The Notion of Tolerable Error from the Mishnah to Maimonides

JOSEPH DAVID
Since the concept of error belongs to the field of epistemology whereas tolerance belongs to the field of political philosophy, the notion of tolerable error in a jurisprudential context inhabits a territory in which two disciplines intersect. It is necessary to clarify under what circumstances judicial errors may be tolerated and on what grounds the toleration of certain errors may be justifiable.

As we have noted in Chapter 1 above, modern concepts of toleration are very complicated and not easily encapsulated, despite being supposedly necessary to a multicultural existence. This is also true of tolerance in pre-modern religious contexts. Study of tolerance may work best not by using a bivalent model but a sequential one, running from the affirmable to the tolerable to the intolerable. Generally speaking, these three qualities represent the three possible predicates attributed to all kinds of deeds and beliefs under any theory of tolerance. At one extreme, the affirmable includes all acts or beliefs which are consistent with the set of beliefs of the individual and hence fully legitimizd. At the other extreme, intolerable acts or beliefs are wrongs which cannot be accepted or lived with. Between the affirmable and the intolerable lie acts and beliefs which can be lived with despite objections.

The two boundaries in this sequence are of great importance to the concept of tolerance and its operation. The first is the boundary between what is affirmable and what is tolerable. To understand this boundary, we must get a clear sense of what makes the distinction between affirmable and tolerable: if both reflect a degree of acceptance, to what extent is their distinction tangible? Will what is tolerable ultimately become affirmable? The second is the tolerable–intolerable boundary, which invites exploration of what makes the difference

I wish to thank Gerald Blidstein, Richard Claman, and Bernard Jackson for their fruitful comments on an earlier version of this chapter.
between various opposed wrongs: what is it that allows one to tolerate one wrong and reject a different wrong? Is what differentiates them conventional, contextual, or essential or does it depend on other perspectives?²

In the following discussion I will sketch the historical outlines of the concept of tolerable error within Jewish legal thought and examine it against parallel notions in contemporary Islamic jurisprudence which may have affected Jewish thinkers.² The sketch will follow chronological order, tracing the development of notions of tolerable error as they were perceived by the rabbis. By accounting for the two boundaries of the tolerable discussed above, we hope to illuminate some features of the idea of tolerance in Jewish intellectual history in this period.

The concept of tolerable error in Jewish legal tradition from the Mishnah to the Middle Ages can be traced back to the biblical distinction between inadvertent sin (šegagah) and deliberate sin (zadon). The measure of wrongdoing in this context is therefore dependent on intention as in the standard assessment of criminal acts: in criminal law, the objective details of an act (actus reus) are necessary but not sufficient to judge criminality, and so long as the act is not accompanied by an intention to act wrongly (mens rea), some tolerance of the act is possible. In biblical law, the standard of intention is further expanded to various types of misconduct.³ Thus, one may view the origins of the notion of tolerable error as an expansion of the concept of inadvertence to include cognitive failure as well as behaviour.⁴ An expression of this expansion may be seen in the following homily in a tannaitic midrash, which expands the category of inadvertence to include cognitive fallacies:

³ In fact, the transition from ‘sin’ to ‘error’ is already hinted at in the biblical verses describing the inadvertent act in cognitive terms—ignorance of the matter (‘and the thing be hid from the eyes of the assembly’) as opposed to knowledge of the sin (‘the sin, which they have sinned, is known’, ‘his sin, which he has sinned, comes to his knowledge’) (Lev. 4: 13–14, 23).

⁴ Evans, Law and Theology in the Middle Ages, 11–19.

¹ Some writers emphasize the fact that the concept of tolerance rests on scepticism, rationalism, or pluralism, (see McKinnon, Toleration). The connection between tolerance and scepticism is also evident in pre-modern and non-Western traditions (see Shagrir, ‘The Parable of the Three Rings’).

² The distinction between tolerable and intolerable errors is rooted in the Roman legal tradition. The maxim *error juris nocet, error facti non nocet* (‘an error of law injures; an error in fact does not injure’—Justinian, Digest, 22: 6) induced the distinction between ‘error of law’ and ‘error of fact’, which was traditionally perceived to reflect the distinction between inexcusable and excusable errors (hence the maxim *error juris non excusat* (‘an error of law does not excuse’)). It has been suggested that the original rationale of the Digest’s distinction was based on the Romans’ perception of the intelligibility of legal norms. According to this view, the Romans held that ‘the law is certain and capable of being ascertained, while the construction of facts is difficult for even the most circumspect’ (Keedy, ‘Ignorance and Mistake in Criminal Law’, 78), or they believed ‘that law can and should be fixed, whereas facts tend to be more elusive. Owing to the greater elusiveness of facts, error as to them should be excused more readily so that only supine ignorance or crass negligence should bar excuse’ (Ryu, ‘Error Juris’, 427).

² The maxim *error facti non nocet* means ‘an error of fact does not injure’; the maxim *error juris non excusat* means ‘an error of law does not excuse’.

