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# Judaism and Postmodernism

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## JUDAISM AND POSTMODERNISM

*Suzanne Last Stone\**

In his *Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective*,<sup>1</sup> Professor José Faur, an eminent scholar of Maimonides, presents a thought-provoking view of the rabbinic concepts of law and hermeneutics, distilled from his many diverse and original writings on these subjects. Here, for the first time, Professor Faur places his study squarely within the Maimonidean tradition and proposes to test his theories against the presentation of the rabbinic legal system in Maimonides' legal works. In a sense, Professor Faur continues two aspects of Maimonides' own work. One of Maimonides' projects in *Guide for the Perplexed* was to translate some of the traditions of rabbinic Judaism into the categories of the philosophers of his time.<sup>2</sup> Professor Faur continues this work by translating some basic rabbinic concepts into the categories of both secular jurisprudence and contemporary critical literary and philosophic theory. Second, according to Professor Faur, Maimonides' work offers a "comprehensive view of the rabbinic legal system according to juridical rather than theological or metaphysical principles."<sup>3</sup> By testing his theories against the Maimonidean presentation, Professor Faur, too, proposes to offer a purely juridical, and not theological, account of the Jewish legal tradition.

Before discussing various methodological and substantive aspects of Professor Faur's presentation, I would like to briefly recount those portions of Professor Faur's Article on which this Comment focuses, and mention several ideas that, in my view, are implicit in his Article and significant for a full understanding of his work.

Professor Faur's Article is divided into two discrete topics. The first addresses the concept of law in the rabbinic tradition; the second addresses the concept of hermeneutics. The two topics are united, however, by a single analytical model that animates many of Professor Faur's theses. This model is the bilateral covenant between man and God. According to Professor Faur, the authority of the law in

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<sup>1</sup> José Faur, *Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective*, 14 *CARDOZO L. REV.* 1657 (1993).

<sup>2</sup> See Isadore Twersky, *Maimonides*, in *UNDERSTANDING RABBINIC JUDAISM* 187, 202-08 (Jacob Neusner ed., 1974).

<sup>3</sup> Faur, *supra* note 1, at 1660.

Judaism does not stem from divine command *per se*, but, rather, is the product of a freely negotiated covenant entered into between two parties, God and Israel, who are equally free to agree or dissent. The essential feature of this historical covenant is the agreement of both parties to be bound in perpetuity by Torah law. The law commands belief in God. Accordingly, as Professor Faur states, "God is the consequence, not the cause," of acceptance of the law.<sup>4</sup> Moreover, since both parties to the covenant are subject to the law and neither can abrogate it, the covenant, according to Professor Faur, both excludes "violence" and guarantees "equality before the law."<sup>5</sup> The law was the product of free negotiation; it was not inaugurated by an original act of violence. The law is perpetual; hence, future revolutionary violence is not possible. The only sovereign entity is the law itself—not God, nor religious, political, or judicial bureaucracies. Therefore, each Jew is an equally autonomous individual and can challenge any of these entities in the name of the law.

The bilateral covenant model not only contributes to Professor Faur's description of the unique conception of law in the rabbinic tradition—it also contributes, in my view, to his description of the unique nature of rabbinic hermeneutics. According to Professor Faur, the object of rabbinic judicial interpretation is not to discover the mind of the author, but to apply the text of the law.<sup>6</sup> This object is consonant with Professor Faur's covenant theory. Thus, Professor Faur contends that the covenant ratified the "actual law" as the supreme authority, not God's will, or the "'original intent' of the legislator."<sup>7</sup> Indeed, one might argue, since God is not prior to the law, pursuant to the covenant model, there is no author to contend with. In a prior work, Professor Faur has expressed in greater detail the relationship of rabbinic hermeneutics to the bilateral covenant.<sup>8</sup> The covenant entered into between God and Israel at Sinai is a relationship between God, the author, and His public, the exegetical community. Through the covenant, God, the author, surrenders His work and deposits it with a community who receives it. The exegetical community is thus authorized to interpret the scriptural text free

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<sup>4</sup> *Id.* at 1661. *But cf.* Lenn E. Goodman, *Maimonides's Philosophy of Law*, 1 JEWISH L. ANN. 72, 98 (1978) (arguing that the Maimonidean classification of belief in God as a commandment is primarily declarative, not imperative, and that the imperative aspect of the commandment "arises from the fact of God's existence as Israel confronts it rather than from any human or intermediary authority").

<sup>5</sup> Faur, *supra* note 1, at 1662.

<sup>6</sup> *Id.* at 1675.

<sup>7</sup> *Id.*

<sup>8</sup> See JOSÉ FAUR, *GOLDEN DOVES WITH SILVER DOTS* (1986).

from the constraints of authorial intent.<sup>9</sup> Rabbinic exegetes “apply the *text* of the law to the situation at hand, by making innovative connections [between the words and particles of the scriptural text] generating, thereby, fresh meaning and understanding of the law.”<sup>10</sup> Professor Faur writes: “The ‘connections’ made in the text are the creative composition of the reader functioning as an author.”<sup>11</sup> Therefore, according to Professor Faur, everything stemming from rabbinic canonical exegesis is classified by Maimonides as a rabbinic (*derabbanan*) and not a scriptural (*deorayta*) obligation.<sup>12</sup>

Finally, in Professor Faur’s presentation, the bilateral covenant provides the essential structure in which reader creativity takes place. The only constraint on rabbinic interpretive practice is that which flows from the source of the authority to interpret—the text itself, ratified by the covenantal agreement. Rabbinic legal exegesis cannot “deauthorize the text and render it *void*.”<sup>13</sup> Any interpretation that is “Gnostic, Christological or antinomial” violates the fundamental terms of the covenant.<sup>14</sup> In short, Professor Faur has presented an intricately integrated description of rabbinic law and hermeneutics. This is one of the great strengths of his presentation. It is also a potential weakness, however, because so much depends on the persuasiveness of the bilateral covenant model.

As can be seen from my brief description, there is also a certain reciprocity between Professor Faur’s presentation of the rabbinic tradition and contemporary critical theories about language and legal relationships. Indeed, I believe Professor Faur is implicitly arguing here, as he has explicitly argued elsewhere, that contemporary critical ways of understanding language and legal relationships now allow for a better understanding of concepts inherent in the rabbinic tradition.<sup>15</sup>

At first blush, the rabbinic tradition and contemporary literary and legal theory would seem to have little in common with one another. Indeed, contemporary theoretical perspectives might be thought to pose especially difficult challenges to a religious, legal tradition. The conceptual challenge of contemporary theory to traditional accounts of religion and law is that the traditional philosophic search for ultimate truth, fact, or objectivity is self-deceptive because it does not yield an accurate, universal, or eternal account of the

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<sup>9</sup> See *id.* at 13-16, 124.

<sup>10</sup> Faur, *supra* note 1, at 1675.

<sup>11</sup> *Id.* at 1676.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1677.

<sup>14</sup> *Id.* at 1676-77.

<sup>15</sup> FAUR, *supra* note 8, at xix.

world. It yields provisional accounts, conditioned by "the normal discourse of the day," subject to revision.<sup>16</sup> The moral challenge of contemporary theory to positivist systems of law is the exposure of the violent aspects of hierarchical legal ideologies, which identify law with order imposed coercively from above.<sup>17</sup> The semantic challenge of contemporary theory is the exposure of the multiple meanings and voices in a text. It is impossible to extract a single, objective meaning or recapture authorial intent, because meaning is reader-determined.<sup>18</sup> These criticisms, taken together, threaten a religious legal tradition based either on classical natural law, on positivist concepts of authority, or on the search for God's true will revealed in Scripture.<sup>19</sup>

Professor Faur's presentation of the rabbinic concept of law and hermeneutics implicitly answers these three arguments. First, the validity of the law in rabbinic Judaism, according to the bilateral covenant model, is based on neither a universal principle nor an eternal, intrinsic truth; it is based on a specific historical agreement. Professor Faur's view of the bilateral covenant, which, as he describes it, assumes that the values that form the ground of the law are "relative to the specific frame of reference established" through the covenant,<sup>20</sup> and which holds that belief in God is a consequence of the acceptance of the law which commands such belief, is compatible with anti-foundationalist perspectives.<sup>21</sup> Second, Professor Faur disputes prior positivist accounts of the rabbinic tradition, in which the authority of the law derives from a supreme commanding figure who imposes his will on his subjects. Instead, the authority of the law in Judaism is the result of a horizontal agreement freely negotiated by two parties, God and Israel. Third, he calls attention to several features of rabbinic hermeneutics that are consonant with various contemporary views of

<sup>16</sup> RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 11 (1979).

<sup>17</sup> See, e.g., Robert Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 3 (1983).

<sup>18</sup> For a similar account of the destabilizing arguments posed by critical theory, see Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory and Judging*, 141 U. PA. L. REV. 371, 375-76 (1992).

<sup>19</sup> Roland Barthes implicitly links the inability to fix meanings in a text to the death of traditional religious projects. According to Barthes, the inability to retrieve an ultimate, univocal meaning of a text implies the rejection of "God and his hypostases—reason, science, law." ROLAND BARTHES, *IMAGE, MUSIC, TEXT* 146-47 (1977). See also Howard Eilenberg-Schwartz, *When the Reader is in the Write*, 7 PROOFTEXTS 194, 196 (1987) (reviewing FAUR, *supra* note 9) ("Barthes insinuates, therefore, that if a religious system were to recognize that its sacred texts sustained a multiplicity of readings which were equally valid, that system would cease to be religious, for such recognition would necessarily entail the death of the Author (God).").

<sup>20</sup> José Faur, *Understanding the Covenant*, TRADITION, Spring 1968, at 33, 36 (1968).

<sup>21</sup> See *id.* (arguing that the "radical" Jewish view of the covenant "has special relevance to an age of scientific relativism").

language and reading. In the rabbinic hermeneutic tradition the scriptural text is polysemous; multiple, even conflicting, interpretations of scripture exist side by side. Judicial interpretation is not based on uncovering the mind of the divine author or determining the meaning the author would have assigned to the work. Instead, as in reader-response theory, the rabbis generate their own meaning. Finally, as in deconstructionism, rabbinic hermeneutics engages in the self-referential "play of the signifiers."

According to Professor Faur, this underlying Jewish worldview has been obscured because "[r]abbinic texts are ordinarily examined through hierarchical distinctions and categories peculiar to Western classical studies."<sup>22</sup> Western metaphysics is an outgrowth of Greek "logocentrism" and the Christian tradition of allegory, which efface the literal meaning of the text and substitute systematic theory. Professor Faur claims that the rabbinic worldview is diametrically opposed to the Greek worldview, and that rabbinic jurisprudence therefore cannot be understood in light of prevailing Western notions of law and hermeneutics. He asks the reader to consider, instead, a distinctively Jewish, non-Greek system of thought. It is not accidental that this distinctive Jewish system of thought seems to resemble, in certain respects, various contemporary literary and philosophic perspectives. Contemporary critical theories, in rejecting logocentrism and the Christian theological assumptions underlying Western metaphysics, reversed the terms of classical Western philosophic and literary analysis. As a result, according to Professor Faur's arguments elsewhere, a "common ground" now exists "sufficient to permit" an understanding of the rabbinic hermeneutic tradition.<sup>23</sup>

Indeed, a growing number of scholars are urging that the rabbinic hermeneutic tradition has much in common with, and is even an analytic precursor of, contemporary literary and philosophic discourse,<sup>24</sup> primarily because of the following: the rabbinic tradition's

<sup>22</sup> Faur, *supra* note 1, at 1657.

