

The Ethics of Decision-Making: Result Oriented Judging and the Oven of Akhnai

*Kansas Supreme Court Justice Caleb Stegall**

I. INTRODUCTION

Judicial codes of conduct exist to “maintain and enhance confidence in the legal system.”¹ That is, the Code is designed to “ensure[] the greatest possible public confidence in [our judges’] independence, impartiality, integrity, and competence.”² As such, the Code serves a vital and necessary purpose. For indeed, a corrupt, wicked, or incompetent judiciary is one of the surest paths to a lawless society.

But given this as the stated purpose of judicial ethics, something big is missing. Because the public’s confidence in the judiciary rests primarily on the source and quality of judicial decision-making itself. One need only look to President Biden’s Commission on the future of the Supreme Court,³ the editorial pages of *The New York Times*,⁴ or Law Professor Twitter⁵ to understand that the ethical dimension of judicial

* I wish to thank my law clerks, Sydney Klaassen and Howard Mahan, for their valuable assistance in completing this Article. I also register a special thanks to Dan Knauss and John Paul Davis whose substantive ideas as we discussed the Oven of Akhnai with one another proved invaluable to my own thinking on this topic.

1. KAN. SUP. CT. RULES RELATING TO JUD. CONDUCT PREAMBLE.

2. *Id.*

3. *Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/prescotos/> [<https://perma.cc/9YKX-7CF4>] (last visited Feb. 14, 2022):

On April 9, 2021, President Biden issued Executive Order 14023 forming the Presidential Commission on the Supreme Court of the United States, comprised of a bipartisan group of experts on the Court and the Court reform debate. . . . The Commission’s purpose is to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.

4. See, e.g., Melissa Murray, *Real-Life Effects of Court Rulings Should Matter as Well as the Law*, N.Y. TIMES (Mar. 18, 2016, 4:29 PM), <https://www.nytimes.com/roomfordebate/2015/01/26/the-supreme-court-meets-the-real-world/real-life-effects-of-court-rulings-should-matter-as-well-as-the-law> [<https://perma.cc/GE3J-TY6W>].

5. See *Results of Law Professor Twitter Census 2020–2021 Edition*, FACULTY LOUNGE (Sept. 17, 2020), <https://www.thefacultylounge.org/2020/09/results-of-law-professor-twitter-census-2020-2021-edition-91720.html> [<https://perma.cc/6FA2-HPXQ>] (compiling 1,368 names and user handles for “individual tweeters who are full-time faculty members at law schools”).

decision-making is the most pressing judicial ethics question we face today.⁶

And yet, judicial decision-making is routinely excluded from the field of judicial ethics. This exclusion is largely because judicial decision-making is not amenable to judicial discipline, and we typically envision ethics being paired directly with discipline for rule violations. But in article form, it may be beneficial to examine the contours of judicial decision-making from an ethical perspective.

II. THE OFFICIAL PIETY

We must begin with a clear understanding of the judiciary's own, self-proclaimed ethical imperative for judicial decision-making. Justice Stephen Breyer in a recent interview with *The Washington Post* responded to criticisms of the United States Supreme Court, including criticisms of his more conservative colleagues: “[The] single most important point is judges are not junior league politicians. They’re judges, and maybe the political process worked to get them appointed, but that process wanted a person appointed . . . [who] believe[s] that the law really requires these results”⁷ In a similar vein, when