⁵ Some writers emphasize the fact that the concept of tolerance rests on scepticism, rationalism, or pluralism, (see McKinnon, Toleration). The connection between tolerance and scepticism is also evident in pre-modern and non-Western traditions (see Shagrir, ‘The Parable of the Three Rings’).
‘And if [they] commit an inadvertent error’ [Lev. 4: 13]. You might think that they are held culpable only for inadvertent performance? [Nay] The Torah teaches: ‘[they] commit an inadvertent error, and a matter escapes the notice of the assembly’ — They are culpable [both] for ignoring the matter and for inadvertent performance.\(^5\) The entire project of mishnaic tractate *Horayot* (‘decisions’ or ‘rulings’), which discusses norms pertaining to judicial errors in rabbinic courts, can be seen as an implementation of the biblical concept of inadvertent sin within rabbinic institutions, an exegetical move that applies the biblical theory of action to the rabbinic theory of adjudication.\(^6\)

In the biblical system, the tolerable–intolerable boundary was thus perceived as a problem of agency determined by a human measure—the actor’s state-of-mind, intention, and mental condition—but in rabbinic law from the Talmud onwards, intention as a criterion for tolerable error was not further developed. Instead, there was a trend to seek external means of assessing which errors can be tolerated. In other words, talmudic articulation of tolerable errors devalues the weight of the wrongdoer’s intention and increases reliance on objective standards.

The Talmud contains three different approaches to the phenomenon of tolerable error within the context of adjudication, each expressing a different conceptualization of the tolerable–intolerable boundary. These approaches can be characterized as follows:

1. According to the substantive approach, tolerable error is defined according to the relations between the *corpus juris*, the core body of the law, and its peripheral aspects. The concept of tolerable error thus reflects a fundamentalist perspective on the law, and therefore every deviation from the fundamentals is considered illegitimate.

2. According to the conventional approach, the tolerable–intolerable boundary is determined by cases involving contravention of religious ideas or behaviour that all Jews can reasonably be expected to share.

\(^5\) *Sifra* on Lev. 4: 13.

\(^6\) Tractate *Horayot*, and the Division of Damages (*Nezikin*) in general, has been seen as part of a rabbinic endeavour to establish a Jewish political system with a new social structure and institutions in competition with the priestly ideology and the Temple cult (see Neusner, *Judaic Law from Jesus to the Mishnah*, 41–2; S. J. D. Cohen, *From the Maccabees to the Mishnah*, 214–31). The last section of the tractate illustrates a principle which privileges acquired status over inherited status: ‘a priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a bastard.... This order of precedence applies only when all these were in other respects equal. If the bastard, however, was a scholar and the high priest an ignoramus, the learned bastard takes precedence over the ignorant high priest’ (Mishnah *Hor.* 3: 8; see Kalmin, ‘Jewish Sources of the Second Temple Period in Rabbinic Compilations of Late Antiquity’, 41–2 n. 78).
According to the scholastic approach, tolerable error is related to the broad rabbinic project of rearticulating the notion of divine law and identifying it with the teachings of the sages. Of these approaches, the first finds expression in the statements of tana’im, mainly in the laws of mishnaic tractate Horayot, while the other two approaches are to be found first in amoraic literature, albeit possibly reflecting earlier conceptions.

The substantive approach to the notion of tolerable error is structured from the perspective of the law by a core of norms (in rabbinic terms: the essence of the law—ikar hadin—or its body—guf hadin) and its particulars. The ignorance or mistake of a court with regard to essential parts of the corpus juris constitute an excessively serious deviation which cannot be tolerated:

[If the] court ruled that an entire body [of the law] has to be uprooted; if they said, [for example], that [the law concerning the] menstruant is not found in the Torah or the [law concerning the] sabbath is not found in the Torah or [the law concerning] idolatry is not found in the Torah, they are exempt [from bringing sin-offering].

[If, however,] they ruled that a part [of a law] was to be annulled and a part retained, they are obliged [to bring sin-offering].

How is this so? — if they said: ‘[the law concerning the] menstruant occurs in the Torah but if a man has intercourse with a woman that awaits a day corresponding to a day he is exempt,’ [or that ‘the law concerning the] sabbath occurs in the Torah but if a man carries anything from a private domain to a public domain he is exempt,’ [or that ‘the law of] idolatry occurs in the Torah, but if a man only bows down to an idol he is exempt,’ they are liable; for scripture says, ‘and a matter escapes the notice [of the assembly]’ [Lev. 4: 13]—a matter, but not the entire body.  

The Mishnah, here and elsewhere, articulates the tolerable—intolerable distinction in terms of atonable—non-atonable errors. Any grave error concerning the essence of the law cannot be atoned for, and therefore anyone who commits such a mistake is exempt from bringing a sin-offering, since it would be useless to make such an offering. A tolerable error, thus, encompasses all those deviations that do not violate the integrity of the entire law. The more the law is distorted by a court’s erroneous ruling, the less the erroneous ruling is tolerated. If the court’s ruling indeed rejects the essence of the law (or its entire body), the ruling is considered void and thus not subject to tolerance at

---

7 Mishnah Hor. 1: 3. On the traditions of interpretation of Deut. 18: 15, in relation to the powers of a ‘prophet like Moses’ over the halakhah and the difference between suspension of the halakhah on particular occasions and permanent eradication, see Jackson, Essays on Halakhah in the New Testament, 26–8.

