2-1993

In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory

Suzanne Last Stone

VOLUME 106 FEBRUARY 1993 NUMBER 4

HARVARD LAW REVIEW

ARTICLE

IN PURSUIT OF THE COUNTER-TEXT: THE TURN TO THE JEWISH LEGAL MODEL IN CONTEMPORARY AMERICAN LEGAL THEORY

*Suzanne Last Stone**

Beginning with Professor Robert Cover's Nomos and Narrative, *contemporary American legal scholars have increasingly turned, implicitly or more directly, to the Jewish legal tradition as an example of a legal system in which law is defined not by reference to the authority and power of the State, but rather by the commitment of a legal community to voluntarily-accepted legal obligations. These scholars depict the Jewish legal system as having successfully confronted — and resolved — several central dilemmas currently facing American law by maintaining a coherent legal system while accepting behavioral and interpretive pluralism. In this Article, Professor Stone shows how various aspects of the Jewish legal tradition have been woven together to create an alternative model of law. Returning to the Jewish legal sources and system, she maintains that Jewish law's seemingly contemporary attitude is made possible by the specifically religious nature of the legal system and its effect on the relationship between the legal interpreter, the legal actor, and the divine. Professor Stone concludes by arguing that there is no secular theory of justice that could readily serve the same function in the American legal system that the divine plays in the Jewish legal tradition, which permits law to express both utopian ideal and political order.*

Every "renaissance," every "reformation," reaches back into an often distant past to recover forgotten or neglected elements with which

---

* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank Mark Galanter, Director of the Institute for Legal Studies, University of Wisconsin Law School, for inviting me to present an earlier version of this Article at a conference on Jews and the Law in the United States in November 1991. I also wish to thank Rabbi David Bleich and Professors Robert A. Burt, Paul Shupack, and Richard Berenson Stone, for their helpful comments on earlier drafts of this essay. I especially wish to thank my research assistants, Samuel Mosenkis and Rebecca Silberstein, for their extraordinary efforts on my behalf.

there is a sudden sympathetic vibration, a sense of empathy, of recognition.

YOSEF H. YERUSHALMI[1]

INTRODUCTION

IT is time to take stock when an article about the postmodern vitality of liberalism proclaims as its "paradigm" Rabbi Joseph Caro,[2] the sixteenth-century author of one of the most austere codes of Jewish law, the *Shulhan 'Arukh*,[3] and one of the most fantastic diaries of mystical experience, the *Maggid Mesharim*.[4] Although that article may pose the most startling juxtaposition yet of new themes in American legal scholarship with Jewish legal history,[5] it is part of a growing body of legal scholarship that is turning (either unabashedly or more indirectly) to the Jewish legal tradition to advance debate in contemporary American legal theory. A careful reading of this scholarship shows that a dual redefinition is taking place. The Jewish legal tradition is being subtly reinterpreted to yield a legal counter-model embodying precisely the qualities many contemporary theorists wish to inject into American law. In turn, American legal theorists are incorporating this new Jewish model into their work, redefining American legal theory. This Article brings to light the often hidden encounter between American legal theory and this new Jewish counter-model and argues that the counter-model presented so far is often more wishful than accurate and, even when accurate, has limited applicability in a secular legal society.

The encounter between Jewish law and American legal theory has a long and checkered history. Sporadic presentations of the major

---

[1] YOSEF H. YERUSHALMI, ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY 113 (Schocken Books 1989) (1982).

[2] Richard K. Sherwin, *Law, Violence and Illiberal Belief*, 78 GEO. L.J. 1785, 1813–15 (1990). To be fair, the paradigm is invoked as part of a larger critique of Robert Cover, *see id.* at 1809–15, who first raised the subject of Rabbi Caro. *See infra* pp. 874–76. Sherwin's critique of Cover is discussed below at pp. 876–86.

[3] An excellent account of the substantive and literary characteristics of the *Shulhan 'Arukh* is in Isadore Twersky, *The* Shulhan 'Aruk*: Enduring Code of Jewish Law, in* THE JEWISH EXPRESSION 322 (Judah Goldin ed., 1976).