6. One need not look far to find claims that the Court is illegitimate because of the way it makes decisions. See, e.g., Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2245 (2019) (book review) (describing the United States Supreme Court's legitimacy dilemmas, which include “in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole”); Presidential Commission on the Supreme Court of the United States, Final Report 19 (2019), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/ELE7-UNLS>] (questioning “whether public trust in the Court will continue to be durable” given the “extreme political polarization” in and around the United States Supreme Court); Ian Millhiser, *The Supreme Court is Drunk on its Own Power*, VOX (Sept. 14, 2021, 12:40 PM), <https://www.vox.com/22662906/supreme-court-conservatives-abortion-constitution-roe-wade> (on file with the Kansas Law Review) (criticizing the Court as being “quite eager to wipe away foundational precedents that have stood for decades, sometimes without much warning that a transformational decision is around the corner. . . . [J]ustices [now regularly] hand down sweeping pronouncements while only barely pausing to consider what they are doing”); Linda Greenhouse, *The Supreme Court Has Crossed the Rubicon*, N.Y. TIMES (Feb. 9, 2022), <https://www.nytimes.com/2022/02/09/opinion/supreme-court-voting-rights.html> [<https://perma.cc/NQP2-VNYK>]; Eric Segall (@espineseall), TWITTER (Feb. 11, 2022, 12:41 PM), <https://twitter.com/espineseall/status/1510729234980999175> [<https://perma.cc/T9L9-76JJ>];

Imagine you have a really prestigious job for life no questions asked and if you convince 4 of 8 people to agree with you, you can dictate your views to the country on abortion, affirmative action, gun control, how gov't works, etc. You wouldn't care about text or history either.

7. Transcript: “*The Authority of the Court and the Peril of Politics*” with Justice Stephen G. Breyer, WASH. POST LIVE (Sept. 13, 2021, 2:18 PM), <https://www.washingtonpost.com/washington-post-live/2021/09/13/authority-court-peril-politics-with-justice-stephen-g-breyer/>

introducing Sixth Circuit Judge Amul Thapar at the National Lawyers Convention of the Federalist Society last year, it was remarked that Judge Thapar “unfailingly goes where the law takes him.”⁸ Embedded in these off-the-cuff statements is the central imperative that an ethical judge, in the course of decision-making, will follow the law wherever it leads. And these are just two recent examples among many that represent the official piety of the judiciary when it comes to talking about what judges do.

And, it must be acknowledged, this kind of genuflection to “law” as a formalist totem is true across the entire spectrum of judges and courts. Good, ethical judges follow the law wherever it leads, whatever the result may be.⁹ Good judges believe in their heart of hearts that the law really requires the result they ultimately pronounce. Very few active judges—possibly none—would admit that the law provided no answer in a particular case, so the judge simply had to make up a rule to resolve the dispute. Only an unethical judge would do such a thing! To admit to such an act of impiety would be to threaten the entire formal edifice of law. A judge who departs from the requirements of the law to achieve a desired outcome may not be at risk of ethical discipline, but that judge will be subject to softer forms of social discipline—castigated as a “result-oriented” judge who desires only to substitute his or her own preferences for the dictates of the law.¹⁰

By way of example, I will pick on my own court. In *In re Adoption of X.J.A.*, Justice Robert Davis said: “An appellate court should refrain from rewriting a plainly worded statute simply to reach a desired result. Result-oriented justice is directly contrary to the concept of the rule of

[<https://perma.cc/3GDR-S6QJ>].

8. The Federalist Society, *Opening Address by Judge Amul Thapar [2021 National Lawyers Convention]*, YOUTUBE (Dec. 7, 2021), <https://www.youtube.com/watch?v=a2qXKdOaSyI> [<https://perma.cc/LL5A-4P28>].

9. See Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 857–58 (2015).

10. See John E. Simonett, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 191–92 (1984) (quoting *Redarowicz v. Ohlendorf*, 420 N.E.2d 209, 216 (Ill. App. Ct. 1981) (Craven, J., concurring in part and dissenting in part) *aff’d in part, rev’d in part*, 441 N.E.2d 324 (1982)):

[C]ommentators and disgruntled litigants may object that the courts are result-oriented, that we decide a case a certain way because we like a certain result. Decisions are result-oriented and rebellious only in a few instances. I would reserve ‘result-oriented’ as a term of opprobrium applicable only when a court decides a case contrary to a living and well established body of law and when no sound policy justifies the departure from the established rule. But in the absence of these two conditions courts must compare competing results and determine which better effectuates public policy.