<sup>23</sup> FAUR, *supra* note 8, at xxix.

<sup>24</sup> See DANIEL BOYARIN, *INTERTEXTUALITY AND THE READING OF MIDRASH* at x (1990) (arguing that contemporary literary theory "opens up possibilities for reunderstanding midrash"); *MIDRASH AND LITERATURE* at x (Geoffrey H. Hartmann & Sanford Budick eds., 1986) (calling attention to "resemblances between midrash and highly similar critical phenomena which . . . have acquired central importance in contemporary literature, criticism and theory"); SUSAN HANDELMAN, *THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY* at xv (1982) (arguing that there are "profound structural affinities between the work of some of our most recent and influential (Jewish) thinkers like Freud, Derrida, and Bloom, and rabbinic models of interpretation"). For a fuller account of the engagement of post-structuralist literary theorists with rabbinic midrash, see David Stern, *Midrash and Indeterminacy*, 15 *CRITICAL INQUIRY* 132 (1988); William Scott Green, *Romancing the Tome: Rabbinic Hermeneutic and the Theory of Litera-*

rejection of the search for an objective "truth";<sup>25</sup> its production of multiple, equally valid, interpretations of scripture—which neither annul one another nor the text's plain sense;<sup>26</sup> and its use of interpretation to extend the text's meaning rather than to determine original authorial intention. Professor Faur's work is distinguishable from this group in several important respects. First, Professor Faur is by far the most well-versed and competent in the rabbinic tradition itself. Moreover, his views on the rabbinic tradition are the logical culmination of lines of thought he has pursued long before contemporary critical theory gained a following in American academic circles.<sup>27</sup> Finally, Professor Faur is the first to apply poststructuralist literary theory to the legal, as well as literary, aspects of the rabbinic hermeneutic tradition.

The first part of this Comment focuses on methodology. The second part examines more closely Professor Faur's theses about (1) the bilateral nature of the Sinai covenant; (2) rabbinic hermeneutics; and (3) the limits on rabbinic interpretive practice.

### I. METHODOLOGICAL PREMISES

In order to show that Western classical categories tend to obscure the actual nature of the rabbinic conception of law and hermeneutics, Professor Faur constructs a model of two opposing ways of thinking about truth, language, the universe, and legal relationships: the rabbinic worldview and the Greek/Christian/Western worldview. Greek truth is platonic. It seeks to uncover the true meaning, the "ideal form" of the text or the intention of the author.<sup>28</sup> Since the text is a representation of meaning, once meaning is discerned, the text itself is displaced or obliterated. Rabbinic truth, in contrast, is contextual and polysemic. Rabbinic exegetes do not discover meaning, they generate multiple meanings. Therefore, according to Professor Faur, the plain sense of the scriptural text (*peshat*) is never displaced by its canonical interpretation (*midrash*).<sup>29</sup> Professor Faur

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ture, 40 SEMEIA 147 (1987). See also Suzanne Last Stone, *In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 834 n.119 (1993).

<sup>25</sup> See DAVID KRAEMER, *THE MIND OF THE BAVLI* (1990) (contending that the Babylonian Talmud perceives "truth" as irretrievable and, hence, indeterminate).

<sup>26</sup> See Stern, *supra* note 24, at 141-46 (arguing that the midrashic citation of multiple interpretations of Scripture, in which none is given precedence over another, differs from comparable exegetical traditions of the period). Stern concludes, however, that midrashic polysemy has little in common with contemporary concepts of indeterminacy. See *id.* at 135.

<sup>27</sup> See Faur, *supra* note 20, at 33, 36.

<sup>28</sup> Faur, *supra* note 1, at 1657, 1675.

<sup>29</sup> *Id.* at 1674.

writes that "the pagan mind conceives of legal relationships in hierarchical terms, determined by an initial act of 'violence.'"<sup>30</sup> The rabbinic worldview, in contrast, rejects hierarchical legal relationships and violence as legitimate bases for political or legal systems. Greek thought is metaphysical (the world exists or has being); Jewish thought is semiological (the world is essentially a writing that must be interpreted). Therefore, the rabbis treat the text of scripture as a collection of semiotic symbols. Every particle of the text is an appropriate object of interpretation and can be rearranged and connected with another particle through midrashic exegesis, thus acquiring new significance.

Anyone familiar with the rabbinic tradition will find immediate resonances in Professor Faur's model. Nonetheless, by placing the rabbinic tradition in such stark opposition to Greek/Christian/Western thought, Professor Faur's Article raises several interesting questions. Do these two opposing models represent unbridgeable, structural differences between the rabbinic mind and the Greco-Christian mind? If so, what accounts for these structural differences? Are there inherent characteristics of the two cultural groups that help explain the divergent ways the two traditions developed? Or are the real differences between these two models the result of the different substantive and ideational demands of each tradition, in particular, on the rabbinic side, the need to constantly modify contemporaneous philosophic ideas in light of concepts basic to a divinely revealed legal system? And is it really the case, as Professor Faur seems to suggest, that these traditions, in all their various manifestations over time, never had anything in common with one another? Thus, in analyzing the rabbinic worldview in terms of its opposition to Greek/Christian/Western thought, Professor Faur's model raises an interesting methodological question, succinctly posed by one specialist in rabbinic hermeneutics: Is it possible "to understand the Other without distorting it in the very name of Otherness?"<sup>31</sup> Without detracting from the unique aspects of the rabbinic tradition, I would like to reintroduce a notion of historical movement and diversity within the rabbinic tradition itself.

The relationship between the rabbinic tradition and the Greek/Christian/Western tradition, both historically and intellectually, is complex because the rabbinic tradition was never isolated from that world. Not only hellenized figures like Philo and Aristobulus, but also the rabbis themselves, sometimes drew on hellenistic concepts

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<sup>30</sup> *Id.* at 1662.

<sup>31</sup> Stern, *supra* note 24, at 134.



and categories, including Greek exegetical terminology, using them for their own purposes.<sup>32</sup> Maimonides explicitly drew on the Greek (Aristotelian) philosophic tradition in his nonlegal works (and, to a lesser extent, in his legal works), transforming its categories, in order to explain various rabbinic concepts.<sup>33</sup> Did Maimonides, when he departed from the general climate of the philosophic opinion of his time, do so because it embodied an alien mode of thinking about language or the universe or because it was incompatible with the particular assumptions of a revealed legal tradition?

Moreover, the notion that there is one underlying rabbinic worldview requires the collapse of distinctions between all rabbinic periods and genres. Yet rabbinic midrash, rabbinic rationalist philosophy, and kabbalistic exegesis differ from one another, almost as much as they differ from Greek/Christian/Western systems of thought. Kabbalistic exegesis, which seems closest to Professor Faur's theory of language and hermeneutics,<sup>34</sup> it has been cogently argued, is "anti-midrashic" in its theory of language, intended audience, and in several of its underlying theological suppositions.<sup>35</sup> The view of language underlying rabbinic midrash seems to have been problematic for more philosophically inclined medieval Jewish think-

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<sup>32</sup> See SAUL LIEBERMAN, *HELLENISM IN JEWISH PALESTINE* 68-82 (1962).

<sup>33</sup> For example, in his legal masterpiece, the *Mishneh Torah*, Maimonides discusses the obligation of *imitatio dei* in terms similar to Aristotle's golden mean. See MAIMONIDES, *MISHNEH TORAH*, SEFER HAMADA, HILKHOT DE'OT 1:6-7 (describing the attributes of God as constituting the median path which we are obligated to pursue). See also JULIAN GUTTMAN, *PHILOSOPHIES OF JUDAISM* 172 (1964) (describing Maimonides's "inner reconciliation" of Judaism and Aristotelianism).

<sup>34</sup> Consider Gershom Scholem's description of the kabbalistic view of language, revelation, and the law. The essence of the revelation is the letters of the name of God. This is the structure of the Ur-Torah. The written Torah itself is already an interpretation of this Ur-Torah through the interpreter system of the Oral law. Related to this is the notion that the word of God carries infinite meaning and is totally different from the human word. Unlike a human word, it cannot be applied to a specific context of meaning. In other words, it is infinitely interpretable. Legal dissent is the result of this infinite interpretability and, because the human mind is unable to maintain contradictory teachings, dissent is arbitrarily resolved by majority rule or in accordance with a particular school. See GERSHOM SCHOLEM, *Revelation and Tradition as Religious Categories in Judaism*, in *THE MESSIANIC IDEA IN JUDAISM* 293-303 (1972).

Scholem and Moshe Idel dispute whether the kabbalistic view is the logical consequence of deeper penetration into this subject, *see id.* at 293, or a radical departure from earlier, exoteric approaches to the concept of legal interpretation. See Moshe Idel, *Infinites of Torah in Kabbalah*, in *MIDRASH AND LITERATURE*, *supra* note 24, at 141, 153 n.4, 155 n.131 (arguing that kabbalistic exegesis is "anti-midrashic" in its approach to language, interpretive techniques, and in its underlying theological assumptions). Both agree, however, that earlier rabbinic descriptions of legal interpretation are far more ambivalent about the authority of commentator over text.

<sup>35</sup> See Idel, *supra* note 34, at 141.

ers as well.<sup>36</sup>

It is difficult to identify a single, unchanging rabbinic worldview about language and the universe even within the classical period that produced rabbinic midrash. Philo, whom Professor Faur treats as a representative of the rabbinic worldview, seems to bridge the rabbinic and Greco-Christian hermeneutic traditions. While Philo interprets scripture via scripture and offers multiple meanings for the text, he frequently favors the allegorical over the literal meaning, although he cautions against those who discard the laws in favor of their allegorical interpretation. Thus, Philo, like Augustine, endorses a hierarchy of interpretations.<sup>37</sup> Did Philo stop short of allegorizing the law because he held a fundamentally different view of language and hermeneutic theory from his Greco-Christian counterparts, or because of the substantive demands of the rabbinic tradition?