[4] *See generally* R.J. ZWI WERBLOWSKY, JOSEPH KARO: LAWYER AND MYSTIC *passim* (1962) (summarizing Caro's diary); S. Schechter, *Safed in the Sixteenth Century: A City of Legists and Mystics, in* THE JEWISH EXPRESSION, *supra* note 3, at 258, 265–70 (same).

[5] Nearly as startling is Steven Friedell's recent article describing the Jewish legal system as a paradigm for feminist jurisprudence, despite its systematic exclusion of women from authoritative roles in the development and articulation of Jewish law. *See* Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915, 918 (1992). Friedell's thesis is that the underlying goals of feminist jurisprudence were anticipated by Jewish law. *See id.* at 918, 944.

principles of Jewish law have appeared in American legal periodicals since the inception of the genre.[6] In the classical era of liberal legal scholarship, these presentations either looked for the Jewish roots of American law[7] or presented Jewish law as an exemplar of then-prevailing Western liberal legal themes.[8] The legal scholarship of that period is part of the larger story of the initial encounter of Jewish lawyers with the American legal order. Jerold Auerbach's recent book vividly argues that, from the 1880s through the first half of the twentieth century, American Jewish acculturation largely involved the transfer of allegiance from a sacred to a secular legal system, from the Torah to the Constitution.[9] According to Auerbach, this process was aided by the creative discovery of a "unitary Judeo-American" legal tradition.[10] As Jewish lawyers asserted that the American legal

---

[6] *See, e.g.*, David W. Amram, *The Summons: A Study in Jewish and Comparative Procedure*, 68 U. PA. L. REV. 50, 50 (1919); Louis Binstock, *Mosaic Legislation and Rabbinic Law*, 10 LOY. L.J. 13, 16–19 (1929); Hugh E. Willis, *A Thousand Years of Hebrew Law*, 41 AM. L. REV. 711, *passim* (1907).

[7] *See, e.g.*, J.J. Rabinowitz, *The Origin of Representation by Attorney in English Law*, 68 L.Q. REV. 317, 317–19 (1952); Jacob J. Rabinowitz, *The Common Law Mortgage and the Conditional Bond*, 92 U. PA. L. REV. 179, 181–87 (1943); *cf.* Bernard J. Meislin, *The Ten Commandments in American Law*, *in* JEWISH LAW AND CURRENT LEGAL PROBLEMS 109, 109 (Nahum Rakover ed., 1984) (describing the initial importance and gradual exclusion of the Ten Commandments as a source of American law).

[8] Edmond Cahn, who pursued an anthropocentric understanding of law, was unique in his use of Jewish sources to illuminate larger issues in American jurisprudence during this period. *See, e.g.*, EDMOND N. CAHN, THE SENSE OF INJUSTICE (1949) (analyzing the story of Jacob's struggle with an angel to epitomize the history of legal philosophy); Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 838–39 (1951) (presenting the *Oven of Akhnai* story discussed below at pp. 841–42, 855–64); *cf.* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 313 (1961) (discussing the unique duty-oriented focus of Jewish law). The Silberg article, written by a Justice of the Israeli Supreme Court, made no discernible impression on the American legal community until the last decade, when it was rediscovered by Arthur Jacobson. *See infra* note 294.

[9] *See* JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION, at xviii–xix (1990).

[10] *Id.* at 24. Auerbach argues that this seemingly successful synthesis of Judaism and Americanism lies not in the "fortuitous discovery" that Torah and Constitution were "convergent traditions," but, rather, in the "sustained effort to obliterate" the vast differences between the two legal systems. *Id.* at xviii. Auerbach thus takes issue with more conventional accounts of why Jews have found a natural resonance in American constitutionalism. *See, e.g.*, Saul Touster, *The View from the Hilltop*, 33 BUFF. L. REV. 571, 572–75, 578 (1984) (arguing that Jewish law and American constitutionalism are uniquely compatible because the Puritans turned to the Hebrew Bible in creating their new civic order).