law.”¹¹ In *Leaming v. Unified School District No. 214*, Justice Harold Herd wrote that “[r]esult-oriented justice is government of men and not of law, directly contrary to the concept of the rule of law.”¹² More recently, Justice Lee Johnson wrote that “working backward” is “starting with [a] desired premise . . . and then manipulating legal doctrine to justify that preconceived result.”¹³ And to be fair, I too have engaged in this sort of tsk-tsking—in *State v. Gleason*, I said that “the majority apparently starts with what it views as a palatable result and works backward to articulate a substitute rationale for demonstrably infirm precedent.”¹⁴

Indeed, court after court will routinely reduce the ethics of judicial decision-making to this simple binary choice: either a judge is following the law wherever it leads, or the judge is engaged in result-oriented judging that supplants the law with the judge’s own preferences.¹⁵ But if one pauses a moment and ponders what is really being said, at a minimum it seems oddly counterintuitive (if not downright callous and possibly evil) to say that a judge must not care one bit about the result of a case pending in his or her court. Or to think that if he or she does care, this is somehow unethical. In fact, the few judges brash enough to buck the official piety are often quick to turn around and accuse their more conventional colleagues of a different kind of unethical decision-making. Judge Richard Posner, for example, famously accused judicial formalists of dishonestly hiding their “personal, subjective, political, and . . . arbitrary . . . constitutional decisions” behind a rationalization of “the law made me do it.”¹⁶

So, what is really going on here? Is it really plausible that judges—

11. 166 P.3d 396, 418 (Kan. 2007) (Davis, J., dissenting).

12. 750 P.2d 1041, 1054 (Kan. 1988) (Herd, J., dissenting).

13. *State v. Thomas*, 415 P.3d 430, 447 (Kan. 2018) (Johnson, J., concurring).

14. 388 P.3d 101, 117 (Kan. 2017) (Stegall, J., concurring) (quoting *Miller v. Johnson*, 289 P.3d 1098, 1132 (Kan. 2012) (Beier, J., concurring in part and dissenting in part)).

15. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting) (“If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.”); *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 438 (6th Cir. 2021) (Thapar, J., concurring in part and dissenting in part) (“Unsurprisingly, wrenching responsibility from the hands of state legislatures and giving it to judges has resulted in acrimony and results-oriented decisions. . . . Judges have been enlisted to serve as legislators, producing a make-it-up-as-you-go abortion jurisprudence.”), *reh’g en banc granted, vacated*, 18 F.4th 550 (6th Cir. 2021); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 705 (9th Cir. 2021) (Vandyke, J., dissenting) (accusing the majority of “break[ing] faith with our most fundamental obligation, which is to apply the law, not our preferences. . . . [T]his type of overt results-oriented judging can’t help but discredit our court and the rule of law generally.”).

16. RICHARD A. POSNER, *HOW JUDGES THINK* 289 (2010).

by turns—willfully violate the prime directive to follow the law wherever it leads (and hide it all behind Judge Posner’s conspiracy of silence)? The real explanation is more complex and so worth exploring from within an explicitly ethical frame.

III. WAITING FOR CICERO

From antiquity, the vexing role of human judges in a system built on law has been known. The Roman jurist Gaius Aquilius Gallus, perhaps intending an insult, referred to a hard case as that which “involved no law, so it is one for Cicero.”¹⁷ And so the limits of the law—its harsh outcomes, its finite scope, and its unfeeling application—have generated the perennial puzzle of ethical decision-making within a system premised on the rule of law. The suspicion lingers across the millennia—the law needs its Cicero. A humanizing check of experience, wisdom, compassion, pragmatism, and plain old common sense that comes from somewhere beyond the formal edifice of the law. The dilemma is often framed as a contest between the letter and the spirit of the law.¹⁸