8 The terminology of this distinction is also widespread in the talmudic laws about an idolatrous prophet. In this context it serves to emphasize the seriousness of deviation from the essential laws, which is understood as distorting the Torah itself.
all. If, on the other hand, the ruling is not in conflict with the essential components of the law but only with its particulars, that erroneous verdict can be tolerated. This conception expresses a deep concern for the integrity of the law. Hence the tolerable–intolerable boundary is located at that point where the erroneous ruling is likely to distort the entire law. Conversely, tolerable error extends over the realm of deviations which do not nullify the body of the law.

The ‘conventional’ approach to tolerable error is expressed by reference to the alleged degree of consensus on some religious matters among Jews, including the notoriously ‘heretical’ Sadducees, in Second Temple times. Thus the defining principle of the tolerable–intolerable boundary according to this approach is ‘a matter which the Sadducees admit’—that is, at the very least, those consensual matters about which the rabbis had no record of a disagreement between Pharisees and the Sadducees:

Rav Judah said in the name of Samuel: The court is not held culpable [for erroneous ruling] until they rule on a matter regarding which the Sadducees do not admit; but on a matter on which the Sadducees admit, they are exempted.

It follows from this that the tolerable–intolerable boundary does not pertain either to the laws themselves or to the extent to which the Torah, as divine law, is distorted, but rather to the degree of agreement with the Sadducees’ legal norms or rulings.

The precise significance of the use of the tag ‘a matter which the Sadducees admit’ as a standard is obscure. There are at least two possible ways of reading the phrase. If the Sadducees were viewed as holders of erroneous knowledge but still holding to certain elementary norms which corresponded to the law acknowledged by other Jews, these norms would be considered by the rabbis trivial and therefore ‘obligatory knowledge’, so that whoever errs regarding them could not be tolerated. Alternatively, a ‘matter which the Sadducees admit’ might indicate norms in a territory of consent between the Sadducees and other groups, such as Pharisees, and these norms might be considered such common knowledge that no-one could ignore or miss them.

The standard of ‘a matter which the Sadducees admit’ also appears in talmudic discussions concerned with judicial errors in trials involving death sentences. Among the differences between civil suits (in talmudic terms,

---

9 The conception of ‘law as integrity’, as introduced in Ronald Dworkin’s legal theory, states that the law must speak with one voice, so judges must assume that the law is structured on coherent principles and that in all fresh cases which come before them, judges must apply the same principles. Accordingly, integrity is both a legislative and an adjudicative principle. Legislative principle requires law-makers to try to make the laws morally coherent. Law-makers are required to make the assumption that these principles were created by, or for, the community as an entity and that they express the community’s conceptions (see Dworkin, Law’s Empire, 225).

10 BT Hor. 4a.
'monetary laws') and suits involving capital punishments, there is a rule which grants procedural privilege to the defendant in capital suits—‘civil suits may be reopened either for acquittal or condemnation; capital charges may be reopened for acquittal, but not for condemnation’. As opposed to civil cases, the defendant in capital suits enjoys the benefit of an erroneous acquittal. The Talmud, however, limits this tannaitic principle according to the same standard:

‘But not for condemnation’. R. Hiya b. Aba said in R. Yohanan’s name: proving that he erred in a matter which the Sadducees do not admit. But if he erred in a matter which [even] they admit, [we tell him] go back to school and learn it.

How does the admission of the Sadducees about a specific matter mark the tolerable–intolerable boundary? According to the Talmud, this question was already asked by the tana‘im of the school of R. Ishmael:

R. Sheshet replied, and so it was taught by the school of R. Ishmael: Why has it been said of a court that ruled ‘a matter which the Sadducees admit’, that they are exempted? Because they should have learned and did not learn.

Accordingly, trivial knowledge, which even the Sadducees admit, is obligatory for any jurist. Therefore, lack of such knowledge is intolerable, an unforgivable negligence that cannot be atoned by sin-offering. The tolerable–intolerable boundary here is determined by an a priori obligation. Thus the concept of tolerable error stands in relation to the concept of negligence. The rebuking expression ‘go back to school and learn it’ is of course semantically close to the admonishment ‘because they should have learned and did not learn’. Both identify the boundary of tolerable error with negligence—that is, ignorance of fundamental legal knowledge.

The scholastic approach to tolerable error, like the previous one, also appears in the amoraic layer of the Talmud and is not found in tannaitic statements. The Talmud suggests a distinction between tolerable or discretionnal judicial error (ta‘ut besbikul bada‘at), which should not be reversed if it occurs, and error regarding an explicit teaching of the sages (ta‘ut bidvar mishnah), which can be reversed and considered a cause for compensation if damage occurs:

R. Sheshet said in R. Asi’s name: If he erred in devar mishnah, the decision is reversed; if he erred in sbikul bada‘at, the decision may not be reversed.

---

11 Mishnah San. 4: 1. 12 This addition appears in BT Hor. 4a. 13 BT San. 33b. 14 BT Hor. 4b. 15 BT San. 33a.
The distinction drawn between these two categories—*devar mishnah* and *shikul bada’at*—is rooted in an understanding of the authority of the sages and the canonical status granted to their teachings. In fact, this conception abolishes the gap between jurists and legal norms. Contrary to viewing the sages as authorized commentators on the law, this perception presents an idea of self-canonization which provides the sages’ teachings an authoritative status in its own right. Accordingly, the sages are not only the mouthpieces of the law or its discoverers, but rather they constitute the law by their teachings and rulings. The casuistic definitions of these categories underline the scholastic perception by which the law is identified with the teachings of the sages. Hence, a deviation from the sages’ teachings by a court is intolerable and thus can be reversed and subjected to compensational remedies. On the other hand, when a judge deviates from those teachings that are not explicitly fixed, but only determined by second-order principles, this error can be tolerated and his decision must be allowed to stand.