Whether Auerbach is right to claim that American lawyers constructed this unitary Judeo-American tradition out of whole cloth, by deliberately suppressing the fact that Jewish law had little in common with American constitutionalism, is far from clear. Auerbach sets forth a broad sketch of the "vast differences" between traditional Jewish legal thought and American liberal legal theory. *See* AUERBACH, *supra* note 9, at 46–48. According to Auerbach, liberal legal theory is grounded in consent, whereas the central motif of Jewish legal thought is submission to obligations imposed from above. *See id.* at 28–29. Jewish law interweaves

system was the finest flowering of the Jewish legal tradition,[11] Jewish legal scholars also discovered that the "'twentieth century ideals of America had been the age-old ideals of the Jews.'"[12] This mindset explains the relative paucity of American legal scholarship drawing on Jewish sources in the liberal era, for pointing out the similarities between the two traditions often made for rather dull scholarship.

Anyone who has glanced through the law journals over the last decade, however, cannot fail to notice the startling increase of citations to Jewish sources[13] in public American legal discourse. The citation

---

religious and secular obligations. By contrast, American law is dedicated to the complete separation of the two. *See id.* at 42–43. Jewish law speaks to a covenantal community engaged in an intimate relationship with God; the Constitution addresses governing institutions and promotes distance, not community. *See id.* at 44–46. In a later essay, Auerbach describes Jewish law as the quintessential "jurisprudence of original intent," a jurisprudence incompatible not only with liberal legal theory but also with its more contemporary manifestations in the works of the legal realists and their successors. Jerold S. Auerbach, Jews and American Law: The Journey from Torah to Constitution 10–11 (Nov. 1991) (unpublished manuscript on file at the Harvard Law School Library).

It is precisely the appreciation of critical differences between the two legal systems — in particular, the Jewish legal system's emphasis on community and obligation — that has engendered the new scholarship I describe in this Article. *See infra* pp. 865–72. Yet a more nuanced assessment of these differences than that outlined by Auerbach is possible. This Article treats some of these themes. On the intersection between Jewish legal concepts and the rule of law, see pp. 852, 858–60 below. On the question whether Jewish law constitutes a jurisprudence of original intent, see pp. 858–65 below. On the question whether the covenantal obligations are the product of consent rather than unilateral imposition, see Suzanne L. Stone, *Judaism and Postmodernism*, 14 CARDOZO L. REV. (forthcoming 1993) (manuscript on file at the Harvard Law School Library).

[11] *See* AUERBACH, *supra* note 9, at 136.

[12] ALLON GAL, BRANDEIS OF BOSTON 126 (1980) (quoting Louis D. Brandeis).

[13] This Article uses the term "Jewish sources" to refer to classical rabbinic material. This definition can be regarded as essentialist in that it focuses on sources used for the development of Jewish law, excluding many other sources of the Jewish religious tradition. As I am specifically concerned with the encounter between two disparate legal cultures, I have focused on those sources deemed authoritative from the internal perspective of the Jewish legal system.

For those not familiar with Jewish legal terminology and history, the following brief glossary and historical overview may be helpful:

Jewish law and the Hebrew term *halakhah* (adj. halakhic) are used here interchangeably. The term *halakhah* designates both the system of Jewish law and also the concept of a single rule of law. The *halakhah* comprises the entire subject matter of Jewish law, including public, private, and ritual law.

Jewish law consists of the written law and the oral law; both, according to Jewish legal theory, were given to Moses on Mt. Sinai. The five books of Moses are often referred to as the Torah. The term Torah also may refer to the entire contents of the Hebrew Bible, including the five books of Moses, the prophets, and the writings. Finally, Torah (literally, teaching) often refers to the entire content of the divine revelation and, by extension, to all the teachings of the Jewish legal tradition.

In about 200 C.E., Rabbi Judah Ha-Nasi edited a written compilation of the oral law, the Mishnah. The scholars of the Mishnaic era (c. 70 C.E. to 220 C.E.) were known as *tannaim*. The term tannaitic refers to the period of the Mishnah.