17. FERNANDA PIRIE, *THE RULE OF LAWS: A 4000-YEAR QUEST TO ORDER THE WORLD* 113 (2021).

18. In the New Testament, Jesus often drew on this distinction. For example, he reminded the Pharisees that despite rigorous adherence to the letter of the law, they continued to fall short: “For you pay tithes of mint and anise and cummin, and have neglected the weightier matters of the law: justice and mercy and faith. These you ought to have done, without leaving the others undone.” *Matthew* 23:23 (NKJV). See also Stephen M. Garcia, Patricia Chen & Matthew T. Gordon, *The Letter Versus the Spirit of the Law: A Lay Perspective on Culpability*, 9 *JUDGMENT & DECISION MAKING* 479, 480 (2014):

[T]he letter of the law, known as *litera legis*, equates to its literal meaning. The letter of the law thus signifies the formal boundary between legal and illegal actions, which tend to dichotomize our judgments of culpability and punishment in “legal” versus “illegal” terms. . . . In contrast, according to Black’s Law Dictionary (Garner, 2009), the *spirit* of the law represents its “general meaning or purpose, as opposed to its literal content,” namely, the *intention* of the law.

See also Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 *MOD. L. REV.* 848, 850 (1991) (“The letter of the rule may not accord with the spirit in which the law was framed; a literal application of the rules may not produce the desired end, it may be counter-productive; there may be gaps, omissions or loopholes in the rules which undermine their effectiveness.”); Raymond Belliotti, *Billy Martin and Jurisprudence: Revisiting the Pine Tar Case*, 5 *ALB. GOV’T L. REV.* 210, 219 (2012) (examining how in statutory interpretation, legislative history is “commonly examined” when a “literal rendering” would lead to an absurd result—i.e., when the letter of the law would cut against the spirit of the law); Samuel J. Levine, *The Law and the “Spirit of the Law” in Legal Ethics*, 2015 *J. PRO. LAW.* 1, 1 (2015) (describing how one commentator rejects “literal compliance” with the letter of the law as “justification for conduct that knowingly and flagrantly thwarts clear underlying purposes” of the law; rather, he calls for a greater degree of “public responsibility” among lawyers, expecting that they will “ask what [is] the underlying purpose of a transaction and compare that purpose to the

Complicating the puzzle significantly—at least in our polarized era—is the absence of any sustained vocabulary or discourse within which to situate the problem. Judges and legal commentators have tended simply to adopt either a willful blindness on the one hand (ethical judges follow the law wherever it leads) or a cynical, corrosive, and universal skepticism on the other hand (ethical judges must admit all decisions are personal and political, refusing to use “the law” as a justification for their exercises of power).

But most real judges—the ones I know and work with, my colleagues and friends—are conscientiously striving to be ethical decision-makers, and we find ourselves stuck somewhere between these two polar positions. With no real alternative explanatory framework for what ethical judges actually do when making a decision, however, we are mostly reticent to talk about it. Every judge I know both instinctively understands and is loath to admit to Oliver Wendell Holmes, Jr.’s comment that the “very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life.”¹⁹

This profound discomfort in what is, after all, the judge’s day-to-day task of decision-making springs almost directly from a core character of the law itself. Stanley Fish has observed that:

The law wishes to have a formal existence. That means, first of all, that the law does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of concern; the law wishes, in a word, to be distinct, not something else. And second, the law wishes in its distinctness to be perspicuous; that is, it desires that the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse²⁰

This kind of formalism is imprinted on the DNA of the western legal tradition. Formalism claims that the law can be written with “such precision and simplicity that [its] meaning[] leap[s] off the page in a way

underlying purpose of the relevant laws”). The commentator criticized the “Enron-style transactions . . . undertaken solely to achieve the benefits of” a few, and opined that the lawyers working on those transactions would likely “concede” that the results “were inconsistent with the spirit of the law.” *Id.*

19. See John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 WASH. U. J.L. & POL’Y 131, 139 (2008) (quoting OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 35 (1881)).

20. Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159, 159 (Austin Sarat & Thomas R. Kearns eds., 1991).

that no one—no matter what his or her situation or point of view—can ignore;” and this legal clarity is supplemented by “procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents [the judges] who might set them in motion.”²¹

Thus, we can say with confidence that judicial willfulness is stopped short and obliged to press its claims within constraints that it cannot override. Author Hans Kelsen put it this way: “[T]he law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.”²²

In a more colloquial sense, I see this as the story of judges who are concerned exclusively with a process, giving little to no regard to the substantive result of their decisions. In this way of approaching the judicial role, the outcome is already baked into what we might call the “rule of law” cake. These judges are like master chefs: we meticulously follow a complex but knowable and intelligible recipe and, at the end of the day, if you don’t like the result, blame the recipe not the chef.

The great advantage of the formalist procedural account of the ethics of judicial decision-making is that it absolves judges of any ethical responsibility for latent indeterminacy in the law. And in a kind of rhetorical feedback-loop, it is the persistence of indeterminacy that gives the formalist account of judges as recipe-followers a lasting and seemingly unbreakable grip on the judicial imagination. This, of course, generates the kind of judicial hypocrisy Judge Posner senses and derides. But he and other critics of formalism are less sensitive to the existential dangers of true judicial willfulness in subjective decision-making predicated on little more than the personal whims or biases of a judge. One might give two cheers, at least, for a formalist account and ethical framework that takes this concern seriously.

I tried to articulate this danger recently in *In re Interest of F.C.*:

[T]he reality of subjective judicial decisions driven by the biases of judges is a perennial problem . . . [because] that bias is nearly always exercised on behalf of the upwardly mobile, middle-class, bourgeois, and polite society from which the majority of judges come, and in which most judges continue to live. When judges are forced to choose

21. *Id.* at 161.

22. HANS KELSEN, PURE THEORY OF LAW 192 (Max Knight trans., Univ. of Cal. Press 1978) (1934).

between competing values, there will be a systemic bias . . . in favor of the values of the upper middle, professional class from which most lawyers and judges . . . are drawn.²³

While the formalist account is designed to prevent this very real danger, it has one glaring flaw. For as every judge, lawyer, and frankly, every person with ordinary common sense will understand, the recipe is rarely as clear or complete as the formalist myth would suggest.²⁴ Indeterminacy remains. And the law is left, still, waiting for Cicero.

IV. THE OVEN OF AKHNAI

I now turn to an unexpected source, the wisdom of an ancient book of Jewish law: the Babylonian Talmud known as the Bava Metzia.²⁵ The Bava Metzia is a legal tract. It mostly deals with areas of commercial law, property ownership, debtor-creditor law, and the like, but it also contains one of the most fascinating, instructive, and deeply perceptive fables of judging that I have ever encountered.²⁶

This fable, now known as the Oven of Akhnai, is the account of one particular legal decision and its aftermath.²⁷ And the fable's chief character is Rabbi Eliezer, who is acknowledged throughout as the preeminent Rabbi and scholar of the law of his generation.²⁸ Rabbi Eliezer is depicted as a man with a brilliant mind, deep virtue, and a passionate heart. He is the unquestioned authority within the Council of Rabbis. One day, in the ordinary course of things, a legal dispute was brought before the Council of Rabbis sitting as a court of final decision.²⁹

The dispute concerned a clay oven and whether the food that had been cooked in this oven was ceremonially clean or unclean. The oven,

23. 482 P.3d 1137, 1148 (Kan. 2021) (Stegall, J., dissenting) (citations and quotation marks omitted).

24. See Drobak & North, *supra* note 19, at 139 (“A ‘balancing’ test, common in constitutional law, frequently requires judges to balance incomparable considerations. . . . Some judges will view one factor as important; other judges will disregard that factor and concentrate on another.”).

25. Daniel J. H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309, 310 (1997).

26. *Id.* I am deeply indebted for this portion of this Article to Professor Daniel Greenwood, who has done brilliant and fascinating work on the Bava Metzia and its relevance to the western legal tradition. My account and telling of these stories is derivative of, and dependent on, Professor Greenwood's work.

