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TEXT, TRADITION, AND REASON IN COMPARATIVE PERSPECTIVE: AN INTRODUCTION

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PREFACE

In the fall of 2004, the Program in Jewish Law and Interdisciplinary Studies of Cardool School of Law organized an international conference on the competing claims to authority of text, tradition, and reason in both law and religion. The conference was predicated on the view that legal and religious traditions share a common interpretive structure and face common dilemmas over how to integrate the often contradictory claims of foundational texts, historical traditions of textual interpretation, and reason. Representatives of the American constitutional tradition, the three major monotheistic religions, and Confucianism took part. The interdisciplinary spirit of the Symposium also was enhanced by the decision to invite scholars working in a wide variety of fields, including law, religious studies, anthropology, political theory, philosophy, history, theology, and sociology. The participants came together for two days of lively discussion and sometimes heated exchange. Despite the variety of traditions represented, the papers related to one another in often unexpected ways. Surprisingly, the debate exposed deep commonalities of approach among those who work in the field of law and legal theory, irrespective of the tradition they represented, with the sharpest divisions emerging between scholars of a single tradition who work from within different disciplines.

The published Symposium begins with introductory comments by Professors Adam Seligman and Suzanne Last Stone, the conveners of the conference. Session I follows, consisting of articles exploring various theoretical problems emerging from the way tradition represents

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itself. The topic of Session II is the political setting of interpretation. Session III explores the way the idea of time enhances or challenges the authority of certain texts or interpretive practices.

INTRODUCTION

The tension between a foundational text, the accumulated traditional understandings of the text, and reason, is a familiar one to students of constitutional law. Today's Supreme Court is as divided over the proper methodology of interpreting the Constitution as any in the Court's history. What justificatory role, if any, should be given to the intent of the framers, the text of the Constitution, precedent and political tradition, or moral and practical reasoning? How should the Court order among these different modes of interpretation when they are in tension with one another? These questions are not unique to contemporary, secular, constitutionally organized societies. The tension between text, tradition, and reason runs through all of the historical civilizations and is attested to in the literature of all cultures. It is especially evident in those religions organized around a revealed text, taken to be the word of God. In those cases, the history of religious thought is often a history of different understandings of the respective roles of *tradition* and of reason in the social understanding of the foundational text.

What is ultimately at stake in all of these debates is authority. The different models of interpretation offer different modes of legitimating a legal decision. Predicating the authority of a decision on tradition or on reason has radically different implications for the organization of society and for the legitimacy of rulers. Neither tradition nor reason ever existed, of course, in its "pure" form (although such forms have always had their defenders). Yet, the very juxtaposition of the one to the other has been one of the most creative tensions in the history of the human imagination.

In Judaism, for example, the authority of the plain meaning of the revealed text (*peshat*), of received opinion (*shemua* or knowledge from tradition), and of interpretive reasoning have all figured prominently in the history of interpretation. The split between the Karaites and rabbinic Judaism was a result of the Karaite claim that only the plain meaning of the revealed text was authoritative. Indeed, within the rabbinic interpretive tradition itself there was a tension between the authority of received opinion and the role of dialogic reasoning in understanding the meaning and import of a revealed injunction. Those familiar with the Talmud can point to myriad of examples where a debate over the legitimacy of various interpretive strategies, such as

analogical reasoning (*kal v'chomer*) is interrupted by one of the interlocutors, as follows: "Why are you arguing over this? I *heard* it from . . . ." The statement makes a claim for the authority of received opinion over that of dialogic reasoning in the understanding of the text, a claim that was often contested. This tension became a central trope in the corpus of the Jewish legal tradition. Today, the question whether open-ended principles of justice, broad scriptural injunctions reflecting moral, social, and religious aims, have weight in interpretive practice or are capable of generating new legal norms within new political and social contexts is a lively one.

Within Islam, entirely different schools of legal analysis developed over precisely the issue of text versus reason, some stressing the revealed text and others emphasizing the interpretive role of reason (*qiyas*). From the Shafi'is and the origins of usul al-fiqh, through the writings of Ibn Hanbal and later Hanbalites, to Muhammad 'Abduh and the more contemporary writings of Abdolkarim Soroush, to name just a few, the role of reason in providing binding understandings of the revealed word has been the source of much contestation. Much of the contemporary struggle over reform in the Islamic world centers precisely over the role of reason and the legitimacy of its use in approaching, understanding and, ultimately, in the practical, social embodiment of the Sunna of the Prophet and of the revealed text of the Qur'an. Indeed, the neo-Hanafi criticism of the Islamic traditionalists in the writings of such thinkers as Sayyid Ahmad Khan or Shibili Nu'mani is precisely over the role of legal reasoning versus tradition in the understanding of the *hadith*. This is a conflict, with much at stake, which rages from the Indian sub-continent and Pakistan to Egypt and Iran. Thus, one of the important and widely acclaimed books published in 1989 in Egypt by Shaykh Muhammad al-Ghazali bears the title: *The Sunna of the Prophet: Between the Legalists and the Traditionalists*.[1] On the other hand, the interpretive hermeneutics of the Qur'anic scholar, Nasr Abu-Zayd, led to his current exile in Holland. The Iranian scholar Abdolkarim Soroush is one contemporary thinker who has done much to try to bring about a new legitimacy to rational interpretation in Islamic thought, weaving it with a unique appreciation of the work of Rumi and the Sufi or mystical strains of the Islamic tradition. Unfortunately, not enough is known in the West of Shiite jurisprudence, which does not have the separation of legal schools that characterizes Sunni Islam.