The next three centuries (c. 200 C.E. to 500 C.E.) were dominated by scholars called *amoraim*

of Jewish sources in many of these writings is, to be sure, subsidiary to the author's larger endeavor. Often, the Jewish sources do not shape the author's perspective; rather, they are cited as a point of information,[14] a literary device,[15] or in place of an imaginative hypothetical or case study.[16] This phenomenon itself is worthy of comment, for it indicates a shift in the relationship between Jewish intellectuals and Jewish culture — a shift that is part of a larger anti-assimilationist trend in the American academy.[17] But by far the more

---

(interpreters), who debated and reconciled the rulings of the *tannaim*. The records of this commentary comprise the Gemarah. Together, the Mishnah and Gemarah comprise the Talmud. Two versions of the Talmud exist. The first, edited in the Palestinian academies, is referred to as the Jerusalem or Palestinian Talmud. The second and more comprehensive version, the Babylonian Talmud, was completed at the academies of Babylonia.

The other significant material produced in this rabbinic period is *midrash*. *Midrash* is the interpretive study of the Bible and consists primarily of rabbinic exegesis tied to scriptural verses. *Midrash* is further subdivided into *midrashei halakhah* and *midrashei aggadah*. The *midrashei halakhah* are legal exegeses of biblical passages. The *midrashei aggadah* are traditionally defined as everything in tannaitic and amoraic literature that is not *halakhah* (Jewish law), including interpretations of biblical narratives, parables, legends, homilies, and allegories.

The post-talmudic history of Jewish legal scholarship is divided into three eras: the Geonic era (c. 590 C.E. to 1038 C.E.); the era of the *Rishonim* (early scholars — c. 1038 C.E. to 1550 C.E.); and, finally, the era of the *Aharonim* (later scholars — from 1550 to the present). Rabbi Joseph Caro's sixteenth-century *Shulhan 'Arukh* is considered the authoritative code of Jewish law and sometimes serves as the dividing line between the *Rishonim* and the *Aharonim*.

Most translations are my own. For the convenience of the non-Hebrew speaking reader, however, I have attempted to give citations to English translations when they exist. The most commonly used of these is the Soncino Press translation of the *Babylonian Talmud*, first published between 1935 and 1961. *See* THE BABYLONIAN TALMUD (I. Epstein trans. & ed., 1961) [hereinafter SONCINO]. An English translation of the Mishnah is that of Herbert Danby. *See* THE MISHNAH (Herbert Danby trans., 1949) [hereinafter DANBY].

[14] *See, e.g.*, Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1228 n.136, 1248 n.205, 1264 n.235 (1987) (comparing aspects of choice of law theory to interpretive themes in Jewish law); *see also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 248 n.65 (1987) (citing the Jewish law on judge disqualification).

[15] Laurence Tribe's address on the technocratic vision of the Burger Court, for example, begins with a citation to one of his favorite *midrashim*. *See* Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157 (1984) (citing a *midrash* about Adam's expulsion from the Garden of Eden).

[16] *See, e.g.*, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 317–18 (1989) (using the rabbis of the *midrash* to illustrate the possibility of reading Supreme Court opinions in the Derridean mode); Richard Hyland, *Babel: A* She'ur, 11 CARDOZO L. REV. 1585, 1589–97, 1603–11 (1990) (discussing the Tower of Babel legend to illustrate the diversity and particularity of language and its relationship to legal education); Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2226–27, 2235, 2241–44 (1989) [hereinafter Winter, *Cognitive Dimension of the* Agon] (using *midrash* to illustrate Lakoffian theory); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1115–17 (1989) [hereinafter Winter, *Transcendental Nonsense*] (drawing upon *midrash* to explore the nature of knowledge).

[17] *Cf.* SUSANNE KLINGENSTEIN, JEWS IN THE AMERICAN ACADEMY, 1900–1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION, at xi–xvii (1991) (discussing the American academy's

interesting development in the recent turn to Jewish sources by American legal scholars is the appearance of a small but significant body of scholarship that draws on the history, philosophy, or interpretive techniques of Jewish law to reconstruct American legal theory.