Rabbinic schools of exegesis also differed in their hermeneutic approach to the scriptural text. The Yishmael school, for example, frequently took issue with the Akiva school precisely because the latter invested each particle and word of scripture with exegetical significance. In one such encounter, Rabbi Yishmael responds to Rabbi Akiva: "Am I to infer [a legal proposition] from three [repeated] words? The Bible uses human expressions [and nothing more may be inferred from the repetition]."<sup>38</sup> Several studies suggest, moreover, that rabbinic exegesis only slowly developed an appreciation for preserving the plain sense of the scriptural text even when it contradicted the canonical interpretation. Earlier stages of rabbinic exegesis tended to collapse the distinctions between canonical exegesis (midrash) and the text's "plain" sense (*peshat*) in those cases: the canonical exegesis was assumed to be the plain sense of the scriptural text.<sup>39</sup> Centuries later, culminating in the medieval period, a more refined view of the plain sense of scripture seemed to have developed. Thus, in the fourth century, Mar declared: "Scripture cannot lose its plain sense (*peshuto*)." Rabbi Kahana responded: "I am eighteen years old and have studied all six orders [of the Mishnah] and did not know

<sup>36</sup> See BOYARIN, *supra* note 24, at xii (singling out Maimonides as an exponent of the Aristotelian allegorical tradition, "hostile to the view of language that *midrash* presupposes"); MARC SAPERSTEIN, *DECODING THE RABBIS* (1980) (discussing medieval Jewish attitudes to midrash).

<sup>37</sup> See STEVEN D. FRAADE, *FROM TRADITION TO COMMENTARY: TORAH AND ITS INTERPRETATION IN THE MIDRASH SIFRE TO DEUTERONOMY 8-9*, 179 n.31, 180 n.39 (1991); Stern, *supra* note 24, at 145 (discussing Augustine's interpretive method).

<sup>38</sup> *SIFRE NUMBERS* § 112.

<sup>39</sup> See DAVID WEISS HALIVNI, *PESHAT AND DERASH: PLAIN AND APPLIED MEANING IN RABBINIC EXEGESIS 3-6* (1991).

until now that scripture cannot lose its plain sense."<sup>40</sup>

Although patristic scriptural interpretation does differ markedly from the rabbinic method, changing patterns, similar to those occurring in rabbinic interpretation, are also discernible. Origen<sup>41</sup> invested every "jot and tittle" of scripture with hermeneutic significance, arguing that scripture should be interpreted by means of other scripture, and that not even a letter of scripture is superfluous.<sup>42</sup> Origen used each word of the text to generate an allegorical interpretation, one that displaced the biblical text. The Antiochene school, in contrast, rebelled against the allegorical interpretations of the Alexandrians. The Antiochenes replaced allegory with *theoria*, or spiritual interpretation, but they also insisted that *theoria* was in addition to the "literal" sense of scripture, or the "historic facts" of the text.<sup>43</sup> Origen made connections among the words of scripture to generate philosophic or theologic meaning; the rabbis made connections between the words of scripture to generate legal meaning. In both cases, again, hermeneutic theory or views of language may have been subordinated to the demands of each tradition's particular religious or legal framework. Indeed, one might argue that Christian hermeneutics allegorizes and thus enlarges the plain sense of biblical scripture in light of its larger context, the New Testament; rabbinic hermeneutics, in contrast, refrains from allegorizing the legal sections of scripture and, instead, often displaces the plain sense of the scriptural text.<sup>44</sup>

Similarly, the rabbinic concept of legal authority which Professor Faur describes has parallels in classical Western secular legal systems. Professor Faur writes that "whereas in other legal systems, law is the effect of authority, in Judaism authority is the effect of the law."<sup>45</sup>

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<sup>40</sup> The exact connotation of the rabbinic statement that "scripture cannot lose its plain sense" is the subject of some academic debate. For divergent views, compare José Faur, *Basic Concepts of Rabbinic Hermeneutics*, in 2 *STUDIES IN JEWISH PHILOSOPHY* (forthcoming) (arguing that *peshat* is analogous to "Vico's *sensus communis*") with HALIVNI, *supra* note 39, at 7 (arguing that *peshat* connotes context; thus, the interpretation must consider the full text, that which precedes and follows the segment under exegetical scrutiny).

<sup>41</sup> Origen (184-253 C.E.), Church Father and theologian, was the first Christian scholar to study Hebrew. See 12 *ENCYCLOPAEDIA JUDAICA* 1467 (1972).

<sup>42</sup> See Burton L. Visotzky, *Jots and Tittles: On Scriptural Interpretation in Rabbinic and Patristic Literature*, 8 *PROOFTEXTS* 257, 258-259 (1988) (citation omitted).

<sup>43</sup> On the similarities and differences between rabbinic and patristic methods of interpretation, see *id.* See also William Horbury, *Old Testament Interpretation in the Writings of the Church Fathers*, in 2 *COMPENDIA RERUM IUDAICARUM AD NOVUM TESTAMENTUM, MIKRA* 727, 770 (Martin J. Mulder ed., 1988) (comparing the Antiochene school with Jewish interpretation).

<sup>44</sup> See HALIVNI, *supra* note 39, at 3-4; Frank Kermode, *The Plain Sense of Things*, in *MIDRASH AND LITERATURE*, *supra* note 24, at 179.

<sup>45</sup> Faur, *supra* note 1, at 1660.

Thus, according to Jewish law, all political, judicial, and ecclesiastical authorities may be challenged in the name of an overarching, authoritative law.<sup>46</sup> Yet, both the Jewish and common law sources are more textured than Professor Faur's model suggests. For example, in England, the king or the government was suable throughout the whole range of the law, sometimes with the king's consent and sometimes without. The requirement that the sovereign consent to suit was not based on the view that the king was above the law. The expression "the king can do no wrong" meant that the king was not allowed to do wrong under the law.<sup>47</sup> In the United States, Justice Holmes's revisionist history led to a conception of sovereignty at odds with both the common law and prior constitutional history.<sup>48</sup> Nonetheless, even in the United States, the immunities of various governmental bodies stem less today from a principled lack of power over the sovereign that makes the law than from a pragmatic consideration of the needs

<sup>46</sup> See *id.* at 1660-1661, 1664-1669.

<sup>47</sup> See Lewis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 n.5 (1963) (reviewing the English sources and, in particular, Bracton's view that "the law makes the king, therefore the king must make a return present to the law by subjecting itself to its rules").

For examples from history, consider the famous confrontation of Lord Coke with King James of England in Fuller's Case, 77 Eng. Rep. 1322 (K.B. 1608). In response to Archbishop Bancroft's statement that the king was the final arbiter of jurisdiction within the English legal system since all judges derived authority from him, Coke—at least, according to his own account—answered the king himself by asserting the king's subjection to the law. *Id.* at 1323-24.

Professor Faur recounts a Jewish version of the famous confrontation between Lord Coke and King James of England, the confrontation between King Antipater and the head of the Sanhedrin, Simeon ben Shetaḥ, who called the king to answer in court for the crime of his servant (possibly Herod). See Faur, *supra* note 1, at 1666. Simeon invokes the angel Gabriel to call the court to account for failing to judge the king, and the angel slays the entire court, except Simeon. The story is correctly cited as an example of how sovereign rulers were challenged by the judiciary in the name of the law. But before reciting this story, the Talmud concludes: "[Therefore,] a king may neither judge nor be judged, testify nor be testified against." BABYLONIAN TALMUD, SANHEDRIN 19a-b. This sounds like a pragmatic concession to monarchical power after all. Yet the Talmud adds, via the opinion of Rabbi Joseph, that this rule applies only to kings of Israel, not kings of Davidic descent. *Id.* at 19a. See also MAIMONIDES, MISHNEH TORAH, SEFER SHOFETIM, HILKHOT MELAKHIM 3:7. The division is seemingly a typological one. The Davidic king represents a king who accepts and is personally committed to the law of God and judges in accordance with it, and therefore will be circumscribed by it, while the kings of Israel symbolize those who do not believe they are circumscribed by the law. See SAMUEL ATLAS, NETIVIM BE-MISHPAT HA-IVRI (Pathways in Hebrew Laws) 156-205 (1978).

For an analysis of the historicity and ambiguities of both the English and talmudic stories, see Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 183-90 (1985).

<sup>48</sup> See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (citing by Justice Holmes for Hobbes for the proposition that "there can be no legal right as against the authority that makes the law on which the right depends"). As Jaffe points out, Holmes's theory neither expresses the moral premises of the Middle Ages, the law as it existed in Holmes's time, or as it exists now. See Jaffe, *supra* note 47, at 4.

of various governmental bodies in performing their functions.<sup>49</sup>

Finally, it would be useful to know how the rabbinic system of thought differs, not only from Greek/Christian/Western thought, but also from the alternative metaphysics of contemporary literary and philosophic theory, which provides an implicit backdrop to Professor Faur's discussion of rabbinic law and hermeneutics.<sup>50</sup> Professor Faur has argued elsewhere that contemporary critical theory, because it situates itself in opposition to Greek and Christian systems of thought, may provide a new vocabulary that better facilitates cross-cultural comparison.<sup>51</sup> Yet the attempt to bring together the rabbinic tradition and contemporary literary and philosophic theory presents methodological issues similar to the ones Professor Faur raises with respect to prior studies of the rabbinic tradition. For if, as Professor Faur suggests, others have "hellenized" rabbinic literature by examining it through "categories peculiar to Western classical studies,"<sup>52</sup> Professor Faur also imposes on the rabbinic tradition a culturally and historically disparate system of thought—poststructuralist theory. And if, as Professor Faur writes, "without acknowledging the 'differences,' [the] similarities between [the rabbinic tradition and classical Western] systems are meaningless,"<sup>53</sup> the similarities between the rabbinic tradition and contemporary critical theory, separated as they are by over a millenium of time, cultural contexts, and interests, also must be assessed in light of their differences. For even though the midrashic rabbis and poststructuralists may share an antipathy to systematic theories of the sort endemic in Greek thought, it is still questionable whether the rabbis were espousing an actual alternative to Greek metaphysics, similar to the alternative metaphysics of contemporary critical thought.<sup>54</sup> Indeed, the differences between the two hermeneutic enterprises are hardly trivial. For example, unlike critical theory, rabbinic hermeneutics assumes the divine unity and stability of the scriptural text itself. Far from engaging in reversals of hierarchical

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<sup>49</sup> See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429-66 (1987).

<sup>50</sup> See *supra* text accompanying note 23.

<sup>51</sup> See FAUR, *supra* note 8, at xxix. Consider Bernard Jackson's suggestion that structuralism provides a better theoretical model for analyzing Jewish law than traditional approaches. In stressing the communicative function of law, structuralism need not distinguish between ritual and civil laws, as traditional analytic jurisprudence usually does. See Bernard S. Jackson, *Secular Jurisprudence and the Philosophy of Jewish Law*, 6 JEWISH L. ANN. 3, 41-44 (1987).

<sup>52</sup> Faur, *supra* note 1, at 1657.

<sup>53</sup> Faur, *supra* note 1, at 1659.

<sup>54</sup> See Robert Alter, *Old Rabbis, New Critics*, NEW REPUBLIC, Jan. 5, 1987, at 27, 28-29.

oppositions, midrash supports them.<sup>55</sup> Indeed, the building of a tripartite typology, encompassing not only the rabbinic tradition and Greek/Christian/Western thought but also the alternative metaphysics of contemporary criticism, may best identify the singular aspects of the rabbinic tradition.