The interpretive history of Christianity is strikingly similar. The Protestant Reformation of the sixteenth century turned, in large part, on the respective roles reserved for interpretation, reason, and hierarchical

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[1] MUHAMMAD AL-GHAZALI, AL-SUNNA AL-NABAWIYYA BAYN AHL AL-FIQH WA AHL AL-HADITH (1989).

authority in providing access to the divine word, pitting papal authority against the plain meaning of the text and individual conscience as a legitimate interpretive tool. Conflict between Catholics and Protestants turned on the search for justification of infallible truth via a self-evident criteria. The Protestants contested papal authority to interpret the word of God, while the Catholics dismissed inner conscience as a legitimate interpretive device. Thus, Francoise Veron, one of the masters of the Counter-Reformation polemic, labored to show how the Protestant claim that scripture was self-evidently clear was manifestly false. Rather, it was in need of interpretation. But predicating interpretation on individual conscience, he claimed, would open the flood-gates to endless sectarianism and antinomian potentialities: that "search for heaven and their lusts as well," as one early seventeenth century Congregationalist described his more enthusiastic neighbors.[2] While the struggles of the Reformation are over, the issues at stake are still very much alive, often dividing mainline Protestant Churches from their more evangelical brethren.

Even in systems lacking a revealed foundational text, such as Confucian thought, there is a similar need to navigate between what are understood as eternal principles of justice and the more circumscribed abilities of human reason to apprehend them. None of the Confucian classics claim divine origin, but all are the works of "sages" who best understood the principles of an abstract *tian* ("heaven" or "nature"). The duty of later commentators was to realize and adjust those principles to their contemporary reality. One could criticize commentaries on a wide range of grounds, from stylistic inelegance to the inauthenticity of the sources they used. Commentary that departed too far from received ideas about eternal principles, however, was dismissed as outside the classics (*bujing*) or simply uncultured (*buwen*). A tension thus existed between claims of fixed knowledge of fundamental principles, the need to adjust them to a changing world, and the problem of textual openness.

As these few examples make clear, each tradition-including that of secular modernity predicated on the Rights of Man and Citizen—must deal with the relative weight and role of traditional authority, on the one hand, and of reason and its interpretive tools, on the other, in its own attempt to organize social life around foundational texts. If anything, this problem has become greatly exacerbated in the modern world where the justification for turning to tradition and the past is no longer self-evident, and "reason" has become not simply part of the interpretive process, but rather, an independent basis of authority. With this development, which has defined the project of the Enlightenment

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[2] ADAM B. SELIGMAN, MODERNITY'S WAGER: AUTHORITY, THE SELF, AND TRANSCENDENCE 137 (2000).

from the eighteenth century until today, the authority of tradition has been either marginalized (in secular societies) or totalized (in the "imagined" traditionalism of different fundamentalisms). The Enlightenment rejection of tradition and engagement with realms inaccessible to reason has provoked a fundamentalist response, which rejects the role of reason in the engagement with revealed and traditional texts. The weaknesses of the first position were already evident to those critics of the Enlightenment as J.G.A. Hamman; those of the latter, are evident daily. One result has been the crisis in authority that Max Weber projected, when the legal-rational order loses all transcendent anchors. Another has been the increasing inability to bridge the differing epistemological and hermeneutical universes of tradition and reason. This conflict is increasingly perceived as a "clash of civilizations," when what is at stake is a conflict *within* all civilizations.

The changing terms of political and social debate in modernity has for the past two hundred years elided these issues, rather than solved them. At the dawn of the twenty-first century, however, we have come to realize that we have lost the fruitful tension between tradition and reason that had animated traditional societies, at their best.

For the first time in centuries, a renewed engagement of the one with the other may be possible. As the undisputed supremacy of reason as source of social and moral authority has been called into question over the course of the last century, and as religious traditions have been forced to confront and negotiate within a rapidly-changing and now global cultural milieu, new crises, but also a renewed willingness to revisit this tension, are surfacing throughout the world. The revival of neo-Confucian thought in China; the encounter between the Jewish legal tradition and the authority of a secular state and civil society in Israel; the return of Reform Judaism to new/old forms of ritual engagement; the cyclically dangerous and thrilling experiment to democratize Islamic Iran; the transformed position of the Roman Catholic Church to the non-Catholic world following the Second Vatican Council; constitutional debates over the teaching of creationism in the public schools; and the role of evangelical Protestantism in shaping contemporary politics in the United States are but a few examples of the social implications of this re-emergent tension.

The organizers of this conference could think of no better way to contribute to this nascent development than through the scholarly process. This Symposium offers a reflective and comparative inquiry into the theoretical sources of this change through a comparative investigation of the way tradition and reason are negotiated in different legal and religious traditions.

I.   TRADITION AND INNOVATION

The papers presented below are divided into three general categories. The first category, "Tradition and Innovation," provides a theoretical overview of the tension between traditional authority and innovation within Judaism, Islam, canon law, and Confucianism. In both law and religion, in contrast to philosophy, deference to prior texts or prior practices, such as a compact, a historical revelation, precedents, or custom, supplies an acceptable reason for current decisions and practices. Within religious legal traditions framed around the concept of divine revelation, such deference may follow from ideas particular to religion, such as the timeless force of divine command or the veneration of generations closest to the initial revelation. Even within religious traditions, however, deference to traditional authority is often the product of ideas familiar to students of secular law, chief among them consent. Thus, pursuant to Maimonides' jurisprudence, the authority of the Talmud follows from an agreement to canonize its legal decisions and the authority of the earlier *tannaite* generations follows from an agreement not to debate their decisions. Canonical texts and rulings may be interpreted and reinterpreted but not rejected. A common critique of such traditional forms of authority is that they subordinate innovation to continuity. The essays in this section explore the extent to which claims of traditional authority are understood within the tradition itself as confining the capacity of later interpreters to innovate.