Thus, there is a new chapter to the story Auerbach set out to tell. Although the attraction of Jewish law once lay in its perceived similarity to the American liberal legal model, it now lies in its perceived difference from that model. This shift in emphasis is the product of several interrelated factors. The renewed interest of Jewish intellectuals in Jewish sources and textual traditions has generated an appreciation for Jewish law as a valuable and distinctive tradition. This new consciousness coincides with the legal academy's loss of confidence both in the moral and intellectual basis of authoritative and supposedly neutral legal interpretation and in liberal political theory generally, with its attendant alienation of the individual from communitarian forms of social life. These concerns, which reflect larger trends in philosophy and literary theory, have led to a search for alternative models to liberal legal theory.[18] The turn to the Jewish legal model is also a somewhat belated response to the call in the 1970s for a "reconstruction of legal theory"[19] grounded specifically in law and religion, a reconstruction that acknowledges the transformative power of law to enrich human existence and the role of religion in shaping the social reality upon which legal theory is based.

These interrelated factors have given rise to a new genre of Jewish-American legal scholarship. Jewish law is invoked as a "contrast case."[20] It is described in this new literature, explicitly or implicitly, as anti-hierarchical,[21] egalitarian,[22] and communitarian;[23] as a juris-

---

earliest Jewish professors of English and American literature). Klingenstein follows the path of the immigrant generation born between 1880 and 1905, which left "a marked Jewish imprint" in its scholarship. *Id.* at xii. She proposes to follow in a further study a second generation which was completely normalized and integrated and then a third generation, born between 1924 and 1940, which gradually rediscovered its "Jewish intellectuality." *See id.* at xi.

[18] For succinct summaries of these trends and the search for new models in contemporary legal theory, see JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 62–106 (1990); and Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 57–70 (1984).

[19] Howard J. Vogel, *A Survey and Commentary on the New Literature in Law and Religion*, 1 J.L. & RELIGION 79, 142 (1983). Given the large body of literature generated in the 1970s by writers in the law and religion group, the turn to Jewish models has been surprisingly slow in coming.

[20] ROBERTO M. UNGER, LAW IN MODERN SOCIETY 88 (1976) (treating pre-imperial China as a "contrast case").

[21] *See* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1690–93 (1991); Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–19 (1983) [hereinafter Cover, *Nomos and Narrative*].

[22] *See* Burt, *supra* note 21, at 1691. Egalitarian in this context refers to the Jewish legal system's exegetical approach, not its attitude toward gender roles.

[23] *See* Friedell, *supra* note 5, at 942–43.

prudence written in a feminist voice (though not by females),[24] based on reciprocal obligations rather than rights,[25] and free of the countermajoritarian difficulty;[26] and as a case study in the redemptive possibilities of legal interpretation.[27] In short, the Jewish legal tradition has come to represent in this scholarship precisely the model of law that many contemporary American theorists propose for American legal society.

This new chapter to Auerbach's story has escaped general attention, however, because the turn to the Jewish counter-model in American legal scholarship is often indirect or allusive. Although some writings forthrightly acknowledge the author's reliance on a Jewish model as a vehicle for reconceptualizing issues in American legal theory,[28] others do not explicitly invoke a Jewish model in the body of the text. Yet a careful reading beneath the surface of these works reveals that the author's particular vision of the Jewish legal tradition was central in shaping the author's theories from the start. The chief representative of this category of scholarship is Robert Cover's tour de force, *Nomos and Narrative*,[29] which is a major focus of this Article.

Robert Cover's work is an exemplar of this larger phenomenon for several reasons. First, Cover's writings present the most sustained attempt to infuse the idea of Jewish law into American legal theory. Moreover, the publication of Cover's work was a significant turning

---

[24] *See id.* at 917.

[25] *See* Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 65–90 (1987) [hereinafter Cover, *Obligation*].

[26] *See* David R. Dow, *Constitutional Midrash, Wisdom, and the Counter-Majoritarian Difficulty: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUS. L. REV. 493 (1992) (forthcoming 1993) (manuscript on file at the Harvard Law School Library).

[27] *See* Robert M. Cover, *Bringing the Messiah Through Law: A Case Study*, *in* NOMOS XXX: RELIGION, MORALITY, AND THE LAW 201, 202 (J. Roland Pennock & John W. Chapman eds., 1988) [hereinafter Cover, *Messiah*].