## II. THE COVENANT MODEL: LAW AND HERMENEUTICS

### A. *The Bilateral Covenant as the Source of the Authority of Jewish Law*

Professor Faur's concept of the covenant parallels that form of social contract theory in which the contract is between subjects and sovereign rather than between the subjects *inter se*. The result of the contract is that a new sovereign authority is created, the Law, which reigns supreme over both parties. This conception is similar to liberal legal theories. But in contrast to the liberal social contract, the covenant is not about preserving the self or its property. It is about becoming a legal community obligated to the ideals of a particular, culturally contingent law.

Professor Faur has thus avoided both the reductionism of Austinian positivism as well as naturalism, the usual doctrines invoked to explain the validity of Jewish law. Thus, contra Menahem Elon and others, Jewish law is not simply a positivist system in which the source of authority of the law is divine command.<sup>56</sup> Nor is reason the source of obligation in Jewish law, or even the source of belief in God, a conception faithful to Maimonidean jurisprudence.

Professor Faur's covenant model is also compelling because, social contract parallels notwithstanding, it is an authentically Jewish model that draws on historical concepts presented in the Bible. It carries important insights for a new conception of the possible grounds for legal relationships, stressing the love of God by autonomous and free wills as the motive for obedience to the law. The model is thus faithful to the conception of man in Jewish theology as free to obey or disobey God. It explains why the community will limit itself to the Torah as the source of law. Moreover, following Maimonides, the model explains why the content of Jewish law is not synonymous with God's revelations to the patriarchs or post-Pentateuchal prophets, but is limited instead to matter revealed at Sinai. The model also explains the active role of human judgment and develop-

<sup>55</sup> See *id.* See *infra* note 67 for a brief discussion of further differences between critical literary theory and rabbinic hermeneutics.

<sup>56</sup> See THE PRINCIPLES OF JEWISH LAW 15 (Menahem Elon ed., 1975) ("The source of authority of the Torah is divine command.").

ment in Jewish law because a cardinal aspect of the covenant is God's promise that legal revelation is now exhausted.

I wish to raise three questions about Professor Faur's bilateral covenant model. First, I understand Professor Faur to be arguing that his theory can be tested against the presentation of the rabbinic system in Maimonides' legal code. Yet Maimonides' legal code provides no specific support for the proposition that the authority of the law in Judaism is based on a bilateral, negotiated covenant, freely agreed to by both parties. Neither Maimonides nor the rabbis of the classical period devoted any systematic attention to the idea of a bilateral, negotiated covenant. Nor did Maimonides associate the authority of the law with a bilateral, negotiated covenant. Maimonides instead seems to have concentrated on the uniqueness of Moses as prophet-lawgiver.<sup>57</sup> Although the bilateral covenant model is not based on any juridical principles inherent in the rabbinic tradition, the model may reflect various religious philosophic assumptions of the Jewish tradition, evidenced primarily in the Bible and in certain non-legal, *aggadic* discussion of the relationship between God and the Jewish people. Thus, despite Professor Faur's desire to divorce rabbinic jurisprudence from its religious framework, in giving the covenant a role analogous to the social contract in secular jurisprudence, Professor Faur seems to be combining theology and jurisprudence. Perhaps, it is impossible, after all, to separate the two.<sup>58</sup>

Second, is the covenant, in fact, the product of free negotiation rather than unilateral imposition? A bilateral pact, like the social contract, assumes an agreement initiated by equal parties for the benefit of both. Is the concept of a bilateral pact, applied in the context of a contract whose terms are not themselves negotiable and whose rejection implies that Israel will not exist as a community, more than a metaphor? Indeed, the rabbinic traditions are markedly ambivalent even on the question of whether Israel voluntarily assented to the laws. The Bible records Israel's agreement and rabbinic narrative tells of God's search for a community willing to accept the Torah.<sup>59</sup> On the other hand, the Bible portrays the human awe and fear when the law was given and promises swift punishment for those who breach the law. A central image in Jewish tradition is the "com-

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<sup>57</sup> See 2 MAIMONIDES, GUIDE OF THE PERPLEXED 39 (Shlomo Pines trans., University of Chicago Press 1963).

<sup>58</sup> See Elliott Dorff, *The Covenant: The Transcendent Thrust in Jewish Law*, 7 JEWISH L. ANN. 68, 71-72, 84 (1988) (arguing that a covenant model takes account of Jewish theology but concluding that the covenant in Jewish law is closer to ancient Near Eastern suzerainty treaties than to social contracts).

<sup>59</sup> See BABYLONIAN TALMUD, AVODAH ZARAH 2b.

manded man," with its implication of heteronomy. Jewish legal tradition often emphasizes that the doing of commandments out of obligation is more meritorious than voluntary adherence.<sup>60</sup>

The *aggadic* discussion of the Sinai revelation poses the issue of consent in interesting terms.<sup>61</sup> According to Rabbi Avdimi, the initial acceptance of the law at Sinai was involuntary. God raised a mountain over the heads of Israel and proclaimed: "Accept the Torah or this will be your grave."<sup>62</sup> Nonetheless, generations later, in the days of Ahasuerus, Israel accepted the law freely.<sup>63</sup> The midrashic traditions thus suggest that humans did not voluntarily enter into the covenant since the covenantal obligations preceded Israel's consent. Although the rabbinic traditions emphasize Israel's ultimate acceptance of the laws, the authority of the law does not seem to depend on such acceptance.

Third, what guarantees the perpetuity of the contract pursuant to Professor Faur's model? If the obligations imposed by the covenant are conventional and have no moral force except to the extent covered by the agreement, as Professor Faur implies, why is there any obligation to continue to abide by the agreement? Appeal to an antecedent agreement to abide by the contract reintroduces a natural law conception of keeping promises. Moreover, can God be bound to a contract in perpetuity without reintroducing the concept of a theological God, whom Israel trusts?

### B. Rabbinic Hermeneutics

#### Traditional descriptions of the rabbinic self-perception of their

<sup>60</sup> See BABYLONIAN TALMUD, QIDDUSHIN 31a ("Greater is he who is commanded and fulfills [the precept], than he who is not commanded yet fulfills it.").

<sup>61</sup> According to Jewish law, *midrash aggadah* is not legally authoritative. For a review of the sources, see JUDAH GOLDIN, *The Freedom and Restraint of Haggadah*, in *STUDIES IN MIDRASH AND LITERATURE* 253, 256-57 (Barry L. Eichler & Jeffrey H. Tigay eds., 1988). Nonetheless, the *aggadah* is the product of the talmudic rabbis and reflective of their own self-understanding. In the absence of legal discussion, *aggadic* discussion of the nature of the covenant should be probative.

<sup>62</sup> See BABYLONIAN TALMUD, SHABBAT 88a (translated by author). This view may be a minority opinion, however. Thus, Rabbi Aha bar Yaakov immediately retorts: "This provides a powerful protest against the Torah." *Id.* Nonetheless, Rabbi Avdimi's views seem to have been accepted by some Geonic and medieval commentators. See *infra* note 63; EPHRAIM E. URBACH, *THE SAGES* 328, 830 nn.38 & 40 (Israel Abrahams trans., 1979).

<sup>63</sup> See BABYLONIAN TALMUD, SHABBAT 88a. Rabbinic commentators also struggled with the question of whether the covenant is involuntary or consensual. One reconciliation poses that Israel voluntarily accepted the written law at Sinai, but not the oral law. The latter was imposed under duress and only freely accepted during the days of Ahasuerus. See 15 MENAHEM M. KASHER, *TORAH SHELEMAH*, 103 n.223 (1944). This interpretation also explains why the voluntary acceptance of the oral law is identified with the time of Purim. Purim is a holiday created entirely through the authority of the oral law.



role as interpreters of the law usually emphasize that the role of the rabbinic exegete was not to have new ideas but rather to lay open the truth embedded in the text.<sup>64</sup> According to Professor Faur, however, the rabbis understood that the canonical interpretation of scripture, the focus of *midrash halakhah*, is a "reader-collusive" activity in which the exegete, functioning as an author, generates the meaning of the object being interpreted. The rabbis never sought to recover the intention of the divine author; rather, the goal of midrashic interpretation is to generate meaning from the words of the text in response to historical, social, and other needs. The rabbinic exegete, somewhat akin to the deconstructionist, generates meaning by making new connections between the various words and particles of scripture.<sup>65</sup> Exegesis is therefore the artistic composition of the rabbis and is judged by the standards applied to all artistic creations.<sup>66</sup>

Midrash is an interpretive technique that crosses many genres, including exegesis of the narrative sections of the Bible, homilies, poems, stories, and parables, all referred to as *midrash aggadah*, and interpretations of the legal sections of scripture, referred to as *midrash halakhah*. It has become standard academic fare to debate whether the rabbinic approach to *midrash aggadah* foreshadows post-structuralist theory, which locates textual meaning in the "shuttle space between the interpreter and the text," rather than in the text itself as a product of an actual author.<sup>67</sup> There has been almost no discussion,

<sup>64</sup> See, e.g., SCHOLEM, *supra* note 34, at 290 (explaining that the commentator assumed that truth existed in the text and also imposed the truth upon the text).

<sup>65</sup> "As did Jacques Derrida, the rabbi sought a 'free-play,' amounting to a 'methodological craziness' whose purpose is the 'dissemination' of texts; this craziness, though 'endless and treacherous and terrifying,' liberates us to an *errance joyeuse*." FAUR, *supra* note 8, at xviii (citation omitted).

<sup>66</sup> See Faur, *supra* note 1, at 1674-1677.

<sup>67</sup> MIDRASH AND LITERATURE, *supra* note 24, at xi. *Midrash aggadah* certainly shares some characteristics of poststructuralist literary theory, including the multiplicity of interpretations assigned to one scriptural phrase, the playful approach to scriptural language, the diversion of attention from the text being interpreted to the exegesis itself, the elaborate shuttling among different verses, which resembles intertextuality, and the frequent focus on a small flaw or irregularity in the text, as a departure for the interpretation.