Of these three talmudic approaches, only the scholastic approach continued to develop in post-talmudic law. It seems that, for whatever reason, the

---

16 The accepted view is that the term *mishnah* (teaching) was introduced following the destruction of the Second Temple, even before it was applied to a specific corpus which came to be known as the Mishnah of R. Judah the Prince. The literal meaning of this term is evidently related to the activity of repetition; nevertheless, it also indicated the idea of independent authority ascribed to the sages. Compared with the early midrashic literary style, which presents the laws as an outcome of a correct reading of the scriptures, the mishnaic style represents the laws as an inseparable part of the sages and their scholastic activities. The independent authority of the Mishnah was taken as equivalent to the scriptures and may be reflected in the Greek form of the term as used by the Church Fathers (denterois) in the various translations of the verb *sh-n-h*, ‘to repeat’, and in the anonymous geonic commentary quoted by R. Nathan ben Jehiel of Rome, *Arukh hashalem*: it is called Mishnah, because it is secondary (*sheniyah*) to the Torah. . . . And it is the Oral Torah; and it is clear that it is secondary to the first thing, as in: “And he said: ‘Do it a second time’”; and they did it a second time [1 Kgs 18: 34]”.

17 Ravina asked R Ashi: ‘Is this also the case if he erred regarding a teaching of R. Hiya or R. Oshaia?’ ‘Yes’, said he. ‘And even in a dictum of Rav and Samuel?’ ‘Yes’, he answered. ‘Even in a law stated by you and me?’ He retorted, ‘Are we then reed cutters in the bog?’ ‘How are we to understand the term: *shikul bada’at*?’—R. Papa answered: ‘If, for example, two *tana’im* or *amora’im* are in opposition, and it has not been explicitly settled with whom the law rests, but he [the judge] happened to rule according to the opinion of one of them, whilst the general practice follows the other—this is a case of [an error] in *shikul bada’at*’. (BT San. 33a)

On the status of such second-order guiding principles in unresolved disputations, see Ch. 6 below.

18 ‘How are we to understand the category of *shikul bada’at*?—R. Papa answered: ‘If, for example, two *tana’im* or *amora’im* are in opposition, and it has not been explicitly settled with whom the law rests, but he [the judge] happened to rule according to the opinion of one of them, whilst *sugyab dehemata* / *sugyan de’alma* follows the other—this is a case of [an error] in *shikul bada’at*’. (BT San. 6a)

The two versions of this second-order principle represent two distinct standards: (1) a literary standard (*sugyab dehemata*) reflecting the general trend, or the spirit, of the talmudic discussion (BT San. 33a) and (2) a practical standard (*sugyan de’alma*) reflecting the widespread habit (BT San. 6a).
other two approaches were not deemed useful conceptions of the tolerable–intolerable boundary in later legal thought.¹⁹

A tradition attributed in a later source to the last head of the Pumbedita Academy, Hai Gaon (939–1038), states that ‘every report of all the scholars is considered devar mishnah’,²⁰ so that knowledge was reckoned to expand beyond the talmudic material, embracing the entire community of rabbinic scholars, but this view was not accepted by all. The Provençal talmudic scholar Zerahiah b. Isaac Halevi (1125–86) recorded his disagreement with an anonymous scholar²¹ who had argued for the inclusion of the teachings of the Babylonian authorities—the geonim—within the category of devar mishnah as part of the obligatory knowledge in respect of which erring is intolerable:

And I have heard, in the name of one of the scholars in the previous generation, that in our times no one errs in sibkul bada’at, for all our halakhic rulings are fixed, either in the Talmud or by the post-talmudic scholars. Therefore, in our times, no one errs in sibkul bada’at, but all those who err, err in devar mishnah. And I do not think so, but whoever makes an error not clearly conflicting the Mishnah or the Talmud is undoubtedly not erring in devar mishnah, but rather erring in sibkul bada’at . . . and what has been ruled by the discretion of the geonim, subsequent to the sealing of the Talmud, and does not conflict with a clear talmudic norm, is like a general practice, and whoever errs regarding that, his error is of sibkul bada’at and not of devar mishnah.²²

While the older scholar opposed by Zerahiah apparently suggested viewing the category of devar mishnah as including all the rabbinic teachings up to his days, Zerahiah Halevi limited the category only to talmudic teachings. In our terms, the two scholars argued about where to locate the tolerable–intolerable boundary with regard to post-talmudic rulings. The former tended to expand the range of intolerable errors, while the latter widened the realm of the tolerable.