[28] Representative of this group are the writings of Sanford Levinson, who uses Jewish law and history to explain the tensions in American constitutionalism, *see* SANFORD LEVINSON, CONSTITUTIONAL FAITH 18–154 (1988); George Fletcher, who contrasts the divergent assumptions of Jewish duty-oriented and Western rights-based criminal jurisprudence, *see* George P. Fletcher, *Defensive Force as an Act of Rescue*, SOC. PHIL. & POL'Y, Spring 1990, at 170, 170; George P. Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201, 206, 210 (1989); and Perry Dane, who uses Jewish law to create new models of legal pluralism, *see* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 1000–05 (1991) (discussing how the state should relate to American Indian subcommunities partly by analogy to Jewish conflict of law principles).

Other scholars have drawn on Jewish law to propose new directions of inquiry for liberal legal theory. *See, e.g.*, Dow, *supra* note 26 (arguing that Jewish judges employ practical wisdom to mediate between norms of majoritarianism and norms of rights); Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the* MaHaRaL *of Prague*, 90 MICH. L. REV. 604, 619–25 (1991) (analyzing the implications for American criminal law of the Jewish legal emphasis on legal as opposed to factual guilt).

[29] Cover, *Nomos and Narrative*, *supra* note 21.

point in the growth of this new literature in American law and Judaism.[30] Like Geoffrey Hartman in literary circles,[31] Robert Cover made it respectable to draw on the Jewish tradition in public discourse.[32] Many of the articles citing Jewish sources in the past decade are either direct responses to Cover's work, whether critical or admiring, or attempts to carry forward Cover's intellectual project. Finally, Robert Cover's work cuts across many of the important debates in contemporary American jurisprudence. Yet many scholars who describe their work as logical extensions of Cover's own — and who address such diverse topics as narrative jurisprudence,[33] legal pluralism,[34] civic republicanism,[35] natural law,[36] and the ethical dimensions of legal interpretation[37] — are unaware of the precise role Jewish sources played in Cover's theories.

---

[30] A survey of articles in the interdisciplinary field of law and religion from 1974 to 1983, published only months before *Nomos and Narrative* appeared, found only three articles devoted to Jewish perspectives. *See* Vogel, *supra* note 19, at 103.

Oddly enough, the increased vitality and visibility of Jewish law as an independent field of inquiry in the American legal academy has played a relatively insignificant role in the genesis and growth of the new literature. The recent decision of the American Association of Law Schools to form an independent section devoted solely to Jewish law, a subject formerly under the rubric of the Section on Law and Religion, is emblematic of the large divide between those scholars interested in the theory and practice of Jewish law and those interested in the interaction of religion with contemporary American legal theory. To the extent that any interdisciplinary dialogue exists, it is mainly at the initiative of a non-American, non-legal institution: the Shalom Hartman Institute for the Study of Jewish Philosophy in Jerusalem. Cited as a major inspiration for the work of Sanford Levinson, the Institute also sponsored conferences in which Robert Cover participated. *See* LEVINSON, *supra* note 28, at x–xi. The Institute is also a moving force behind George Fletcher's new journal in Jewish Law and Philosophy, *S'vara.* (S'VARA: A JOURNAL OF PHILOSOPHY AND JUDAISM is co-published by Columbia University School of Law and the Shalom Hartman Institute.)

[31] Hartman's work led to the anthology *Midrash and Literature.* *See* MIDRASH AND LITERATURE (Geoffrey H. Hartman & Sanford Budick eds., 1986).

[32] *See* Winter, *Cognitive Dimension of the* Agon, *supra* note 16, at 2225 n.3 (crediting Cover for the author's "rediscovery" of the intellectual richness of traditional Jewish literature and its value as a "source of analytic insight" in contemporary legal scholarship); Winter, *Transcendental Nonsense*, *supra* note 16, at 1115 (stating the author's intention to approach the topic of objectivity and subjectivity in law in a "Coverian mode by consulting the *midrash*").