There are also important differences. The most notable difference is that the midrash assumes, on the theological level, both the divine unity and sanctity of the text and the possibility of recovering the fullness of the divine presence through the activity and study of *aggadah*. Cf. SIFRE: A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY § 49, at 106 (Reuven Hammer trans., 1986) [hereinafter SIFRE DEUTERONOMY] ("If you wish to come to know [God] . . . study haggadah."). Moreover, on closer inspection, the multiple interpretations of a scriptural verse often reveal an Archimedean viewpoint affirming the unity of revelation or the ways of God. Thus, the different interpretations attached to a single verse are often simply multiple variations on a single meaning which effectively foreclose opposing interpretations. See Green, *supra* note 24, at 61-63. Sometimes a single message is attached to a given verse, but has been progressively elaborated in different narrative contexts. See Su-

however, of the relationship of legal midrash to contemporary literary theory. On the contrary, the general consensus has been that the rabbis felt themselves freer in the *aggadic* realm—from which legal conclusions generally are not drawn<sup>68</sup>—but in matters of praxis, of discerning behavioral norms and fixing them, significant constraints on the exegetical process existed.<sup>69</sup> Professor Faur seems to dispute this. He contends that the rabbinic method of midrash does not vary with the genre of material interpreted, whether the material consists of scriptural narration, scriptural laws, or nonscriptural documents.<sup>70</sup>

Professor Faur's work is important precisely because it focuses on midrash, not only as a literary text but also as a legal text—namely, a method of interpretation to derive laws. His theory that the midrashic method does not differ with the nature of the material interpreted has implications, not only for scholars of midrash, but also for American law scholars interested in the problematic relationship of legal texts to literature and the effect of interpretative theory in literature on law.<sup>71</sup>

Professor Faur's first argument in support of his thesis flows from the nature of the relationship that he posits was formed between God and Israel through the covenant. As he argues at greater length in his highly original book, *Golden Doves with Silver Dots*, the exegetical role of the rabbi/reader is a consequence of the covenantal relationship formed between God and the community, when God, the author, surrendered His work to a public who approved it. The pro-

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zanne Last Stone, *The Transformation of Prophecy*, 4 CARDOZO STUD. L. & LITERATURE 167, 178 n.63 (1992). Finally, unlike poststructuralist theory, midrash is unconcerned with reversals of hierarchies. The status of God and man, Israel and the nations, redemption and exile remain stable. See Alter, *supra* note 54, at 32. See generally David Stern, *Moses-cide: Midrash and Contemporary Literary Criticism*, 4 PROOFTEXTS 193, 202-03 (1984) (reviewing SUSAN A. HANDELMAN, *THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY* (1982)); Howard Eilberg-Schwartz, *Who's Kidding Whom?: A Serious Reading of Rabbinic Word Plays*, 55 J. AM. ACAD. RELIGION 765 (1987); see Stone, *supra* note 24, at 844 n.172.

<sup>68</sup> See *supra* note 61. *Midrash halakhah*, unlike *midrash aggadah*, is a source of law.

<sup>69</sup> See 2 COMPENDIA RERUM IUDAICARUM AD NOVUM TESTAMENTUM, MIKRA, 577-80 (Martin J. Mulder ed., 1988) [hereinafter MIKRA]. Cf. HALIVNI, *supra* note 39, app. ii, at 159:

Midrash halakha remains less susceptible to modern theory than midrash aggada. Midrash halakha's cues overwhelmingly come from within the text. The text is the principal guide . . . [to] behavior. The reader's (the interpreter's) role is much more limited. He interacts with the text, but what he brings to bear on it is much more impoverished. The hermeneutic principles at his disposal are fewer in number; his maneuverability is restricted.

*Id.* (endnote omitted).

<sup>70</sup> See FAUR, *supra* note 8, at xxv.

<sup>71</sup> For a good summary of the debate, see RICHARD A. POSNER, *LAW AND LITERATURE* 209-68 (1988).

cess of surrendering, he argues, is described by the technical term *mesirah*. *Mesirah* is also the term used in rabbinic sources to refer to the passing of the Torah from one generation to another. *Mesirah*, Professor Faur argues, is also a technical legal term for depositing a document with a court and authorizing the court to interpret the document as the court sees fit, without regard to the parties' intent. The use of the same term to refer to the surrendering of the Torah implies that each generation is authorized to interpret the text of scripture free from the constraints of authorial intention.<sup>72</sup>

In this article, Professor Faur tests this thesis against the juridical framework of the rabbinic legal tradition provided by Maimonides. He argues that the bilateral covenant ratified the law formally presented at Sinai, not the intention of the lawgiver. In support of this thesis, he also cites the basic principle that governs legal interpretation, articulated in the Oven of Akhnai story. In this incident, a heavenly voice proclaiming the law in accordance with Rabbi Eliezer's opinion is disregarded in favor of the majority opinion of the rabbis. The heavenly voice is banished by Rabbi Yehoshua, with the citation of a scriptural proof-text: "The Torah is no longer in Heaven."<sup>73</sup> For Professor Faur, the scriptural proof-text is a juridical principle conferring power on the rabbis to disregard authorial intention (revealed by the heavenly voice) and, instead, to generate new meanings from the words of scripture in response to changed circumstances and historical necessity.

The juridical principle embodied in Rabbi Yehoshua's citation of the proof-text that the "Torah is not in Heaven" is that, from the legal standpoint, revelation is exhausted; post-revelational communication from the author, including clarificatory divine voices, has no legal import.<sup>74</sup> That post-Sinaitic heavenly voices are illegitimate evidence of divine authorial intent does not impel the conclusion, however, that the midrashic rabbis viewed the interpretive process as divorced from all search for authorial intention. For example, resort to the words of the scriptural text alone is perfectly compatible with a theory of authorial intention. Thus, for some constitutional law scholars, the constitutional text itself is a "privileged form of evidence" of authorial intention because "the text *is* the intention of the authors or of the framers."<sup>75</sup> In this view, the four corners of the document control

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<sup>72</sup> See FAUR, *supra* note 8, at 13-16, 124.

<sup>73</sup> BABYLONIAN TALMUD, BABA MEZIA 59b (translation by author).

<sup>74</sup> *Id.*

<sup>75</sup> Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13, 21 (citing Charles Fried, *Sonnets LXV and the "Black Ink" of the Framers' Intention*,

and exclude or have priority over any other data that might be considered in reaching a legal decision. In this, as in other intentionalist models, the reader's goal is to use the text to "open a channel to the mind of the author."<sup>76</sup> The channel is opened by assuming that the author had a reason for writing everything he did. "To understand the work means to discover or understand those reasons."<sup>77</sup>

Midrashic hermeneutics also seems to assume that the divine author had a reason for writing everything He did. Hence, every word of the text is significant. Similarly, it has been cogently argued that midrashic hermeneutical methods and practices stem precisely from the association of the text with the author. Because the entire text of scripture is viewed as a unified expression of the divine will, every word and particle can be connected to one another.<sup>78</sup> Indeed, one might argue further that rabbinic exegetes do not focus solely on the words and particles of the text but also on values and ideals expressed in the text. These ideals express the divine author's value system and illuminate why He wrote everything He did. Rabbinic exegesis implicitly takes account of this value system. Thus, by making connections between the words of the text in light of the value system expressed by the author in the text, rabbinic exegetes and judges are attempting to come to know the mind of the author and discern how the author wished the text to be applied in different situations.<sup>79</sup>

Moreover, it is perfectly plausible to talk of "intention about intention."<sup>80</sup> Both literary and legal scholars who advocate an intentionalist model recognize that the author may well have implanted ambiguity in the text in order to authorize later interpreters to choose between a range of legitimate options. In exercising that authority, later interpreters still are pursuing authorial intent.<sup>81</sup> This view is consonant with various rabbinic perspectives on the revelation, which emphasize that the divine author purposefully encoded certain ambiguities into the law.<sup>82</sup> The task of the rabbinic exegete, in this view, is

100 HARV. L. REV. 759 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 895-98 (1985).

<sup>76</sup> POSNER, *supra* note 71, at 221.

<sup>77</sup> *Id.*

<sup>78</sup> See Stern, *supra* note 24, at 150.

<sup>79</sup> See *id.* ("To know the Torah, to read and follow the divine blueprint is, in this sense, a way to come to know the mind of the divine architect and, ultimately, to imitate Him and construct a human existence modeled after God's creation of the world.").

<sup>80</sup> POSNER, *supra* note 71, at 228.

<sup>81</sup> See Richard H. Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939 (1986) (arguing that the correct method of interpretation is the method the author herself asks the reader to use).

<sup>82</sup> See 1 THE MIDRASH ON PSALMS 173 (William Braude trans., 1959) (quoting the *Jerusalem Talmud*). The *Jerusalem Talmud* states:

to choose among these encoded ambiguities through the application of the appropriate canons of interpretation, including the hermeneutic rules used to explicate the text of scripture. In sum, Professor Faur may have described the underlying assumptions that make reading possible for the rabbinic exegete, rather than the theory of interpretation that the rabbinic exegete is consciously adopting.<sup>83</sup>

Finally, even if midrashic hermeneutic practice cannot be understood within the parameters of intentionalist models, one should ask how the rabbis, and their audience, understood rabbinic authority to interpret the text free from the constraints of divine authorial intent. Here too, the theological premises of the Jewish legal system may intersect with jurisprudential or hermeneutic theories of interpretation and authority. The authoritative expositors of the scriptural text were not simply judges applying a national constitution; they were a professional elite sharing certain religious characteristics and suppositions, in particular, suppositions about the nature of interpretation and authority in a divinely revealed legal system. In talmudic society, for example, the judge derived his power not from institutional appointment, but from communal acceptance of the judge.<sup>84</sup> Thus, if rabbinic hermeneutic practice is explicable, in part, in light of the association of the scriptural text with the expression of the will and value system of its divine author, the rabbinic authority to interpret is explicable, in turn, in light of the association of the rabbi with Torah. Indeed, in the Talmud, the rabbi is described as a living embodiment of Torah.<sup>85</sup> Rabbinic authority, which is not derived from any institutional appointment, but rather from acceptance by the larger community which the rabbi addresses, is achieved and sustained because the

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R. Yannai said: The words of the Torah were not given as clear-cut decisions. For with every word which the Holy One, blessed be He, spoke to Moses, He offered him forty-nine arguments by which a thing may be proved clean, and forty-nine arguments by which it may be proved unclean. When Moses asked, "Master of the Universe, in what way shall we know the sense of the law?", God replied: "The majority is to be followed. When a majority says it is unclean, it is unclean; when a majority says it is clean, it is clean."

*Id.*

<sup>83</sup> Cf. Post, *supra* note 75, at 25-26 (arguing that hermeneutic insights have modest implications for theories of constitutional interpretation because they "describe the conditions that make reading possible, but offer no guidance to the judge" in then choosing among different theories of constitutional interpretation, such as originalism or the search for present shared values).

<sup>84</sup> See HANINA BEN-MENAHEN, JUDICIAL DEVIATION IN TALMUDIC LAW 182 (1991). As Ben-Menahem notes, "this social institution of acceptance (kabbalah) is one which deserves further study." *Id.*

<sup>85</sup> See BABYLONIAN TALMUD, MAKKOT 22b.

community recognizes that the particular sage has come to represent Torah and, in a sense, God's will.

I now wish to pursue two related questions: First, how do the transmitted exegetical traditions, customs, and laws intersect with the hermeneutic practices Professor Faur has described? Second, can the hermeneutical conventions, used by the rabbis to interpret the legal sections of scripture, be viewed as significant constraints on, or even authorizers of, rabbinic exegesis?