The most far-reaching claim for innovation within tradition is advanced by Michael Puett in his overview of early Chinese Confucianism.[3] Puett focuses on the nature of practice, the relation of current to past practice, and the critical question of how to innovate from within a tradition of practice. In contrast to the Western emphasis on pure will as the defining locus of change, of action, and, consequently, of innovation, Confucianism emphasizes the very ever-present molding and remolding of tradition. Presenting what he terms, a "ritual theory of innovation," Puett shows how Confucian notions of propriety allow for the continual refining of one's own responses to the constantly changing situation (of life) as defined by and contextualized within ritual's embrace.[4] In an inherently fractured world (which is the Confucian view of our own), where the center, as it were, never held, there are only actions, human actions, to be guided by ritual prescriptions. Thus, the goal of Chinese Confucianism is to build continuity in a fragmented world by ritualizing useful actions that better

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[3] Michael Puett, *Innovation as Ritualization: The Fractured Cosmology of Early China*, 28 CARDOZO L. REV. 23 (2006).

[4] *Id.* at 28.

order the world. In this worldview, new rituals are not innovations; rather, viewed retrospectively, they are exemplary actions that should be followed. The Confucian ritual canon is an open canon: new, useful rituals are continually added to the canon and useless ones discarded. This is a deeply pragmatic vision of ritual and, indeed, Puett describes Chinese Confucianism as an excellent illustration of what an anti-foundationalist, pragmatic "tradition" would look like.

The very need for ritual regulation of a fractured universe of action does, however, also evoke (with Laozi) the call for positing a ground or foundation for the ordered act. Not surprisingly, this ground is to be found in the sovereign or ruler who generates order as if it were a natural process. Disguising actual innovation as the timeless, natural order of things is a useful instrument of rule—for any sort of sovereign—but its dangers, as Puett points out, are significant. Interestingly, it is the very anti-foundationalism of the ritual tradition that provides a critical corrective (at least potentially) to this tendency.

Hanina Ben-Menachem's paper on *The Second Canonization of the Talmud* puts forth a startlingly similar argument to that of Puett.[5] Both contend that what we term traditional authority is only authoritative in retrospect. New sources of authority emerge within historical time and yet are made to appear as if they are the timeless, natural order of things. Ben-Menachem's argument unfolds through a study of what he terms the first and second canonizations of the Talmud. He begins by noting that the Jewish legal tradition may be divided into three distinct forms of law: Law, law to be applied, and concrete judicial rulings. Law with a capital L, as Ben-Menachem puts it, consists of the trans-historical and context-free reflection on the Law of God. As Shlomo Fischer later describes, such reflection on God's law is a utopian activity: to try to capture the law "as it exists in the mind of God."[6] This pure or theoretical law is not authoritative for practice. Only law that has been translated by the sages into "law to be applied," law that can be applied in concrete factual settings is positive law and authoritative for practice. Judicial rulings consist of the application of the positive "law to be applied" to specific cases. The authority of the later interpreter to classify a prior law as theoretical only rather than law to be applied places considerable power in the hands of the later interpreter to keep the law flexible and unfrozen. Ben-Menachem focuses on the subsequent interpretive quandaries of classifying a

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[5] Hanina Ben-Menahem, *The Second Canonization of the Talmud*, 28 CARDOZO L. REV. 37 (2006).

[6] *See generally* Shlomo Fischer, *Excursus: Concerning the Rulings of R. Ovadiah Yosef Pertaining to the Thanksgiving Prayer, the Settlement of the Land of Israel, and Middle East Peace*, 28 CARDOZO L. REV. 229 (2006).

particular law as either theoretical law or law-to-be applied.[7]   This quandary marks the career of the Talmud.

According to Ben-Menachem, the Talmud initially contained all three categories of law. In the medieval period, however, under the influence of Rashbam, the Talmud came to be viewed, instead, as a codification entirely of law to be applied and practical rulings. Ben-Menachem terms this medieval shift the second canonization of the Talmud. It is only with this second canonization that the Talmud actually became a repository of authoritative, positive law. Yet, the second canonization portrays the Talmud as if it was authoritative positive law to be applied from the very beginning. Thus, the authority of the Talmud as positive law emerges only in retrospect. The Rashbam's vision of the Talmud is innovative; yet, over time, it appears as the natural order of things. As with Confucianism, pragmatic considerations are a driving force behind the instantiation of new authoritative traditions. But whereas Confucianism is theoretically committed to pragmatism, a driving force behind the second canonization of the Talmud as authoritative law to be applied is the contingency of historical circumstance. The historical vicissitudes of Judaism shattered the oral tradition that the jurists possessed of how to distinguish between theoretical law and law to be applied. It was, Ben-Menachem posits, the loss of this oral tradition that led, in the medieval period, to the re-conception of the Talmud as a canonical text of positive law to be applied, impeding innovation.

The critical distinction Ben-Menachem draws between theoretical law and law to be applied brings into greater focus the commonalities and difference among the Jewish, Christian, and Muslim legal traditions. Although Ben-Menachem claims that the idea of non-positive theoretical law is unique to Judaism, that claim is open to question. Indeed, both Silvio Ferrari, in his discussion of canon law,[8] and Asifa Quraishi, in her discussion of Islamic law,[9] rely on the same distinction. Ferrari argues that the capacity of canon law to change is intimately linked to its juridical nature. Positive law is authoritative and confining. But later interpreters arbitrate whether canon law is properly seen as positive or theoretical law (law *in potentia*). Ferrari describes a

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[7] An example of this quandary would be how to categorize Maimonides' famous Mishne Torah. Often understood as a paradigmatic example of law-to-be-applied, any even cursory study of the work will uncover its strong claims to be characterized as theoretical law (Maimonides's discussion of daily prayer is thus, not a simple how-to list of ritual acts, but a meditation on divine love).

[8] Silvio Ferrari, *Adapting Divine Law to Change: The Experience of the Roman Catholic Church (With Some Reference to Jewish and Islamic Law)*, 28 CARDOZO L. REV. 53 (2006).