[33] *See* Aviam Soifer, *Reviewing Legal Fictions,* 20 GA. L. REV. 871, 873 (1986).

[34] *See, e.g.*, Dane, *supra* note 28, at 964 n.17 (calling Cover's work "[m]y own most direct inspiration for expanding the domain of law beyond the law of the state").

[35] Frank Michelman, who has turned his attention to the republican vision of self-government, speaks of his work as extending, but not deepening, Cover's work in *Nomos and Narrative.* *See* Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 16 (1986) [hereinafter Michelman, *Traces of Self-Government*]; *see also* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988) (adopting Cover's term "jurisgenerative" to describe republicanism).

[36] Ronald Garet, who is concerned with the relationship of natural law as a theory of human nature to political theory, associates his work with that of Cover. *See* Ronald R. Garet, *Natural Law and Creation Stories, in* NOMOS XXX: RELIGION, MORALITY, AND THE LAW, *supra* note 27, at 218, 257 n.11 [hereinafter Garet, *Creation Stories*]; Ronald R. Garet, *Meaning and Ending*, 96 YALE L.J. 1801, 1816–17 (1987) [hereinafter Garet, *Meaning and Ending*].

[37] *See, e.g.*, Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the*

This Article has three interrelated goals. My chief goal is to show that a dual redefinition is taking place: American legal scholars are reinterpreting the Jewish legal tradition in light of their particular concerns, even as their colleagues reshape American constitutional theory to accommodate this new Jewish perspective.[38] *Nomos and Narrative* encapsulates this phenomenon. As a powerful statement of the possibilities of law for American society, *Nomos and Narrative* is heavily influenced by Cover's contemporary interpretation of Jewish sources. In turn, American constitutional theory is slowly being reshaped from within as legal theorists incorporate (sometimes unwittingly) Cover's Jewish model into their work.

My second goal is to show how Jewish sources have been used to reconceptualize American legal theory. I argue that, in the new scholarship, the Jewish legal system functions primarily as a theoretical model for how legal meaning is created. I hope to demonstrate how various aspects of the Jewish legal tradition have been woven together to create this conceptual model as well as to highlight where this model departs from the Jewish legal system's internal understanding of its tradition. I focus on one distinct weakness in the conceptual model that has been constructed. Despite the desire of the new scholarship to understand legal institutions through religious categories, the new scholarship frequently ignores the religious element of Jewish law. Although much of the methodology and subject matter of Jewish law makes no overt reference to religious concepts, one cannot fully understand Jewish law without considering the religious framework that makes Jewish law possible and renders it intelligible to its practitioners.[39] Yet such basic religious concepts as the revelatory nature of Jewish law, the religious qualifications of authoritative interpreters of the law, the veneration of early masters of the tradition, *imitatio dei*, and divine accountability are rarely mentioned in the new literature. These religious concepts sometimes propel Jewish law in directions quite at odds with the aspirations of contemporary legal theory. At other times, the affinity of Jewish law for contemporary models of legal discourse is precisely a function of the religious basis

---

Possibility of Legal Interpretation, 11 CARDOZO L. REV. 1687, 1690 (1990) (addressing Cover's concern that the interpretive turn in legal theory courts danger by deflecting attention from the law's inherent violence).

[38] *Cf.* KLINGENSTEIN, *supra* note 17, at xii (arguing that the works of immigrant Jewish academics in American philosophy and literature reveal "traces of a dual redefinition: Judaism (or Jewishness) is remodeled in the light of what America has to offer, while 'America' is reinterpreted to accommodate a Jewish mode of thought").

[39] Jewish law defines the obligations of members of a covenantal community commanded to preserve holiness. The underlying assumptions of Jewish law are organized around this conceptual framework. According to Jewish legal tradition, many Jewish legal principles are neither appropriate nor necessary for conventional polities because these principles are tied to particularist religious ideals. *See* Suzanne L. Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1192–93 (1991); *infra* p. 889.

of the law. The transformative power of Jewish law, some of Jewish law's interpretive methods, and the Jewish legal system's communitarian social order are strongly linked with religious concepts and ideals.