Professor Faur seems to suggest that midrashic exegesis is primarily, if not exclusively, historically or sociologically driven, in that it is a response to new developments, specific historical pressures, or even changed conceptions of public morality. It seems from Professor Faur's presentation that, other than the particular historical, legal, or moral crux that serves as the occasion for the midrashic exegesis, no other constraints on the hermeneutic process of making connections in the text—the play of the signifiers—existed. Thus, Professor Faur states that there are no “rules to decide between different hermeneutical options”<sup>86</sup> and the thirteen hermeneutical rules used by the rabbis “are sufficiently broad to allow for all types of interpretations and associations.”<sup>87</sup> Rabbinic Judaism thus emerges as a legal system shaped primarily by hermeneutic theory, liberated on the one hand from hermeneutic conventions and a conception of God's will, and on the other hand from a historical past that includes legal and exegetical traditions, ideas, cultural practice, and social life.

But even if there were no official institutional controls on interpretation, it is unlikely that rabbinic hermeneutics was so unconstrained. Institutional constraints can “work silently,” as David Stern notes, “through what Frank Kermode has called the tacit knowledge of the permitted range of senses.”<sup>88</sup> Second, the rabbis undoubtedly inherited traditions about the proper interpretations of specific verses. They assumed that scripture must conform with transmitted laws. Indeed, the freest manipulation of the words and particles of scripture seems to occur when midrashic exegesis is used to ground traditional laws in the scriptural text.<sup>89</sup> This raises the question of whether mid-

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<sup>86</sup> Faur, *supra* note 1, at 1675.

<sup>87</sup> *Id.*

<sup>88</sup> Stern, *supra* note 24, at 146 (citation omitted).

<sup>89</sup> Thus, Saul Lieberman concludes that the rabbis “applied comparatively few rules to the elaboration of the legal part of the Torah,” in contrast to the exposition of the nonlegal sections of the Bible and “in the *asmakhtot* (supports) for the Halakha.” LIEBERMAN, *supra* note 32, at 78. See also MIKRA, *supra* note 69, at 579. Cf. SIFRE DEUTERONOMY, *supra* note 67 (discussing the laws of phylacteries where the *Sifre* uses the hermeneutical rules in an extravagant fashion and finds scriptural support for the undoubtedly ancient practice of *tefillin*).

rashic interpretation is in fact an independent hermeneutic technique for deriving the law at all or whether it is a means of linking the normative *halakhah* to scripture.<sup>90</sup> As many scholars point out, there are two forms of legal midrash: confirmatory and innovative. The innovative form usually stays much closer to the plain meaning of the text and relies on comparatively few hermeneutic rules, while the confirmatory form uses all means possible to find a scriptural base for an existing *halakhah*.<sup>91</sup> Thus, the rabbinic hermeneutic practice that Professor Faur describes—the unconstrained process of making connections between various words and particles of scripture—may take place within a circumscribed setting in which the result is often a foregone conclusion. When the result is not a foregone conclusion, the kinds of associations made in the text may be constrained by the comparatively few hermeneutic rules employed.

Of course, from an external perspective, it may well be the case that the hermeneutic conventions, the thirteen rules of interpretation, do not, in fact, constrain interpretation in any significant way. From an internal perspective, however, both the rabbis and Maimonides seem to assign a much greater role to the hermeneutic conventions than Professor Faur suggests. Indeed, the rabbis themselves, and particularly Maimonides, seem to have considered these rules a set of limited, authorized procedures for interpreting the legal sections of scripture.

Although, as Professor Faur notes, the same basic exegetical methods and techniques are used for both the legal and the narrative sections of Scripture and for nonscriptural legal documents, the rabbis cite fewer types and numbers of exegetical rules as relevant for deriving laws.<sup>92</sup> Whatever the pedigree of these rules, the limited number of rules cited for producing legal midrash, in contrast to *midrash aggadah*, suggests a system of self-imposed limitations on the types of

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<sup>90</sup> The scholarly debate is linked to the question whether legal midrash preceded or postdated the Mishnah. Jacob Neusner argues, for example, that the Mishnah is rabbinic Judaism's first literary document and is a statement of Jewish law arranged according to philosophical divisions. See JACOB NEUSNER, *JUDAISM AND SCRIPTURE: THE EVIDENCE OF LEVITICUS RABBAH* 3-5 (1986). According to Neusner, legal exegesis, *halakhic* midrash, developed later in order to ground Mishnaic law in scripture. David Weiss Halivni takes the opposite view and argues that the *midrashei halakhah* are earlier than the Mishnah. The latter is actually a truncated form of legal midrash (lacking the exegetical underpinning and argumentation of the midrash) suitable for memorization and thus preservation of the law in times of threatened Jewish autonomy. See DAVID WEISS HALIVNI, *MIDRASH, MISHNA AND GEMARA: THE JEWISH PREDILECTION FOR JUSTIFIED LAW* 1-3 (1986).

<sup>91</sup> See *supra* note 89.

<sup>92</sup> Seven hermeneutic rules for producing legal midrash are attributed to Hillel the Elder and thirteen to Rabbi Yishmael. Thirty-two rules are cited for the production of *midrash aggadah*, attributed to Rabbi Eliezer. See MIKRA, *supra* note 69, at 584-86.

connections and associations that can be made among the words of scripture; possibly in order to constrain aberrant explanations of the law. Second, even the application of these thirteen rules is restricted by the rabbis. For example, the rabbis ruled that one may not introduce a *gezerah shavah* (an analogy from verbal congruities) on one's own authority; a *gezerah shavah* can be used only to support an existing tradition.<sup>93</sup>

Maimonides assigns a critical role to the hermeneutic conventions. In Maimonides' system, the thirteen hermeneutic rules are divinely revealed Sinaitic norms,<sup>94</sup> given to the rabbinic community in order to derive the laws from the scriptural text. Thus, Maimonides seems to suggest that the divine author guarantees the interpretive process by stipulating the authoritative procedures within which the exegetical community must operate. The laws derived through the hermeneutic rules are themselves authoritative precisely because they are based on divinely authorized procedures.

Thus, the hermeneutic conventions, received traditions, and interpretations already in place within the rabbinic community are inseparable from the hermeneutic activity itself. These conventions and traditions should not be viewed simply as external limitations on the otherwise self-referential, closed yet creative, reader-text collusion occurring within midrashic hermeneutic practice. They should be viewed as constitutive of midrashic practice.<sup>95</sup>

Professor Faur contends that his description of midrashic hermeneutics is compatible with Maimonides' description of the rabbinic legal system. In Maimonides' system, according to Professor Faur, the obligations generated through midrashic exegesis are rabbinic (*derabbanan*).<sup>96</sup> They are the product of the creative collusion between the rabbis and the text. In my view, Maimonides does not assign rabbinic status to all midrash, as Professor Faur seems to be stating. Maimonides differentiates between laws derived solely through midrashic exegesis (by means of the application of the hermeneutic rules to the scriptural text) and interpretations received from Moses transmitted down the generations that have been rooted in scriptural exegesis. Laws derived solely through the application of the hermeneutic rules to the scriptural text may be the subject of dis-

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<sup>93</sup> See JERUSALEM TALMUD, PESAḤIM 6:1; MIKRA, *supra* note 69, at 578 (citing other limitations).

<sup>94</sup> See MAIMONIDES, HAKDAMOT LEPIRUSH HAMISHNAYOT 13 (Mosad HaRav Kook ed., 1968).

<sup>95</sup> See Steven D. Fraade, *Interpreting Midrash 2: Midrash and its Literary Contexts*, 7 PROOFTXTS 284, 294 (1987).

<sup>96</sup> See Faur, *supra* note 1, at 1676.



pute, resolved through a vote of the High Court. A later High Court may overturn the decisions of the prior Court. Nevertheless, these laws may well have biblical (*deorayta*) status.<sup>97</sup> Traditions received from Moses that have been rooted in the scriptural text through the use of hermeneutics are revelational, historically transmitted, and certainly have biblical status (*deorayta*). There can be no dispute about these traditions; their authority is based on continuous practice.<sup>98</sup>

To illustrate the complex interrelationship between rabbinic hermeneutics of scriptural interpretation, historical, legal, or social needs, and transmitted legal traditions, I would like to focus more closely on two examples of rabbinic hermeneutics cited by Professor Faur.

Professor Faur's first example is the famous rabbinic definition of the biblical *lex talionis*.<sup>99</sup> Tannaite teaching declares that the biblical "eye for an eye" means "monetary compensation for the injured eye."<sup>100</sup> Professor Faur describes the biblical *lex talionis* as an example of one of the "undefined" laws of scripture (*dinim mufla'im*), "which were not defined by oral tradition" and thus "can be defined exclusively by the judiciary."<sup>101</sup> According to Professor Faur, the "ambiguity in the Law [is] designed to allow for adaptability and development" through the judiciary.<sup>102</sup>

Yet, are the tannaite rabbis reading the scriptural passages pertaining to *lex talionis* in order to clarify an undefined law, or are they explicating the logical and scriptural basis of a law stipulated by oral tradition? The closer one looks at the primary sources, the more it seems that no new development was involved.<sup>103</sup>

The talmudic discussion of *lex talionis* explicates a mishnah dealing with forms of monetary compensation for injury. The Talmud

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<sup>97</sup> See MAIMONIDES, MISHNEH TORAH, SEFER SHOFETIM, HILKHOT MAMRIM 2:1. Although the issue is not free from debate, it appears that Maimonides assigns these laws rabbinic status (*derabbanan*) only if the Talmud has not labeled them biblical. See also MAIMONIDES, SEFER HAMIZVOT, HAKDAMAH.

<sup>98</sup> See MAIMONIDES, *supra* note 94, at 31-33; MAIMONIDES, MISHNEH TORAH, SEFER SHOFETIM, HILKHOT MAMRIM 1:2 (distinguishing between interpretations received from Moses (*mipi hashmuah*), yet rooted in scriptural exegesis, and rulings deduced solely through the application of the hermeneutic rules).

<sup>99</sup> See Exodus 21:24.

<sup>100</sup> BABYLONIAN TALMUD, BABA QAMMA 83b-84a (translation by author).

<sup>101</sup> Faur, *supra* note 1, at 1672.