One departure from the scholastic approach in geonic legal thought may be related to the development of Islamic jurisprudential ideas and methods, since the new meaning ascribed to tolerable error by these rabbis reflected a

---

¹⁹ The discussion here is related to my wider exploration of halakhic rules and theories of decision-making in talmudic and post-talmudic literature in David, ‘Knowing the Word of God’, chs. 1 and 2, but in this context the discussion is limited to cases from which something can be deduced about rabbinic perceptions of the relationship between toleration and judicial error.

²⁰ This statement is documented only in later sources and it is probably known only through the testimony of Estori Haparchi (Isaac b. Moses, 1280–1355), who learned about it during his travels in the Orient (see Ben Moses, Sefer kaftor vaferah, 51).

²¹ Ta-Shma identifies this scholar as Joseph b. Me’ir ibn Migash (1077–1141), the head of the yeshiva in Lucena (see Ta-Shma, Zerahyah Halevi and his Circle (Heb.), 113).

²² Zerahiah b. Isaac Halevi, Hama’or bagadol, San. 12a (in the Al-Fasy pages).
wholehearted change in their basic understanding of the concept of law and the act of adjudication. The change arose in the aftermath of the emergence of reasoning-based jurisprudence that acknowledges and praises the involvement of legal reasoning in interpreting the law and applying it to new cases.

The ideas expressed by Sherira b. Hanina about judicial errors were based on the talmudic typology of tolerable and intolerable errors, but the meaning that he ascribed to these categories reflected a remarkable departure from talmudic notions and a deep absorption of Islamic legal concepts into Jewish legal thought. In this respect, Sherira’s embrace of Islamic jurisprudential concepts completely modified the traditional setting of the law and the meaning of legal reasoning. Consequently, he provides innovative accounts of what the law is, what adjudication is, and what judicial error concerns. Following the conceptual vocabulary of Islamic law, he departs from the scholastic perception of tolerable error and instead favours an objectivist approach which rests on a view of the law as combined of roots and branches. Judicial reasoning, accordingly, is about drawing analogical linkages between existing laws, ‘roots’, and new cases, ‘branches’:

In one of these two things judges err: either this legal case has a root, [which has] a tradition or ruling, and this judge did not know it has some resemblance [to that root], and [instead he] analogizes it to a different root—by that he errs in *devar mishnah*.

Or else, [when] this case is definitely a branch that has nothing similar to [another root], and that judge analogizes it to a root, which is not similar and with which it has nothing in common—by that he errs in *shikul bada’at*.

This account of judicial error ignores the notion of error as deviation from, or contradiction of, the teachings of the sages: for Sherira, judicial error is a failure to draw correct analogical links between roots and branches. The difference between tolerable and intolerable errors is therefore articulated according to a botanical metaphor and the relations of roots and branches. By viewing judicial error as a mistake in applying analogical reasoning, Sherira expresses a position that seeks to impose constraints on its use and to limit the range of legal solutions that may be obtained thereby. Not only does he reject the view of analogical reasoning as a product of a jurist’s personal preference, but he also proposes a new approach according to which judicial analogy requires substantive correlations between the root and its branches. Such an attitude limits the range of possible outcomes. In fact, Sherira wishes to create

---

23 Born around 900 CE and dying around 1000 CE, he served as the head of the Babylonian yeshiva at Pumbedita, which was relocated to Baghdad towards the end of the ninth century.

a conceptual criterion to distinguish between valid and erroneous analogies.\textsuperscript{25} Such a perception is best understood as an objectivist approach.\textsuperscript{26} We can summarize Sherira’s position as an endeavour to provide relevant meaning to the talmudic typology of judicial error in accordance with the Islamic theory of \textit{qiyas}.\textsuperscript{27} Such relevance is possible with an objectivist attitude which allows the peculiar juxtaposition to be found in the phrase ‘erroneous analogy’.

Now we turn to the other boundary in the sequence, the one between what can be affirmed and what can only be tolerated. Compared with the tolerable–intolerable distinction, it is more difficult to account for the difference between the affirmed and the tolerable, since it does not reflect a division in principle between the legitimate and the illegitimate: in practice, both the affirmed and the tolerable are accepted, and thus the difference between them tends not to be clear cut. Indeed, we can sometimes trace the footsteps by which the distinction between the affirmed and the tolerable has been blurred both in practice and in theory.

Examples of this shift were expressed independently by two prominent Jewish jurists of the twelfth century, Isaac b. Aba Mari (1122–93) and Moses Maimonides (1135–1204). Both scholars nullify, on different grounds, the talmudic category of discretionary error (\textit{ta’ut besbikut bada’at}), so that what had previously been considered only tolerable was deemed by them to be affirmed.

Isaac b. Aba Mari introduced a different perspective on the multiplicity of opinions in the Talmud. He explicitly ignored any second-order procedure in deciding between opposing teachings of the sages. To him, multiplicity of teachings, and even opposing teachings, should be a source of legitimization for multiple practices:

What are [the circumstances of] \textit{shikul bada’at} like? If two amora’im are mutually opposed, and sugyab dishemata [a tradition on that matter], corresponds to the [other]

\textsuperscript{25} Sherira’s insights can be compared to those of Sayf al-Din al-Amidi (d. 1233). For Amidi, the resemblance between two analogized cases is pre-existent, not the result of the jurist’s deliberation. Hence he situates the \textit{qiyas} outside the sphere of the intellectual activity of the jurists (see B. G. Weiss, \textit{The Search for God’s Law}, 552–3).