27. *Id.* at 312.

28. *Id.* (“[T]raditions indicate that Rabbi Eliezer ben Hyrcanus, sometimes called ‘the Great,’ was active in the first generation after the destruction of the Temple in 70 C.E., and so we may surmise that the story is set at the end of the first century in Roman-occupied Judea . . .”).

29. See *id.* at 312–13.

this Oven of Akhnai, had been broken and then repaired, and the law provided two possible rules to resolve the case.³⁰ There was the rule of broken things or the rule of repaired things.³¹ And the outcome of the dispute depended entirely on which rule the court chose to apply.³²

As the arguments were presented, the Council of Rabbis was divided.³³ A majority of the rabbis took one side of the question while the eminent Rabbi Eliezer took the other. Rabbi Eliezer contended with all the learning, brilliance, and authority that he could muster. It is in fact recorded that he “made all the arguments in the world,” and yet still the court was unmoved.³⁴ And it is here that the story gets interesting, for Rabbi Eliezer’s dissent took a form that we mortal judges can only dream about.

He summoned the very power of God in his defense, offering several miraculous signs before the council.³⁵ If I am right, he declared, “the carob tree will prove it”—and the carob tree flew through the air.³⁶ But they said: “We do not bring proof from a carob tree.”³⁷ Then Eliezer shouted, “[i]f the law is as I say the water channel will prove it”—and indeed, the rivers flowed backwards.³⁸ But the Council of Rabbis was unmoved. This majority said that it could not accept the legal rulings of trees and rivers.³⁹ Eliezer returned and said, “[i]f the law is as I say the walls of the House of Study will prove it”—and the walls began to fall.⁴⁰ Still, the Council of the Rabbis remained firm. Eliezer had one last move to play—he turned to the court and said, “[i]f the law is as I say, from

30. *Id.* (“The disputants agreed that if the rule for broken or incomplete things applied, the oven could not convey impurity to its contents resulting from contact with a dead animal. On the other hand, if the rule for whole or repaired objects applied, the oven was (or rather, its contents were) impure.”). The dispute, much like what appellate judges are tasked with today, was, as one commentator put it, “over a fine point in the interpretation of the law.” Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 838 (1951).

31. Greenwood, *supra* note 25, at 312–13.

32. Thus, the case really does present the kind of dispute that lawyers and judges are quite familiar with: it is simply a choice between two rules.

33. Greenwood, *supra* note 25, at 313.

34. *Id.*

35. Izhak Englard, *Majority Decision vs. Individual Truth: The Interpretations of the “Oven of Akhnai” Aggadah*, 15 TRADITION: J. ORTHODOX JEWISH THOUGHT, 137, 137 (1975).

36. Nachman Levine, *The Oven of Akhnai Re-Deconstructed*, 45 HEBREW STUD. 27, 31 (2004).

37. *Id.*

38. *Id.*

39. *Id.*; Greenwood, *supra* note 25, at 313. Majorities, as any judge will tell you, tend to be stubborn.

40. Levine, *supra* note 36, at 31.

Heaven they will prove it”⁴¹ And behold, “[t]he *Bat Kol* (a Heavenly voice) went forth [and said], ‘Why are you disputing with R[abbi] Eliezer, for [it] is as he claims everywhere.’”⁴²

Now, as Professor Greenwood slyly remarks, “[i]n a world of sovereign-centered positivism [and formalism], surely that would be the end of the issue.”⁴³ “[T]he Founding Father has told us [exactly] what He meant.”⁴⁴ Any difficulties of interpretation have been authoritatively taken off the table. All that is left for the rabbis to do here is to be good, ethical decision-makers. That is to say, to follow the law wherever it leads. But they do not. In fact, Rabbi Joshua, the leader of the majority, stands up and immediately declares: “The law is not in heaven! It was given on Mount Sinai. We pay no attention to a Heavenly Voice.”⁴⁵