[9] Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

process within the canon law tradition that is the exact inverse of the one Ben-Menachem discerns with respect to the Talmud. Whereas over time, the Talmud was transformed from a corpus that included fluid theoretical law into a repository of exclusively positive, authoritative law to be applied, canon law was transformed over time from a set of authoritative rules into a set of fluid and open-ended values and directives. Thus, what was once perceived as a set of rules was later seen to be values and directives. These values and directives require additional human acts of positivization before they bear the juridical character of authoritative rules. It is precisely the authority of later human interpreters to control the process of positivization that provides canon law with the capacity for change and adaptation.

Ferrari contrasts the differing juridical structures within Jewish and Islamic law on the one hand, and Christian law, on the other, which allow for adaptation and historical change. The first, Ferrari contends, deals with change primarily through judicial interpretation, while the Christian tradition does so through legislative acts. Rooted in the "ideology of juridical completeness" and the "presence of a legislator who is . . . super-ordained above the entire community," the uniqueness of canon law lies in its delegation of legislative authority to a single ruler, the pope.[10] The pope is charged with the process of transforming divine law into positive law. Thus, the comprehensive code of law that comprises canon law is not authoritative in itself; the law is authoritative because it is promulgated by a singular authority: the pope. By contrast, the Jewish legal tradition has no comparable legislator to the pope. Instead, the task of institutional authority is to coordinate among the various, legitimate sources of law and that institutional authority is radically diffuse and dispersed. The Talmud is the last text that is authoritative for all Israel. Post-talmudic rabbinic authority is provisional and regional. Hence, adaptation and innovation is accomplished in the Jewish legal tradition through a decentralized and pluralist system of interpretation, in contrast to the hierarchical and monist system of canon law.

The contrast between the Jewish and canon law traditions may also be re-framed in terms of their conceptions of the nature of divine law. Thus, the difference between interpretation versus legislation as modes of accommodating divine law to human history and so to historical change has much to do with just how that divine law is initially understood. While both Jewish and Christian civilizations understand God as a legislator—a giver of commandments-their understanding of divine law and of the relation of divine law to human history-and hence to socio-historical change—is very different. The Christian

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[10] Silvio Ferrari, *supra* note 8, at 61.

understanding of divine law as a juridical act presupposes legislation as the only means of acting upon the law and bringing it into some conformity with the processes of human history. The Jewish, and to an extent, Islamic, interpretive traditions are themselves rooted in an original, non-juridical understanding of divine law. Legislative versus interpretive modes of dealing with historical change also reflects different attitudes toward the relationship between reason and truth. Although, in comparison with modern and Enlightenment views, all the religious traditions maintain a certain skepticism about the ability of reason to produce truth, this skepticism has a radically different salience in each of the religious traditions. Thus, we can posit two ideal-typical positions: a) reason as producing truth and b) reason as an attempt to explicate truth. The Jewish legal model, which privileges interpretation as a means to bring the divine law into human history is nearer to position b); whereas the legislative model of the canon law is nearer to position a).

The distinction between theoretical law and law to be applied is also crucial to Asifa Quraishi's description of Islamic jurisprudence. As Quraishi notes, cognizance of human fallibility is built in to Islamic legal reasoning, as is "a pervasive skepticism in the ability of any human process to achieve certainty."[11] While divine revelation represents absolute Truth, any human knowing, interpretation or application of that truth (law-as-applied) can only be partial and fallible. Thus, the very same distinction that Ben-Menachem makes between theoretical law (*halakha*) and law to be applied (*halacha l'ma'aseh*) is repeated by Quraishi in the distinction between *shari'a* (Law of God) and *fiqh* (the law of the jurists). Within Islamic juridical reasoning, there were further, great debates between those who stressed the role of reason (*ahl-al-ray*) and those who stressed the "plain" meaning of the text (*ahl-al-hadith*). One of the critical points for comparative analysis (with the Jewish case for example) would be in the institutional form taken by these different strands of the tradition. In Islam, they crystallized into separate schools of law—which remain separate to this day; in the Jewish tradition, by contrast, the codification of the Talmud as the authoritative legal code for all, subsumed the pre-existing differences between different rabbinical schools, for whom such distinctions were also relevant (*Beit Hillel* and *Beit Shammai*). Thus, while Quraishi can trace the continuing conflicts between the advocates of *qiya* (analogical reasoning) and those of *illa* (original intent) throughout the different maddhab or legal schools, the same cannot be done within the Jewish legal tradition where codification made of these differences is nothing more than different individual interpretive moves

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[11] *See generally* Quraishi, *supra* note 9, at 82.

rather than formal legal orientations, as noted in our opening remarks.

Another significant comparative point is the role of original communal practice in defining later normative claims. As Quraishi makes clear, at least one Islamic school of law, the Maliki, stressed the role of early communal practice—of the Median community, as a tool to interpret the Sunna, that is the practice of the Prophet (which was taken as normative). The debate within Islam is, in part, over what is canonical and hence authoritative. Quraishi poses this question starkly: Is it the text of the Qur'an that Muhammad gave or is it all of Muhammad's output, including not only his statements but also his practices? Furthermore, even if the text is singularly canonical and Muhammad's practices are not in themselves independent sources of law, are the prophet's practices evidence of the proper interpretation to be given to ambiguous Qur'anic statements? This debate over what is actually canonical has parallels within the Jewish legal tradition as well. The famous story of the Oven of Akhnai, which pits the majority law of the sages against a minority opinion which a divine voice attests as correct, poses the question equally starkly: Is revelation, whenever it appears, authoritative, or is the product of the initial revelation, the text, authoritative? Similar questions surround the role of customary practice in Jewish law. Are such practices an independent source of law or are they evidence of the proper interpretation of ambiguous legal principles? Thus, the Talmud records Hillel's instruction to observe what the people are doing in order to resolve a legal question related to the paschal slaughter. Indeed, medieval jurists in Ashkenaz often viewed the holy community of Ashkenaz as reliable carriers of the tradition, whose practices attested to the true content of the law. Nonetheless, this theme is more muted in the Jewish legal tradition, possibly because the reliability of the chain of tradition and thus of continuous practice was cast into doubt by historical disruptions. Indeed, one important strand of *halakhic* theory locates the source of scholarly disputes about the law in the disruption of the chain of tradition with the destruction of the Temple and the Exile. It is therefore primarily the task of the jurists to reconstruct the lost or forgotten divine law.