<sup>102</sup> *Id.*

<sup>103</sup> For a comprehensive analysis of the rabbinic exegesis of *lex talionis*, see Judah Goldin, *Of Change and Adaptation in Judaism*, in STUDIES IN MIDRASH AND LITERATURE, *supra* note 61, at 217-18 (concluding that the rabbis never thought there was a time in which *talionis* was literally exacted). See also Symposium, *Between Talmud and Torah: The Law of Talionis*, S'VARAH, Spring 1991, at 45.

searches for the scriptural source of the mishnaic ruling and cites a variety of tannaite traditions to the effect that an "eye for an eye" means monetary compensation. The talmudic discussion suggests that the tannaite interpretation of an "eye for an eye" as monetary compensation is supported by hermeneutic principles as well as by logic, because of the impossibility of calculating and inflicting equivalent physical losses.<sup>104</sup> Although the talmudic discussion certainly concedes the ambiguity of the biblical phrase "an eye for an eye" itself, the discussion seems unanimous in assuming that the legal import (and true intent) of the scriptural text was, from the beginning, monetary compensation. True, the Talmud reports the statement of Rabbi Eliezer that the scriptural text refers literally to the eye of the offender. But, as the Talmud presents it, Rabbi Eliezer is not suggesting that the scriptural phrase "an eye for an eye" means something other than monetary compensation. The Talmud explains (via Rabbi Ashi) that Rabbi Eliezer believes that compensation must be based on the value of the offender's eye rather than the value of the eye of the injured party. It is conceivable (though unlikely) that Rabbi Ashi's explanation is an attempt to harmonize Rabbi Eliezer's views with the general understanding. Yet, in the lengthier citation of Rabbi Eliezer's view, in the tannaite *Mekhilta*, Rabbi Eliezer's objection emerges more clearly as technical, not substantive.<sup>105</sup> Rabbi Eliezer is questioning whether the verse in *Exodus*, standing alone, is a sufficient proof-text for the accepted *halakhah*. Possibly, he believed that the text of *Leviticus* 24:19-20, which specifies that one who injures his fellow is subject to payment of an indemnity, was needed to provide a proper grounding for the *halakhah*.<sup>106</sup> Interestingly, independent evidence suggests that as early as the second millennium B.C.E., compensation rather than actual retribution could be exacted.<sup>107</sup>

Maimonides' treatment of *lex talionis* remains a scholarly puzzle because Maimonides seems to offer different explanations for the exegesis in various works. In both the *Introduction to the Mishnah* and the *Mishneh Torah*, the specific frame of reference against which Pro-

<sup>104</sup> See BABYLONIAN TALMUD, BABA QAMMA 83b-84a.

<sup>105</sup> See MEKHILTA DERABI YISHMA'EL, MASHEKHTA DENEZIKIN 8 (Jacob Z. Lauterbach trans., 1949).

<sup>106</sup> See STUDIES IN MIDRASH AND LITERATURE, *supra* note 61, at 218. The discussion of *lex talionis* in *Mekhilta Derabi Yishma'el* is difficult. Goldin does an admirable job dissecting this text, suggesting that the text is best understood as a comment on *Leviticus*, which was shifted to *Exodus* by association. See *id.* at 218 n.14.

<sup>107</sup> For the primary sources, see the citations in STUDIES IN MIDRASH AND LITERATURE, *supra* note 61, at 218 n.14.

fessor Faur tests his legal theory, the identification of "an eye for an eye" with monetary compensation is attributed to an interpretation received from Moses, transmitted down the generations (*mipi hashemuah*), and was never the subject of dispute or change.<sup>108</sup> Accordingly, the meaning of *lex talionis* is not determined through judicial interpretation but is stipulated by oral tradition. In his *Guide of the Perplexed*, however, Maimonides seems to suggest that the plain sense of the scriptural verse is physical punishment, interpreted as monetary compensation because humans, unlike God, cannot extract commensurable physical punishment. Here, Maimonides offers a logical rationale for the law that differs from the talmudic presentation in noting the inconsistency between the interpretation and the plain sense of the scriptural text.<sup>109</sup> This distinction does not really emerge in the Talmud, again suggesting that the distinction between plain sense (*peshat*) and applied meaning (*derash*) was more fluid in the earlier period. Nonetheless, Maimonides' comments in his *Guide*, even taken alone, do not compel the conclusion that he viewed the tannaite interpretation of *lex talionis* as the product of adaptation.<sup>110</sup>

<sup>108</sup> See MAIMONIDES, INTRODUCTION TO THE TALMUD 81 (Z. Lampel trans., 1975):

This basic point must be fully understood: The explanations which were known to have originated with Moses were never subject to any disagreements whatsoever. Ever since Moses, until the present, we have never found a dispute arising among the sages of any time or era—from the days of Moses to those of Rav Ashi—in which there would be a sage who would say that one who takes out the eye of his fellow has his eye removed as an observance of the verse, "Eye replaces eye" . . . and that it would be only another sage who would state that the verse means he is obligated to monetarily compensate for the loss.

*Id.*

Similarly, in his *Mishneh Torah*, Maimonides suggests that the interpretation of *lex talionis* is a law, apparently rooted in the scriptural text, handed down from the mouth of Moses. MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIN, HILKHOT HOVEL UMAYIK 1:6. Thus, Maimonides classifies *lex talionis* as a law whose validity rests on tradition, but which has been related to the scriptural text through exegesis.

<sup>109</sup> See MAIMONIDES, GUIDE OF THE PERPLEXED 3:41 (Shlomo Pines trans., 1963). Maimonides comments as follows: "For at present my purpose is to give reasons for the [biblical] texts and not for the pronouncements of the legal science. Withal I have an opinion concerning this provision of legal science, which should only be expressed by word of mouth." *Id.*

<sup>110</sup> See David Novak, *Lex Talionis: A Maimonidean Perspective on Scripture, Tradition, and Reason*, S'VARAH, Spring 1991, at 61 (harmonizing Maimonides' comments in the *Guide of the Perplexed* with his comments in the *Mishneh Torah*). There is a school of Maimonidean scholarship, exemplified by the work of Leo Strauss, that favors an esoteric, rather than exoteric, explanation of Maimonides' system of thought. See LEO STRAUSS, PERSECUTION AND THE ART OF WRITING (1952). According to Jacob Levinger, an exponent of this school of thought, Maimonides concealed his realistic historical conception of the development of the oral law in his public legal writings and often classified rabbinic innovations as received traditions in these writings so that the nonphilosophically sophisticated masses would not be led to doubt the immutability of Torah law. See Jacob Levinger, *The Oral Law in Maimonides' Thought*, 37 TARBIZ 282 (1968).

Levinger points, in particular, to the differential treatment of *lex talionis* in Maimonides'

Professor Faur's second example, the substitution of prayer for the Temple service, is an ideal illustration of the complex intersection of the pressures of historical time, legal traditions, and scriptural interpretation in rabbinic hermeneutics. Professor Faur vividly poses the historical background to the hermeneutic activity of the rabbis. Without hermeneutics, post-Second Temple Judaism would have had to either break with scripture or confine itself to the "sociopolitical and religious institutions of biblical Israel."<sup>111</sup> Specifically, with the destruction of the Second Temple, sacrifices ceased. This posed a potentially fatal situation for Judaism. Either minor temples would have to be instituted outside of Israel, breaking with the biblical ideal, or religious services would have to be eliminated altogether, effectively heralding, as Professor Faur writes, the "end to both the Jewish people and the Jewish religion."<sup>112</sup> This dilemma, Professor Faur argues, was resolved through hermeneutics.<sup>113</sup> By making innovative connections in the scriptural text, the rabbis associated the Temple "service" (*avodah*) with "service of the heart" or prayer (*avodah shebalev*). Through exegesis, "the Rabbis were able to sanction a new form of worship. . . ."<sup>114</sup> Prayer thus would replace (not displace) the sacrifices—an exegetical formulation that "revolutionized the history of religion,"<sup>115</sup> and culminated in the creation not only of the synagogue, but also of the church and the mosque.

It is worth briefly revisiting history, however, to illustrate how historical circumstance, hermeneutics, and legal traditions operate together.

Although the exact roots of the synagogue phenomenon are unclear, synagogues existed before the destruction of the Second Temple, not only in the diaspora, where Jews were far from the Temple, but also in Jerusalem.<sup>116</sup> The synagogue was the locus not only of scripture reading but also of communal prayers. Both the reading of scripture and prayer were supplements to the Temple service. Much of the liturgy used today was formulated before the destruction of the Temple. Fixed times of praying also is attested to by Second Temple

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*Guide* and in Maimonides' legal works. The *Guide*, according to Levinger, hints at Maimonides' true position that the laws were changed rabbinically—a position Maimonides shrank from asserting in his legal works that were intended for a mass audience. See *id.* at 289.

<sup>111</sup> Faur, *supra* note 1, at 1673.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Shmuel Safrai, *The Synagogue*, in 2 *THE JEWISH PEOPLE IN THE FIRST CENTURY* 908, 909 (S. Safrai & M. Stern eds., 1976).

sources.<sup>117</sup> In short, these elements of Jewish religious and social life already were in place before the destruction of the Temple.

The innovative activity of the post-Temple rabbis consisted, it seems, of transforming prayers into institutional substitutes, rather than counterparts, for the expiatory function of the sacrifices. Certainly, the destruction of the Temple was a major turning point in the history of Judaism, one that demanded rabbinic response if Judaism was to retain its essential unity. To some, cessation of sacrificial worship meant the loss of all ties between the people and God. Thus, Rabbi Yehoshua ben Hananya, one of the sages of the time, declared: "Woe to us . . . for this house that lies in ruins, the place where atonement was made for the sins of Israel."<sup>118</sup> One of the chief architects of the post-Temple restoration, Rabbi Yoḥanan ben Zaḳai (and his successor, Rabban Gamliel II) instituted a variety of legislation to fill the spiritual void created by the destruction of the Temple, including the transfer of customs once performed at the Temple to the synagogues.<sup>119</sup> Moreover, the spiritual void was filled not just by prayer, but by several forms of divine worship already in existence. Rabbi Yoḥanan ben Zaḳai reportedly responded to Rabbi Yehoshua's statement of despair by asserting that "we have another means of atonement which is as effective and that is, deeds of lovingkindness."<sup>120</sup> The term "deeds of lovingkindness" referred to a wide variety of pietistic acts, possibly including prayer.<sup>121</sup> Often, Torah study was identified as the substitute for sacrificial worship.<sup>122</sup> Thus, the same midrashic exposition that equates the words "Temple service" (*avodah*) with prayer through an exegesis of the phrase "service of the heart" (*avodah shebalev*) in *Deuteronomy* 10:10 also equates Temple service (*avodah*) with the study of Torah through an exegesis of the phrase "God took man and placed him in the Garden of Eden to work it (*le'ovdah*)."<sup>123</sup>

The gradual substitution of prayer for sacrificial atonement should be viewed within this larger context. Deeds of lovingkindness became associated with acts of love; prayer and, often, the study of Torah, became associated with the Temple worship. Midrashic expo-

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<sup>117</sup> For a full discussion of the sources, see *id.* at 908-13.

<sup>118</sup> BABYLONIAN TALMUD, AVOT DERABI NATAN 4:5.

<sup>119</sup> One example is the sounding of the shofar (ram's horn) on the New Year. See MISHNAH, ROSH HASHANAH 4:1.

<sup>120</sup> BABYLONIAN TALMUD, AVOT DERABI NATAN 4:5.

<sup>121</sup> See STUDIES IN MIDRASH AND LITERATURE, *supra* note 61, at 227.

<sup>122</sup> See BABYLONIAN TALMUD, AVOT DERABI NATAN 4:5; BABYLONIAN TALMUD, MENAḤOT 110a.

<sup>123</sup> SIFRE DEUTERONOMY, *supra* note 67, at 85.

sitions work their transformation of Jewish society within the context of a specific history, drawing on existing and traditional legal and cultural practices.