Thus, Rabbi Joshua and the majority of Rabbis on the Council settled the matter as a Supreme Court superior even to the heavenly giver and author of law. And not content simply to prevail on the point of law concerning the oven, the Council then declared all the objects that Eliezer had pronounced pure to be unclean, gathering those objects and burning them in the fire.⁴⁶ They also voted to excommunicate him from the Council because he had the audacity to invoke the *Bat Kol* and thus destabilize the law.⁴⁷ The first chapter of this fable concludes with one magnificent detail. Another rabbi, Rabbi Natan (who had been at the council and is often an intercessory figure between heaven and earth), asked Elijah what God’s response was to the Council’s ruling.⁴⁸ Elijah replied that God merely laughed and said, “[m]y children have defeated Me.”⁴⁹

Thus, this first chapter of the story encapsulates the whole paradox of text, intent, and interpretation.⁵⁰ For it turns out Eliezer was right all

41. *Id.*

42. Greenwood, *supra* note 25, at 314 (emphasis added).

43. *Id.*

44. *Id.* at 314.

45. Cahn, *supra* note 30, at 838.

46. Bruce Ledewitz, *The Openness of Talmud*, 41 DUQ. L. REV. 353, 358 (2003).

47. Englard, *supra* note 35, at 138.

48. Greenwood, *supra* note 25, at 316.

49. *Id.*; Ledewitz, *supra* note 46, at 358.

50. See Englard, *supra* note 35, at 143 (quoting NISSIM GERONDI, DERASHOT HARAN, III, V, VII):

Thus, although all of the rabbis saw that Rabbi Eliezer had put the matter more correctly and that all the signs he gave Divinely authenticated his decision, nevertheless in the end the final word was with them because the decision they had arrived at was dictated by their human reasoning. They were conscious of the fact that in the circumstances that

along. Yet heaven still smiled for the Torah (the law) is not in heaven. It is, instead, in the majority of the rabbis—even when the majority is wrong.⁵¹

But the story doesn't end there. The second chapter, if it was a Hollywood movie, would be titled *Rabbi Eliezer Strikes Back*, for he retained all of his formidable powers and grew vengeful. Heaven, it seems, continued to favor Eliezer, for he used his miraculous authority to exact revenge on all those who casted him out.⁵² First, the story notes that the rabbis were fearful of even telling Eliezer the result of the court's decision because they knew that he might "destroy the entire world" in his anger.⁵³ They were fortunate it seems, for Eliezer only destroyed one-third of the olive crop, one-third of the wheat crop, and one-third of the barley crop.⁵⁴ Additionally, on that great day everything Rabbi Eliezer saw was burned up.⁵⁵ Not long thereafter, another of the presiding rabbis who was in the majority happened to be shipwrecked, and it was said that it was "on account of none other than R[abbi] Eliezer."⁵⁶

The final chapter of this fable concerns Rabbi Eliezer's death. Things had not gone so well for his students after his banishment, for while heaven had smiled on their judgment, it came at the cost of losing their father, teacher, and friend.⁵⁷ Several of his students attended his deathbed, though, of course, they meticulously remained separated by the distance demanded by the legal ban.⁵⁸ Still, there is some reconciliation achieved, and at his passing the other rabbis cried out, "Woe unto me, my master, because of thee! Woe unto me, my teacher, because of you!

decision was wrong but they could not hold otherwise, for that would have meant going against their religious conviction, when their intellect told them that the oven was unclean, the determination being entrusted to the rabbis at all times.

51. See *id.* at 139 (quoting MOSHE SILBERG, *TALMUDIC LAW AND THE MODERN STATE* 64 (1973):

We have here the rule of law in its absolute sense, the rule of law over the one who decrees the law He accepts the discipline of the judgment pronounced by an authoritative body—the majority—which was empowered by Him for deciding doubtful cases, even though in this instance the doubtful case is for Him not doubtful at all. If the law is to follow a majority, one must act in accordance with this law, even if the one involved in litigation is the giver of the Torah Himself.

52. Greenwood, *supra* note 25, at 317–19.

53. *Id.* at 317.