This comparison raises an important question about the ways history influences the continuing process of tradition and its construction and reconstruction in every generation. Past *practice*, as opposed to simply appeals to text and reason as interpretive mechanisms, is a separate variable of significant weight. Traditional practice may impede innovation more severely than either appeals to texts or to reason. Take, for example, the famous rabbinic dictum that everything a "*talmid chacham*" (meaning, interestingly enough, both a great scholar and/or the student of a great scholar) can teach has already

been given by Moses at Sinai. On the simplest level this statement could be read as limiting innovation, for the statement implies that all knowledge has already been given. Yet, this statement is also a great legitimizer of innovation. The statement reduces the tension between novel interpretations and tradition by claiming that any innovative interpretive moves were always, already part of the tradition. It is an open and interesting question whether such a fluid vision of tradition would be possible if one of the pillars of tradition was original practice.

The essays in this section focused until now on the extent to which rhetorical claims of traditional authority, nonetheless, make room for actual innovation. Christine Hayes's essay, Rabbinic Contestations of Authority,[12] reminds us that the tension between authority and innovation may proceed in precisely the opposite direction: with radical statements of authority to innovate accompanied by an actual retreat from innovation. Hayes notes that many aggadic passages in the Talmud, including the famous story of the Oven of Akhnai cited above, proclaim a bold theory of rabbinic authority. And, indeed, early rabbis, especially in Palestine in the first two centuries, enacted legislation contrary to Torah law, engaged in creative forms of scriptural interpretation, asserted the power to declare facts as a matter of law, and relied on legal fictions. Yet, from the fourth century and on, while the rhetoric of bold rabbinic authority persisted, rabbis, especially in Babylonia, not only retreated from all four practices, they recast the earlier bold exercises of authority as conservative or emergency uses of authority.

For Hayes, it is unremarkable that later rabbis would express anxiety over departing from the apparent thrust of Scripture, or adopting erroneous or contrary-to-fact rulings, given a legal system that represents itself as divine in origin—as emanating from a revealed text, free of falsehood. Rather, Hayes argues, "it is the early and primarily Palestinian tolerance for radical exercises of rabbinic authority that is remarkable."[13] According to Hayes, the earlier Palestinian practice may have been influenced by the surrounding Roman, secular legal culture, which emphasized multiple sources of law and legal authority. But, as the memory of Roman legal culture faded, as the center of rabbinic authority moved to Babylonia, and as the Jewish legal system became more clearly hierarchical—subordinated to the ultimate authority of the divine text—the rabbis honored their predecessors work in word far more than in deed.

The final paper in this section raises an important challenge to the claim that authority and innovation are reconcilable within any legal system. With great passion, Asma Barlas shows how Muslim religious

scholars are continually able to move the discourse from text to tradition to reason, when their anti-female interpretations of Islam are challenged, without losing their power to frame the discourse itself.[14] In this way, they preserve their role as gate-keepers of religious meaning. Focusing on the often misogynist positions of Muslim *ulema* and *exegetes*, Barlas points to problems created for women by the continual shift from arguments based on text to those based on tradition or reason as legitimations for their own agendas and interests. Each legitimating structure is capable of trumping the other; yet, the interpreters never directly face the tension between text, tradition, and reason. Instead, they use each, in different contexts, to resist change and to deflect any critique of the patriarchal nature of religious knowledge as it is currently structured. Indeed, the very multiplicity of authoritative bases only serves to safeguard the discourse from any meaningful critique. Such, Barlas claims, is the nature of authority. The relative roles of tradition, text, and reason are, at the end of the day, always inherently political, as is the interpretive process. This is the insight which Barlas would have us assimilate into our readings of the inherent tensions between these different principles. She ends by staking the claim for a new, more liberating, reading of the Qur'an as a no less legitimate contribution to the continual remaking of tradition.

II.   POLITICS AND INTERPRETATION

Barlas's focus on the political aspect of authority serves as a useful bridge to the second category of this Symposium, Politics and Interpretation.   This category examines the relationship between interpretive practices and political contexts. The doctrine of free will was developed by Mutazalite philosophers within the context of a struggle for the legitimation of political rule. Catholic and Reformation debates over the role of reason in the interpretation of scripture were also a political struggle over the boundaries and nature of the Christian community. Different Jewish perceptions of the duties owed to non-Jews and of the acceptable scope of Jewish-Gentile relations were set in the context of political and economic dependency. The uneasy relation of politics to constitutional interpretation was a major theme of slavery, segregation, and abortion cases. Appreciating the role of politics in constitutional interpretation and within religious traditions is of vital import as interpretive traditions are compelled to respond to increasingly complex political, ethical, and social agendas such as

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[14] Asma Barlas, *Qur'anic Hermeneutics and Sexual Politics*, 28 CARDOZO L. REV. 143 (2006).

abortion, euthanasia, the importance of political sovereignty over sacred spaces, and just war, to name but a few.

At the same time, textual interpretation cannot be reduced solely to the external historical forces of a given era. It is equally structured by the internal tension between reason and tradition within a given interpretive tradition. The five papers in this category investigate how the external influence of politics and the internal dynamics of an interpretive tradition impact one another in different political contexts. Two papers in this section concentrate on the changing role of women in society. These are Yaakov Elman's study of the changing legal status of Zoroastrian women[15] and Marion Katz's study of how certain pre-modern Muslim scholars reinterpreted the practice of the Prophet in the field of gender relations.[16] The three papers that follow each deal with the role of political sovereignty in shaping interpretation. These three papers, by Arye Edrei,[17] Shlomo Fischer,[18] and Steven Fraade,[19]discuss the effect of political sovereignty on exegetical innovation within the Jewish tradition—though with three millennia separating their respective cases.

