabbis?

Ans: So long as it was not written down, the rabbis had complete flexibility to invent new law (that did not clearly conflict with the Written Law) & to adapt to changing circumstances. As it turned out with the Destruction of Herod’s Temple in 70 CE the rabbis needed to reinvent the Jewish religion to replace the temple with the synagogue & to transfer the ritual of the temple into every aspect of family life. To put it another way, the priesthood acted as intermediaries between the individual and God. With the priesthood gone the individual had to take back much of the responsibility & the rabbis, through the Oral Law, were able to reinvent Jewish practice. And Jewish practice became known as Halacha.

After the Oral Law was compiled into the Mishna the rabbis no longer had the flexibility to invent new laws. In a sense the Talmud’s Gemorra, Tosefta & other commentaries on the Mishna are the rabbi’s attempt to continuously modify the law or Halacha to adapt to changing circumstances. With the end of the Talmudic period, Halacha’s adaptation to societal change has been far more difficult & perhaps is the main reason, during the Haskala, other forms of Judaism developed.

Final Question: In Pirkei Avot, did the rabbis tell a “porky” & if so, was it knowingly?