Maimonides, of course, does not treat the phenomenon of prayer as a rabbinically instituted, historical development of any kind. For Maimonides, the scriptural text itself refers to several forms of divine worship, all subsumed under the term "service of God" (*avodah*), including prayer, Torah study, and Temple service. Accordingly, in his *Book of Commandments*, Maimonides lists prayer as one of the six hundred and thirteen biblical commandments revealed at Sinai, for which no hermeneutical derivation is necessary at all.<sup>124</sup> Similarly, in the *Mishneh Torah*, Maimonides codifies the obligation of daily prayer as a law received from Sinai.<sup>125</sup>

### C. *The Limits on Rabbinic Interpretive Practice*

Just as transmitted traditions shape rabbinic hermeneutics, I have suggested that religious or ideational concepts and attitudes also shape rabbinic hermeneutics. Indeed, they may well operate as powerful constraints on interpretive practice.<sup>126</sup> Professor Faur's final point, on the limits of reader-collusion in midrash, illustrates this point obliquely.

According to Professor Faur, the only constraint on rabbinic legal interpretation derives from the very grant of authority to interpret. Interpretation may de-author the text; it may not "deauthorize" it—or "render it *void*."<sup>127</sup> Because the covenant called the law itself into being a sovereign authority, any interpretation which negates the

<sup>124</sup> MAIMONIDES, SEFER HAMIZVOT, MIZVAT ASEH 5 (listing prayer as one of the "minyan hamizvot" and therefore a biblical obligation). Cf. HALIVNI, *supra* note 39, at 71-72 (noting Maimonides' willingness to depart from the plain sense of the scriptural text in counting the number of the commandments).

<sup>125</sup> See MAIMONIDES, MISHNEH TORAH, SEFER AHAVAH, HILKHOT TEFILAH 1:1 (stating that the obligation of daily prayer, although not the liturgy itself or the fixed times set for prayer, is a law received from Moses (*mipi hashmuah*)).

<sup>126</sup> For example, Professor Faur cites cases of "exegesis redefining the law" or restricting "laws that were no longer compatible with public morality." Faur, *supra* note 1, at 1672-73. No doubt moral considerations influenced rabbinic exegetical interpretation. Yet there is virtually no discussion in classical rabbinic literature of the moral inadequacies of scriptural laws or the need to interpret the law in the light of heightened conceptions of public morality. Instead, the exegetical interpretation is presented as a natural outgrowth of the text. See David Weiss Halivni, *Can a Religious Law be Immoral?*, in PERSPECTIVES ON JEWS AND JUDAISM 165 (Arthur A. Chiel ed., 1978). This lack of focus on evolving conceptions of public morality is explicable in terms of the religious character of the Jewish legal system. Scriptural law is divine and, hence, theoretically not subject to change solely on the basis of considerations of "public morality."

<sup>127</sup> Faur, *supra* note 1, at 1677.

authority of that law must be illegitimate. For Professor Faur, this includes "Gnostic, Christological and antinomial" interpretations.<sup>128</sup>

Professor Faur thus uses the covenant both to ground the authority of Jewish law and to determine the limits of interpretive practice in Jewish law. This methodology parallels recent attempts in American constitutional theory to build a bridge between the authority of the Constitution and constitutional interpretive practice.<sup>129</sup> For example, adherents of originalist theories of interpretation, which focus on the framers' intent, frequently justify originalism by pointing to the authority of the Constitution itself as an original act of will. Similarly, constitutional interpretation which appeals to evolving values often is grounded on a conception of the Constitution as authoritative because it embodies an ongoing national "being."<sup>130</sup> Attempts to link theories of constitutional interpretation to theories of constitutional authority often run into difficulties, however. First, constitutional authority is not "external to the processes of its own interpretation."<sup>131</sup> Second, in American jurisprudence, one rarely finds in practice that a single theory of constitutional authority consistently determines or drives a jurist's interpretive methodology.

Similarly, in Jewish jurisprudence, the conception of the law as sovereign authority does not appear to correlate directly with the scope of legitimate rabbinic interpretive practice. Maimonides suggests, for example, that a temporary suspension of biblical law is well within the rabbinic power.<sup>132</sup> Professor Faur also suggests that various scriptural laws, such as the law of the rebellious son or capital punishment, were effectively annulled through interpretations based on new conceptions of "public morality."<sup>133</sup> What then constitutes an illegitimate interpretation that de-authorizes the text and renders it void?

Professor Faur suggests that the distinction is best captured by comparing rabbinic interpretive practice to antinomial, Gnostic, or Christological interpretations that obliterate the law itself or allegorize it entirely. This distinction seems entirely sound. The question is whether this distinction between rabbinic, acceptable interpretations

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<sup>128</sup> *Id.*

<sup>129</sup> See Post, *supra* note 75, at 18-26.

<sup>130</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920). See also Post, *supra* note 75, at 23-26.

<sup>131</sup> Post, *supra* note 75, at 27.

<sup>132</sup> MAIMONIDES, *MISHNEH TORAH, SEFER SHOFETIM, HILKHOT MAMRIM 2:4*. Cf. *BABYLONIAN TALMUD, YEVAMOT 89b*.

<sup>133</sup> Faur, *supra* note 1, at 1672. True, these laws are not obliterated through allegorical interpretation, the method of the Pauline Church; nonetheless, their literal application is made impossible.

and Pauline, anti-rabbinic, unacceptable interpretations was, in fact, institutionalized by the rabbis in any explicit formulation. Professor Faur attempts to locate a rabbinic rule constraining legal interpretation along the lines of his thesis in the *Babylonian Talmud's* denial of a share in the world to come to those who offer "faltering interpretations" and to those who "disclose a face to the Torah not in accordance with the law."<sup>134</sup> According to Professor Faur, these statements explicitly condemn "subversive" legal interpretations "designed to void a particular law."<sup>135</sup> Logically one might expect to find explicit rules outlawing allegorical interpretations of the kind engaged in by the Pauline Church. Surprisingly enough, the rabbinic sources Professor Faur cites do not, in my view, address this issue. In many manuscripts and parallel versions of the talmudic source, the words "not in accordance with the law" are absent. These words are probably an interpolation.<sup>136</sup> More importantly, close analysis of the talmudic passage and its parallels suggests that the Talmud is not attempting to fix substantive limitations on legal interpretive practice at all. The Talmud equates one who offers a "faltering interpretation" of scriptural narrative with one who "discloses a face in the Torah."<sup>137</sup> This latter term is ambiguous; it might, as Professor Faur and others have argued, refer to methods of legal interpretation.<sup>138</sup> The term often connotes, however, a brazen or insolent attitude.<sup>139</sup> The talmudic traditions are linked to a scriptural verse that condemns those who act with a "high hand" and mock God's words.<sup>140</sup> Furthermore, to illustrate those who offer "faltering interpretations," the *Babylonian Talmud* cites the example of Menasheh, son of King Hizkiah, who mocked God by pointing out scripture's inclusion of seemingly pruri-

<sup>134</sup> BABYLONIAN TALMUD, SANHEDRIN 99b.

<sup>135</sup> Faur, *supra* note 1, at 1678, 1677 n.98.

<sup>136</sup> See EPHRAIM E. URBACH, *THE SAGES* 296, 818 n.35 (1979) (noting that these words are absent from the Kaufmann and Cambridge manuscripts and are additions).

<sup>137</sup> See BABYLONIAN TALMUD, SANHEDRIN 99b; SIFRE, COMMENTARY ON NUMBERS 15:30, 112.

<sup>138</sup> Other scholars, like Professor Faur, have argued that the phrase "disclose a face" is a reference to the "seventy faces," or interpretive aspects, of the Torah. These scholars hold that the talmudic traditions refer specifically to Pauline interpretive practice or to the Alexandrian allegorical school of interpretation. See A. BUCHLER, *STUDIES IN SIN AND ATONEMENT IN THE RABBINIC LITERATURE OF THE FIRST CENTURY* 103 n.2 (1928) (referencing the various views); see also URBACH, *supra* note 136, at 296-97 (aligning himself with this view).

<sup>139</sup> For a discussion of the etymology of "disclose a face" and its association with insolence in rabbinic literature, see BUCHLER, *supra* note 138, at 103. See also BABYLONIAN TALMUD, SHEVU'OT 13a (comment of Rashi); BABYLONIAN TALMUD, YOMA 85b; BABYLONIAN TALMUD, KERITOT 6a (comment of Rashi, interpreting *megaleh panim*) ("discloses a face," as one who approaches the words of Torah with an insolent attitude).

<sup>140</sup> *Numbers* 15:30-31.



ent narratives.<sup>141</sup> The *Jerusalem Talmud*, in turn, defines one who "discloses a face to the Torah" as either one who denies the divinity of the law or one who shows his insolence by publicly transgressing the law, as did King Yehoyakim.<sup>142</sup> Finally, whatever was the actual import of the talmudic traditions in their original context, Maimonides codifies the latter view.<sup>143</sup>

In sum, the traditions which Professor Faur cites are associated by both the Talmud and Maimonides with religious attitudes, not substantive constraints on interpretive practice. The traditions specifically condemn those who purposefully and publicly ridicule the corpus of the divine text or approach the words of the text with an insolent attitude. Notably, Maimonides places emphasis on the intention of the actor in determining the legality of his acts. This emphasis is consonant with the broad powers Maimonides assigns, conversely, to the rabbis to restrict biblical laws. The intention of the sages in restricting certain laws is to preserve the corpus and purpose of the law as a whole; hence, such restrictions are valid.

Thus, the officially formulated constraints on legitimate interpretive practice emerge as less substantive than attitudinal. An appropriate attitude to the text may well affect the way interpretation itself proceeds and, indeed, endow the interpretation with authority it would otherwise lack.<sup>144</sup> Indeed, one could read the statement Professor Faur cites to identify the limits on "reader-collusion" as a caution not to approach the scriptural text as contemporary readers do—as an object on which to exercise the Nietzschean will to power.<sup>145</sup>

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<sup>141</sup> BABYLONIAN TALMUD, SANHEDRIN 99b.

<sup>142</sup> See JERUSALEM TALMUD, SANHEDRIN 10:1; JERUSALEM TALMUD, PEAH 1:1.

<sup>143</sup> MAIMONIDES, MISHNEH TORAH, SEFER HAMADAH, HILKHOT TESHUVAH 3:11.

<sup>144</sup> Official authority to interpret the law is vested only in judges who, in addition to formal academic requirements, have a "fear of the Lord" (*yirai elohim*). MAIMONIDES, MISHNEH TORAH, SEFER SHOFETIM, HILKHOT SANHEDRIN 2:7.

<sup>145</sup> See FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL, Aphorism 211, at 35 (M. Cowan trans., 1955) ("*But the real philosophers are commanders and legislators. They say 'It shall be thus' . . . Their 'knowing' is creating. Their creating is legislative. Their will to truth is will to power.*"). For the view that Nietzsche was a hermeneutic conservative, who urged the reader to overcome his or her own will to power over the text in order to discover the text, see Weisberg, *supra* note 81, at 962-76.