Elman and Katz both address the changing status of women. Elman's case deals with demographic crises of the sixth century which forced Sassanian civilization to accord women a public role that they had not had before and to somehow legitimize that role through texts that were by any account misogynist in their original or "plain meaning." Katz traces a very different movement with respect to women's public visibility as articulated by the Sha'afi scholar Ibn ajar al-Haytam in the sixteenth century C.E. Elman is concerned with the way the Zoroastrian tradition was reinterpreted to allow women to own and manage large agricultural estates and to appear publicly while menstruating; while Katz is concerned with showing how one jurist argued against women's appearance in the great mosque in Mecca despite the clear acceptance of this practice by the Prophet. Both illustrate well the hermeneutic principles noted above. The Sasanian interpretive moves are simply those of analogical reasoning—which one will find in Jewish, Islamic, and other legal traditions. Moreover, as Elman notes, the Zoroastrian tradition seems as comfortable as the Jewish with making those moves explicit (though perhaps not so much

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[15] Yaakov Elman, *Scripture Versus Contemporary Needs: A Sasanian/Zoroastrian Example*, 28 CARDOZO L. REV. 153 (2006).

[16] Marion Holmes Katz, *The "Corruption of the Times" and the Mutability of the* Shari'a, 28 CARDOZO L. REV. 171 (2006).

[17] Arye Edrei, *Law, Interpretation, and Ideology: The Renewal of the Jewish Laws of War in the State of Israel*, 28 CARDOZO L. REV. 187 (2006).

[18] Fischer, *supra* note 6.

[19] Steven D. Fraade, *Deuteronomy and Polity in the Early History of Jewish Interpretation*, 28 CARDOZO L. REV. 245 (2006).

so that they are ensconced in the daily liturgy, as in the Jewish case). The case of al-Haytam touches on the very point of practice that we just discussed. His reasoning for an innovation (the limitation on women's public appearance) is predicated on the change in the current situation of women (who, according to him, allow themselves a new lasciviousness in dress and demeanor that did not exist in the Prophet's time). Note again the reference to past practice—but this time as a model, fallen away from, the very declension then justifying new practices.

New political forms provide no less of a challenge for interpretive traditions than economic or social changes such as a demographic crises or the putative change in women's behavior. The emergence of Zionism and the establishment of the State of Israel is a remarkable challenge for the Jewish legal tradition, forcing it to confront the most pressing issues of *realpolitik* in the contemporary Middle East. Given the development of the *halakhic* tradition in conditions of exile, the Jewish legal system has few precedents to draw on in shaping a Jewish legal response to the profound issues raised by political sovereignty. Arye Edrei focuses on the different interpretive models *halakhic* decisors have resorted to in confronting for the first time the need to articulate a real, practical set of rulings on the use of force. As Edrei makes clear, this became a critical issue when the State engaged in military action that involved the death of innocent civilians (Kibya in 1954 and the siege of Beirut in 1982). The pivotal question *halakhic* decisors faced is what significance to assign to the glaring gap within the Jewish legal tradition on the subject of just war. The differing positions staked out within the rabbinic community are shaped both by different religious and political ideologies and also by differing attitudes toward the jurisprudential meaning of a gap in the law. Extreme traditionalists, Edrei shows, interpret this gap as a sign that the Jewish legal tradition frowns on the use of force altogether. Thus, political sovereignty, which requires force, is itself indicted by these traditionalists. Classic traditionalists view Jewish political sovereignty as simply another changed historical setting, which from the jurisprudential viewpoint raises the familiar issue of adjusting law to new historical situations and new political settings. They approach the legal question in light of the conventional paradigms provided during the exilic period for filling gaps within the Jewish legal system. Pursuant to the conventional model, gaps within the *halakha* either signify that the subject matter is outside the regulation of law altogether—a matter of *reshut* or permission—or provide license for incorporating foreign law, such as international rules for the conduct of war.

Edrei identifies a new form of traditionalism that has emerged

among those jurists who view the new political formation of the Jewish State as itself vested with positive religious significance. For the new traditionalists, the use of force must be addressed by the Jewish legal system and that system must somehow craft rules drawn from indigenous *halakhic* sources. To incorporate foreign law, instead, runs counter to the religious nationalist ideology of resuscitating the *halakha* as national law.

Edrei's comparison of the rabbinic approach to that of the first Israeli Prime Minister, David Ben-Gurion, is also telling. Not bound by *halakhic* determination, Ben-Gurion was free to appeal to the Bible rather than to the corpus of the Jewish legal tradition. His approach is "Protestant" in that he proffers an individual—his own—reading of the Bible to support the effort of nation building. This appeal to the nonjuridical biblical source of the legal tradition to directly inform political initiatives is a strong illustration of how a textual tradition can be used ideologically by individuals who do not feel themselves bound by the authority of tradition. The turn to revelation, unmediated and unconstrained by its traditional interpretation, is analogous to many contemporary "fundamentalists" within Islam and Christianity. The rabbis were not free to the same degree and were forced to construct a *halakhic* account of the rules of war—that is an account predicated on the law-to-be-applied and not on the trans-historical word of God.