\textsuperscript{26} It seems that, for Sherira, ‘roots’ and ‘branches’ have slightly different connotations. They do not indicate the principles and their particular derivations, but rather stand for two types of resemblance. A ‘root’ is a legal norm of which the potential similarities, subject to further analogies, are fixed in advance, so that failure to construe the \textit{ab initio} similarities is an intolerable judicial error. A ‘branch’ is a legal norm whose potential resemblances are not fixed in advance. Analogies drawn to this norm do not undermine pre-existing resemblances and thus can be tolerated.

\textsuperscript{27} The Arabic term \textit{qiyas} in its legal sense refers to judicial analogy, general deduction, or syllogism. At times, legal \textit{qiyas} was considered the archetype of all forms of legal argumentation. In particular, the term indicates the various types of argumentation that legal scholars use in their independent reasoning. The term probably originated in the ancient Hebrew term \textit{bekesh}, based on the Aramaic root \textit{n-k-sh}, which means to ‘hit together’. 
one, it is not [considered] an error for whoever follows the practice of one to do so, and whoever follows the practice of the other to do so.\textsuperscript{28}

In fact, Isaac b. Aba Mari does not acknowledge any aspiration to legal unity in the first place, since for him, the open texture of the Talmud is sufficient for full acceptance, and there is therefore no need to have to tolerate what should be fully affirmable.\textsuperscript{29}

Isaac's contemporary, the great thinker and jurist Moses Maimonides, also tried to eliminate the affirmative–tolerable boundary, though on different grounds. As a typical rationalist in theology and law, Maimonides, like the Babylonian geonim, supported the use of legal reasoning. When dealing with the talmudic typology of judicial error, he displayed much sensitivity to the wide range of possibilities achieved by embracing legal reasoning. His approach on this issue expresses a sophisticated combination of fundamentalism,\textsuperscript{30} on the one hand, and reductionism, on the other. Hence his interpretation of the talmudic categories of judicial error:

First, I will explain that judicial error may occur in one of two things, either with reference to [authoritative] transmitted text, as when he forgot the language or did not learn it, and this is called an error in \textit{devar mishnab}. And the second is when he errs in a thing dependent on analogy: if the thing is possible as he stated, nevertheless the [common] practice contradicts it, and this is called an error in \textit{shikul hada’at}.\textsuperscript{31}

Maimonides, like Sherira, adopts Islamic legal theory by equating the talmudic categories to the distinction between revealed law (\textit{al-nass}) and its extension by means of analogy (\textit{qiyas}),\textsuperscript{32} but, unlike Sherira, he remains loyal to the essence of the talmudic typology, at least prima facie, preserving the notion of judicial error as a departure from an authorized norm. Maimonides' definitions of the circumstances applicable to different sorts of error do not correspond precisely to those of the scholastic approach to tolerable error, but he maintains the distinction between deviation from a fixed authorized norm and deviation from a norm that is fixed on the base of secondary principles. In this respect, Maimonides can fairly be characterized as a fundamentalist and his approach as consistent with the talmudic approach, but in the words immediately following the passage cited above he is revealed as a reductionist when he

\textsuperscript{28} Ben Aba Mari, \textit{Itur soferim}, 157–8.

\textsuperscript{29} Certainly, he followed the documentation-as-legitimization approach (see Ch. 6 below).

\textsuperscript{30} Maimonides' fundamentalist character has recently been emphasized by Stroumsa (\textit{Maimonides in his World}, 53–85).

\textsuperscript{31} Maimonides, \textit{Commentary on the Mishnah}, Bekk. 4:4.

\textsuperscript{32} Maimonides' reference to the juxtaposition of revelational/derivative law with the terms \textit{nass} and \textit{qiyas} illustrates a thorough incorporation of the \textit{usul al-fiqh} (Islamic jurisprudence) technical terminology.
inserts legal reasoning into the category of *ta’ut beshikul bada’at*, and, even more so, when he historicizes the talmudic typology:

This was [relevant] before the editing of the Talmud, but in our times the possibility of this occurring has diminished, for if one issues a ruling, and we find the opposing view in the Talmud, then he errs in *devar mishnah*; and if we do not find the opposing view, and his inferences seems probable according to the inferences of the divine law, although there are reasons against his ruling it is impossible to determine his error, for his analogy is possible.\(^{33}\)

In this passage, Maimonides first reduces the distinction between the two errors into modal terms—propositions from the transmitted text are necessary truths, their epistemological status is certain and absolute, and thus any deviation is impermissible and intolerable, whereas propositions based upon legal reasoning are only possibly true, their epistemological status is probable, and therefore error regarding such statements is not to reversed. Secondly, by contextualizing the talmudic typology within a limited historical framework, Maimonides eliminates the possibility of discretional error (*ta’ut beshikul bada’at*) and thus abolishes the possibility of tolerable error in the terms understood in the Talmud.