54. *Id.*; Ledewitz, *supra* note 46, at 358.

55. Greenwood, *supra* note 25, at 318.

56. *Id.*

57. *Id.* at 323 n.59.

58. *Id.* at 320.

For you have left the whole generation fatherless!”⁵⁹

So, who in the end gets the last laugh? Who was ultimately vindicated? Framing it in the terms of this discussion, who was the ethical decision maker?⁶⁰ The Bava Metzia denies us the satisfaction of an answer to these questions.⁶¹

For the fable of Akhnai is filled with paradox and misdirection—and that, of course, is the point. For while this is a fable about many things, it is principally about the paradoxes of decision-making. In the end, the Oven of Akhnai is a powerful exercise in myth-making. As Professor Greenwood states,

[Akhnai] shows both the attraction and the importance of the traditional answer, both excluding it in favor of the current majority and condemning the majority for that exclusion. . . . [T]he very authorization of majority rule reminds us that the majority is not authorized to do wrong. The very act by which the majority asserts its right to rule is simultaneously accepted as an act of the majority, and criticized as wrong: even a majority entitled to make the rules is not entitled to dishonor and exclude its minority members.⁶²

Greenwood continues,

Akhnai stands for the power of paradox over coherence, wisdom over logic. . . . Law is a communal experience without a fixed or predictable result. . . . Akhnai is part of a massive battle to define the limits of civilized discourse. Invocation of absolute truth is incompatible with continued debate; Akhnai chooses discussion over truth, living together over correctness. Yet Eliezer, like the simple traditionalism for which he stands, remains attractive and important even when he must be excluded. . . . But in rejecting him, the rabbis deny Eliezer—and the truth—the respect that he and it rightly demand, thus contradicting the very principle that entitles them to exclude him.⁶³

In so doing, they left an entire generation without its teacher and father.

59. *Id.* at 323.

60. *See* Ledewitz, *supra* note 46, at 361 (“[Y]es, lawmaking requires some sort of closure. But, Talmud is not lawmaking.”).

61. Greenwood, *supra* note 25, at 326–27; Englard, *supra* note 35, at 141 (“The tale . . . is replete with tension. It is profoundly thought provoking and cries out for exegesis.”).

62. Greenwood, *supra* note 25, at 354–55.

63. *Id.* at 356–57; *see also* Ledewitz, *supra* note 46, at 360 (“[Human] authority is badly liable to abuse. Majority rule is untrustworthy. The rabbis do not win over Eliezer, they simply have more votes.”).

V. CONCLUSION

One lasting lesson from this fable occurs to me. In the coda to Rabbi Eliezer's story, we are given one final scene. In it, Rabbi Eliezer now sits among the firmament after his death with none other than Moses and the Holy One. They delight in their discussion of the Torah, and Rabbi Eliezer (who I imagine wears a wry and satisfied smile) instructs them on the finer points of the law.⁶⁴

The fable of Akhnai opens up for us the terrifying reality that for a court, a judge, and even for a political community in the throes of an especially difficult decision, heaven smiles mischievously down at us—for indeed the Torah is not in heaven. The secret of the story is that we can smile back if we have the stomach for it. The law wants a conversation partner, after all. It inhabits the record of that very conversation.

The wisdom of the Akhnai fable is repeated, I think, in one haunting line of T.S. Eliot's poetry: "You are the music while the music lasts."⁶⁵ There is a universal insight here that goes beyond the law, certainly, but it also includes law and polis—the political community. The Oven of Akhnai is ultimately about how to recognize, create, and preserve the conditions for convivial relations between and among Heaven, the Law, and the Community. And this is a result worth being "oriented" toward. Indeed, one might go so far as to suggest it would be unethical not to be oriented toward such an end. Such is, after all, the *telos* of the judicial essence.

64. Greenwood, *supra* note 25, at 324–26.

65. T.S. Eliot, *The Dry Salvages*, in *FOUR QUARTETS* (1941).