While Edrei focuses on the rules of war, Shlomo Fischer turns his attention to the equally critical question of exchanging land for peace. His paper highlights the legal methodology and religious-political ideology of a contemporary Sephardic classical traditionalist, Rabbi Ovadia Yosef, and contrasts his position with modern Ashkenazi schools of thought, which Fischer terms utopian. For Fischer, both the extreme traditionalists and the new traditionalists, which Edrei identified, share a utopian orientation. The extreme traditionalists of the Haredi community are devoted to Torah study as the exclusive form of communion with God. The Haredi school wishes to recapture the trans-historical, objectively true divine law "as it exists in the mind of God." This is implicitly a rejection of the distinction Ben-Menachem drew between Law and positive law to be applied. For this reason, the Haredi community bases their rulings on the most severe interpretation, lest actual practice fail to correspond to divine *halakhic* truth. Rabbi Ovadiah's devotion to the lenient ruling, by contrast, stresses that the law to be applied must be realistic and capable of fulfillment by the ordinary mass of the populace, given their frailties and constraints. Such law is procedurally true rather than metaphysically true. Rabbi Ovadiah's orientation is also free from the nationalist utopianism of the new traditionalists, such as Rabbi Shlomo Goren. While Goren's rulings are shaped by his utopian vision of the significance of the

establishment of the State of Israel, Ovadiah Yosef insists on framing the issues within conventional *halakhic* categories. In this respect, Rabbi Ovadiah departs as well from assessing the establishment of the State of Israel in nationalist terms, as do both the extreme and new traditionalists. While the new traditionalists affirm the underlying nationalist rationale for the State, vesting it with religious significance, the Haredi school opposes a nationalist construction of Jewish identity, of which the State is a realization. For Rabbi Ovadiah, the erection of the State is simply a concrete act or event to be judged by ordinary *halakhic* criteria. The disagreement among these schools over the symbolic and material meaning of the Land of Israel, of the Jewish State, and of the commandment to settle the land, offer another prime example of how ideology informs legal methodology.

Steven Fraade's paper, like that of Elman, reminds us that the eruption of history is not solely a modern or early modern phenomenon. For Fraade, the book of Deuteronomy is an exegetical exercise in making a Constitution for the new polity of Israel—the polity of biblical times. The focus of Deuteronomy is to create a new centralized system of governance and, at the same time, to unify the new national polity through law. This new Constitution appears, at first blush, to be in the form of legislation—the laws set forth in Deuteronomy. Fraade shows, however, that these laws are the product of exegetical interpretation—a re-reading of the laws enshrined in the prior four biblical books. Through this re-reading, the Deuteronomist introduces innovations that would become normative within the Jewish tradition. Here is an excellent illustration of Ferrari's point on the interpretive nature of the Jewish encounter with historical processes. It is fascinating that Fraade bring this interpretive move into the very Pentateuch itself. Later innovations and forms of community—textual communities if you will—whether at Qumran or at Yavneh, were already prefigured in the very innovations of the Deuteronomist—that is, in the divinely revealed text itself!

III. TIME AND TRADITION

The third category of the Symposium, "Time and Tradition," moves us beyond the practical and historical and into the meta-legal and broader metaphysical contexts or languages within which both text and tradition find their home. Many of the papers in this section deal with a substantive aspect of the human condition: love, sacrifice, or identity. These papers are united in their focus, however, on the question of how the way in which time is apprehended intersects with traditional authority.

Within secular legal systems, authority serves to structure time

along the model of religious traditions. Jurists look backward at the sources of law, at precedent and prior practices, as clues to what is possible in the future. Whether this new perspective on time ushered in by the Enlightenment disqualifies legal arguments based on past tradition is controversial. The legal sociologist Niklas Luhman has argued, for instance, that modern legal systems can be guided only by such principles as overlapping consensus, the future welfare of society, or positive lawmaking—and not the backward glance of precedent. Are there other justifications for turning to the past within modern legal systems? Do some modern legal systems preserve a pre-modern, religious conception of time? How does postmodernity affect ways of apprehending time?

These questions are confronted directly by Paul Kahn,[20] who contrasts the differing ways time is apprehended in systems based on liberalism and the social contract and in systems based on Christianity. For liberalism, political time is perceived as progressing linearly. This conception of time is captured in liberalism's devotion to reform. The goal of the legal system is to progress over time to an ever-better state of affairs. Christianity perceives the polity as transtemporal. All generations are united in faith in Christ. Interestingly, Kahn identifies the American approach to political time not with liberalism, but, rather, with Christianity. "We the People" is a metaphoric restatement of the trans-temporal polity of Christianity. It is precisely this transtemporal conception that accounts for the central place *originalism* occupies in American constitutional interpretation. The dominance of *originalism*, of searching for the intent of the framers, as the authoritative mode of reading the constitutional text, Kahn argues, corresponds to the conception of the American people as a transtemporal polity. *Originalism* thus ensures that all successive generations will be united and bound together in a common faithfulness to the text.

Continuing this line of inquiry, Ron Garet asks a deceptively simple question: how do certain legal texts and readings within a legal tradition gain more authority over time than others?[21] He argues that those texts in which law and personal sacrifice are inextricably linked, carry heightened textual authority. As he begins, "there are principles that are worth dying for."[22] But why does the fact of past sacrifice of lives provide an additional reason to adhere to a legal principle, beyond the worthiness of the principle on its own terms? Garet notes that the very invocation of the word sacrifice to describe deaths in the course of

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[20] Paul W. Kahn, *Political Time: Sovereignty and the Transtemporal Community*, 28 CARDOZO L. REV. 259 (2006).

[21] Ronald R. Garet, *"The Last Full Measure of Devotion:" Sacrifice and Textual Authority*, 28 CARDOZO L. REV. 277 (2006).

[22] *Id.* at 277.

this-worldly struggles not only situates such deaths within the dimension of the sacred but implies that these deaths are somehow addressed to the present audience, authorizing and directing those living in the present to pursue a particular course of conduct. Such communication is central to textual authority, Garet argues. This form of textual authority is transparent in the case of Christian Scripture. But the Reconstruction Amendments and the civil rights laws they launched also exhibit this feature. They have a special authority borrowed from the sacrifice of life in the Civil War. Nonetheless, Garet argues, the nature of this heightened authority is radically different in the two systems. Thus, Garet asks: how would the authority of scripture of the Constitution change were we to discover that Christ's sacrifice and the deaths at Gettysburg had no historical veracity? Garet surmises that the authority of Christian Scripture would be fundamentally negated whereas the authority of the Constitution would be unaffected. These two texts exhibit then contrasting models of authority. While the Constitution sets forth principles and commands adherence to them in each generation, whether or not prior generations sacrificed their lives on behalf of its principles, Christian Scripture does not merely command; it enables faith and love. But that enablement depends on the veracity of Christ's sacrifice.