The canonization of the Talmud is for Maimonides a watershed moment in Jewish legal history,\(^{34}\) a crucial event for the legitimacy of legal reasoning. Accordingly, rulings of post-talmudic laws by analogical reasoning are not likely to be erroneous because ‘it is impossible to determine his error, for his analogy is possible’. This, of course, destroys the talmudic typology, as only one type of error is deemed possible—that is, a decision against an explicit ruling in the Talmud. This illustrates Maimonides’ fundamentalist-reductionist nexus: limiting the possibility of judicial errors to the talmudic material in fact elevates the Talmud to the level of revealed law, while at the same time also annulling the possibility of judicial errors regarding post-talmudic cases. This being the case, whereas Sherira stressed restrictions in order to limit the range of possible analogies and ruled out laws based upon erroneous analogies, Maimonides denied the very possibility of post-talmudic judicial errors by viewing the sealing of the Talmud as allowing nearly unrestricted judicial reasoning.\(^{35}\)

---

\(^{33}\) Maimonides, *Commentary on the Mishnah*, *Bekh. 4*: 4.

\(^{34}\) The jurisprudential significance of historical events is also illustrated by a parallel conception in Sunni legal theory, according to which the ‘gates of *ijtihad*’ were ‘closed’ in the tenth century. On the meaning of this phrase, see Hallaq, ‘Was the Gate of Ijtihad Closed?’.

\(^{35}\) Maimonides’ fundamentalist-reductionist approach is also apparent in his attitude towards the problem of transmission. On that topic he claims that rabbinic law indeed relies on a continuous transmission traced back to Moses at Sinai but that the continuous chain of transmission (*inmad*) had vanished when the Talmud was sealed, and that therefore post-talmudic law is no longer based on transmission (see David, ‘Critical Transmission’ (Heb.)).
In sum, post-talmudic conceptualizations of tolerable error all continued to define the range of tolerance by external standards, using either a scholastic or a substantive approach. Through new definitions some scholars (such as Sherira) narrowed the realm of tolerable error, while others (such as Zerahia Halevi) extended it or even seemed to abolish the tolerable–affirmable boundary altogether, as did Isaac b. Aba Mari and Maimonides. But the most significant change in the history of the concept of tolerable error in the course of this period was the emergence of a reasoning-based jurisprudence that introduced a sharper methodological and conceptual apparatus to rabbinic legal thought.

How did these developments in Judaism relate to notions about tolerable error in Sunni Islam in the same period? A comparison with Islamic writers reveals both similarities and differences. Some Islamic influence on Jewish thinkers is certain, but some central themes in the Islamic texts are not to be found in contemporary rabbinic legal thought: in particular, despite their embrace of reasoning-based jurisprudence, and, in contrast to the rabbis, some Islamic teachers aimed to restore the intention in an act of error as a reason for toleration.

Thus the idea of rewarded error appears in Islamic theology in association with the centrality of reasoning-based jurisprudence. Within Sunni legal thought, special religious virtue is ascribed to the very process of legal reasoning by a jurist, the scholars’ effort towards achieving the right answer—*ijtihad*—is thus appraised independently of the results of these endeavours. Hence, *ijtihad* is not only viewed as a legitimate method, but also as a religious standard according to which the obedience of the believer is measured. Juristic efforts are therefore respected even when the outcomes are mistaken. The religious value of a mistaken judgement is well-articulated in the famous tradition that states: ‘He who is mistaken in his personal judgement deserves reward, while he who judges correctly deserves a double reward’. Accordingly, judicial error derived by means of *ijtihad* is not only tolerated in Islamic thought, but it also enjoys a positive reward, since the very quest for the word of God is a merit by itself. A further expression of this conception can be seen in al-Ghazali’s (d. 1111) account of the problem of judicial error in relation to reasoning-based jurisprudence. The idea is exemplified through the case of alms-giving:

---

36 ‘[It is] that in respect of which God has imposed on His creation the obligation to perform *ijtihad* in order to seek it out. He tests their obedience in regard to *ijtihad* just as He tests their obedience in regard to the other things He has imposed on them’ (Ibn Idris Shafi’i, *Risala*, §59).

37 Ibid. §1409.
Everything that depends on an effort of personal interpretation is of this sort. For example, for legal almsgiving the recipient may be poor in the personal judgement of the donor, whereas secretly he is wealthy. This mistake is not sinful because it was based on conjecture. . . In this way the prophet and religious leaders were forced to refer the faithful to personal interpretation, despite the risk of error. The prophet—peace be upon him—said, ‘I judge by appearances, it is God who looks after what is hidden’. This means, ‘I judge according to general opinion taken from fallible witnesses, though they may be mistaken’. If the prophets themselves were not immune to error in matters of personal judgement, how much more so ourselves?!

Al-Ghazali argues against viewing the instructions of the Imam as the ultimate response to uncertainty in the law. Instead he advocates *ijtihad* as the preferable method. For him, *ijtihad* explicitly derives from the fundamental nature of legal knowledge as partly revealed. Hence, fallibility is a substantive and essential trait of the divine law itself.

In this respect, the appearance of the concept of rewarded error signifies a re-emergence of an intentional theory of actions that re-establishes the conceptual proximity between sin and error. Choosing alms-giving as a paradigm for right and wrong judgements is a fine demonstration of the shift from a consequential approach to an intentional one—‘since he is not punished, except in accordance with what he thought’. Some scholars have claimed that the medieval rabbinic idiom ‘and his divine reward will be doubled’ is an echo of this concept, though even if the echo is there, this notion never reached the degree of articulation in rabbinic jurisprudence that it did in Sunni thought.