The implicit subject of Jeremy Waldron's contribution is being and becoming.[23] Waldron focuses on Paul's critique of Mosaic law to illuminate a central question in jurisprudence: what might law be or become? We may view law as primarily aiming at identifying and responding to transgressions or as primarily aiming at voluntary, full compliance with its demands. The purpose that we ascribe to the law fundamentally shapes the way in which laws are interpreted and, as we see above, this purpose always has a temporal moment. Thus, interpretation varies with the view of what sort of legal system is at hand. Paul's critique, Waldron argues, adds to our ways of viewing systems of law. Paul directs our attention to the criteria law must exhibit if it wishes to be viewed as promoting law-abidingness: the requirements of the law must be reasonable and possible for ordinary persons to fulfill. This is the gist of Paul's antinomianism. He reveals a defect in Mosaic law: it has features that are hard to comply with, given what ordinary, reasonable people are like. This defect precludes viewing the law as aimed at law-abidingness—its intermediate aim— and consequently, precludes the law from becoming, from fulfilling its ultimate future aim: salvation.

Waldron's invocation of Paul also puts the question of law's audience at the fore. To whom are legal norms addressed? While

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[23] Jeremy Waldron, *"Dead to the Law:" Paul's Antinomianism*, 28 CARDOZO L. REV. 301 (2006).

Waldron contrasts legal systems addressed primarily to citizens—exhorting them to law-abidingness—with those addressed to officials who apply sanctions for transgressions—another fruitful contrast emerges from juxtaposing Waldron's invocation of Paul with Fischer's discussion of the debate between Rabbi Ovadiah and the Haredi school as well as Fraade's invocation of the Deuteronomist. For Paul, the addressee of Mosaic law is the ordinary individual, who is incapable of perfectly fulfilling the law on his own. Hence, the law becomes a stumbling block to salvation. Indeed, the gist of the interpretive battle between Rabbi Ovadiah and the haredi community is over the proper addressee of the law. Thus, Rabbi Ovadiah eschews strict interpretations that are beyond the capacity of ordinary people. Fraade's invocation of the Deuteronomist adds another dimension to this question of the legal subject. Deuteronomy addresses the polity, and not the individual. It is possible to fulfill the law, Deuteronomy explicitly declares. But fulfillment is conceived in communal and not individual terms, as is salvation. If we interpret "under a description," as Waldron asserts, that interpretation will have to encompass not only the aim of the law but also to whom the law is addressed.

We have finally turned to the third "leg" of the collection's title: the role of reason and its place in mediating the tensions between the dual claims of revealed text and interpretive tradition. This subject has only been treated obliquely thus far and so a further word on the position of reason in articulating both the text and the hermeneutic traditions is called for. The comparative cases addressed in this Symposium make clear how both reason and tradition can be appealed to both as independent legal principles as well as a method of adjudication. Reason, in the final analysis is not self-constituted. Recall, Max Weber's famous analysis of irrationality; as rationality in the service of itself, rationality posited as a substantive end rather than as a method. Reason of course, as method, is formal and universal in a way that traditions—and texts—are not, which is the source of its seductive appeal. In the search to provide an anchor for law these qualities of reason present themselves as strong candidates; so strong that we often are blinded to the fallible nature of reason when appealed to not as a method to adjudicate truth but to produce it. The appeal to tradition too, must however be understood as an appeal to tradition not to provide an answer, but as an appeal to a certain form, a certain mode of discourse and not as providing access to ultimate authority and unmediated revelation. And it is perhaps at this point that we can reflect on the importance of the questions posed in these papers to the study of comparative law.

We begin with authority, a notoriously elusive concept. Yet, several common themes about the nature of authority emerge from these

comparative papers. A relevant theme that has emerged is the "*a posteriori*" or retrospective character of authority. An authoritative, canonical text is not self-executing; it does not constitute itself nor appear already marked authoritative. Rather, authority is vested in prior texts, practices, or traditions by its later interpreters and adherents. It is in the nature of authority, however, that its retrospective character remains hidden. As Puett puts it, it comes to appear as the natural order of things. Third, appealing to authoritative texts or traditions is a way of shaping a question, of finding a conceptual form, which allows for communication diachronically across generations within a given tradition. Since the text or practice is a vehicle for a conversation, such appeals never completely settle the question.

Yet, law and religious practice also require the selection of a single norm. The appeal to authority, conceived as a means of formulating a question and initiating a cross-generational dialogue, cannot in itself, provide a stable, singular norm. For this reason, law and religion must have institutional structures that enable the selection of a particular norm. Such institutional structures vary across traditions, as we have seen. Their differences are sociologically significant. Thus, the networks of rabbinic authority in the Jewish legal system and the various legal schools of Islam provide a more pluralist institutional structure than does the monist system of canon law, with its resort to the pope.

This understanding of authority and its structures elucidates how a particular norm comes into being, but not how it changes. How does law change? Various answers have been given to this question in the discipline of legal theory, ranging from the formalist model of internal processes of law working themselves, pure to the notion that new concepts enter into a legal system through different legal systems coming into contact with one another. In this Symposium we have stressed another theory of change, one that comes from the force of history and contingency. Social and political forces intrude into a legal tradition and impel a response. In the process, consensus coalesces around the turn to new anchors or different methodologies to achieve a satisfying result. New rituals are vested with authority, older texts take on new authoritative status, or new interpretive strategies come to be seen as acceptable methodologies within the tradition. How precisely consensus operates and is achieved is a question we leave for another Symposium.