Distinct from the notion of rewarded error was the use of the concept of tolerable error in Sunni Islam to describe the differences between heresy and other wrong behaviour or ideas, with the intolerable–tolerable boundary described by al-Ghazali in terms of primary and secondary issues:

‘My community will divide into over seventy sects; all of them will enter Paradise except the Crypto-infidels . . .’. As for the maxim, it is that you know that speculative matters (*al-nazariyyat*) are of two types. One is connected with the fundamental principles of creed, the other with secondary issues. The fundamental principles are acknowledging the existence of God, the prophethood of his Prophet, and the reality of the Last Day. Everything else is secondary. Know that there should be no branding any person an unbeliever over any secondary issue whatsoever, as a matter of principle.

---

38 Al-Ghazali, *Deliverance from Error and Mystical Union with the Almighty*, 85–6.
39 For references to human fallibility as an essential aspect of the divine law and its implications for the concepts of disagreements and diversity, see the discussion of Elijah b. Abraham in Ch. 6 below.
40 Al-Ghazali, *Deliverance from Error and Mystical Union with the Almighty*, 85–6.
41 Lazarus-Yafeh, note 34 to Al-Ghazali, *The Deliverer from Error*, 48 (Heb.).
Obviously, heresy has a very limited meaning here and in fact leaves deviations from secondary issues subject to tolerance, but the connection between a fundamentalist approach and tolerance is observable. Tolerance is possible due to the reduction of the entire set of creeds and practices to a settled list of principles. In contrast, and as many commentators have shown, a fundamentalist construction of Jewish belief is lacking in Jewish intellectual history before Maimonides. In this respect, the development of these ideas within an Islamic intellectual milieu might help to explain the emergence of Maimonides’ views.

Finally, tolerable error was used by Islamic jurists for apologetic purposes as an argument for legitimizing speculative theology, philosophy, and scriptural interpretation. By drawing analogy from adjudication, Ibn Rushd (Averroes) argued that philosophers are judges of reality, and as such they deserve at least the same allowances that apply in legal judgements, including the concept of tolerable error:

This is why the Prophet—peace be upon him—said, ‘If the judge after exerting his mind makes a right decision, he will have a double reward; and if he makes a wrong decision he will [still] have a single reward . . .’. These judges are the scholars, specially chosen by God for [the task of] allegorical interpretation, and this error which is forgivable according to the Law is only such error as proceeds from scholars when they study the difficult matters which the Law obliges them to study.44

Interestingly, Ibn Rushd identified the idea of a reward for an erroneous judgement with the concept of a tolerable error. He saw both concepts as dependent on the privileged status of the scholars, and therefore only errors made by mandated scholars can be tolerated and even rewarded. Viewing tolerance as a professional privilege rather than an impersonal matter is striking. One cannot escape the impression that this theory was intended to advocate the legitimization of speculative disciplines against the accusation of crossing the line into heresy, but we can also understand Ibn Rushd’s stress on the special status of the scholars on the basis of a connection between mission (‘the scholars, specially chosen by God . . . they study the difficult matters which the Law obliges them to study’45) and tolerance. In this respect, the reason for tolerating an act or judgement derives from balancing the risk of erroneous judgement against a scholar’s duty and enthusiasm to study difficult matters. The rationale for the concept of tolerable error and the reason for rewarding some judicial errors is the same: both were intended to acknowledge the missionary aspect of scholarship. Even so, the concept of tolerable error according to Ibn Rushd exposes an elitist perception, which excludes non-professionals from

43 Novak, ‘The Role of Dogma in Judaism’.
45 Ibid.
toleration if they err. In another text, Ibn Rushd combined the idea of toler-
ance as immunity with the fundamentalist approach seen above:

In general, error about Scripture is of two types: either error which is excused to one
who is a qualified student of that matter in which the error occurs (as the skilful
doctor is excused if he commits an error in the art of medicine and the skilful judge
if he gives an erroneous judgement), but not excused to one who is not qualified in
that subject; or error which is not excused to any person whatever, and which is unbel-
lief if it concerns the principles of religion, or heresy if it concerns something sub-
ordinate to the principles. . . . Examples are acknowledgement of God, Blessed and
Exalted, of the prophetic missions, and of happiness and misery in the next life.46

Alongside the professional status of the jurist or the scholar, the subject matters
of their judgements are also essential to the extent of tolerance that they will
be bestowed. For such elevation of the status of scholars and their activities,
the rabbinic texts of the medieval period provide no precise parallel.

To conclude, the history of the concept of judicial error in a legal context
reflects the development of legal thought in general. Changing perceptions of
legal authority, the organization of the law, the role of knowledge and profes-
sionalism, and other aspects are all mirrored through changing approaches to
the problem of error. As we have tried to show, the notion of tolerance in the
form of tolerable error existed alongside the rabbinic tradition from post-bib-
lical times to the Middle Ages. In that respect the history of tolerable error
reveals an inner dynamic in rabbinic jurisprudential history that sheds light
also on the history of tolerance in these contexts. Our analysis showed the very
limited relevance of intention to the toleration of error after the biblical period
and the extent to which justification of tolerable error rested on ideas very dif-
ferent from justifications of toleration in the modern world.