It is not always clear whether the model of Jewish law evoked in contemporary writings is intended to correspond to historical reality. But, even if it is not, it is still important to test this model against the Jewish legal system's own frame of reference for two reasons. First, the conceptual model is compelling, both for the writer and her audience, precisely because it seems to reflect an actual, living legal system. Second, a fuller exploration of the religious concepts that underlie Jewish law can deepen awareness of the differences as well as the similarities between religious and secular legal systems and thus highlight the range of concepts that should be considered if we desire to understand secular legal institutions through religious categories.

Finally, I hope to stimulate further comparative scholarship that draws on this rich legal tradition by directing attention to the complex relationship between *halakhah* and its spiritual underpinnings. I argue that this complex relationship is replicated in Cover's conception of law as the paradoxically interdependent and irreconcilable expression of both utopian ideal and institutional hierarchy.

Part I of this Article explores the process of redefinition through an extended examination of *Nomos and Narrative*, both as a response to intradisciplinary concerns within constitutional theory and as a reflection of three themes in the Jewish legal tradition. Part II situates the three "Jewish" themes in *Nomos and Narrative* within the context of contemporary academic debates about interpretation and authority, law as obligation versus law as rights, and the transformational capacity of law. It presents and then reexamines the contrast case arguments drawn from Jewish law. Part III asks whether there is a distinctive "Jewish voice" in contemporary American legal scholarship and locates this voice in Cover's conception of law as the product of the tension between utopian ideal and institutional order.

I. READING BETWEEN THE LINES OF *NOMOS AND NARRATIVE*

Nomos and Narrative, Robert Cover's celebrated statement about the nature of law, has been analyzed from numerous perspectives.[40]

---

[40] *See, e.g.*, Garet, *Meaning and Ending*, *supra* note 36, at 1802 (analyzing Cover's theory of law as a theory of natural law based on human nature); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 55–63 (1989) (analyzing Cover's separation of constitutional interpretation from constitutional authority); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1527–31 (1985) (discussing the anarchism of Cover's theory).

Cover himself once implied that *Nomos and Narrative* should be read with its "political

But, when *Nomos and Narrative* is re-read in light of Cover's lesser known writings, which discuss Jewish law more directly, a still richer understanding is possible. Cover's statement about the nature of law, I argue, was fashioned out of a unique synthesis of themes in Jewish law and themes derived from contemporary Western theoretical models. I first present *Nomos and Narrative* as a response to problems in constitutional theory. I then offer a counter-reading of *Nomos and Narrative*.

A. Robert Cover's Vision for American Law

American constitutional jurisprudence has reached a crucial stage in its theorizing about the relationship between legal interpretation and legitimate authority: the loss of faith in the objectivity of law. Because interpretation is situated in a historical and ideological position, the interpretive act involves the creative reading of individual values and predilections into a multivocal and opaque text. This would be unproblematic if the interpreters were literary critics. But the interpreters are judges, who exert power over individuals in the name of a single, objective law derived from the Constitution. The problem is played out on a vast scale when we consider not merely individuals, but groups of people, communities committed to different "constitutional visions,"[41] each true from the perspective of the community. These competing normative orders exist within the larger system of American law and are subject to the state's coercion when their constitutional visions and that of the judge do not coincide.

This is the central problem posed in *Nomos and Narrative*, one that Cover began to work out in slow stages.[42] In *Nomos and Narrative*, he linked this problem to the Supreme Court's opinion in *Bob Jones University v. United States*,[43] which held that the Internal

---

significance" in mind. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1985) [hereinafter Cover, *Folktales*]. Cover's later work is more explicitly programmatic. *See* Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 832–33 (1986) [hereinafter Cover, *Bonds of Constitutional Interpretation*] (arguing that dissenting movements must back their constitutional visions with blood if they are to "make law"); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605–07 (1986) [hereinafter Cover, *Violence*] (arguing that legal communities that resist official law will realize their commitments in the flesh, through martyrdom, rebellion, or killing).

[41] Cover, *Nomos and Narrative*, *supra* note 21, at 31.

[42] In chronological order, see Cover, *Folktales*, cited above in note 40, at 182–83, which discusses the commitments official judges make in asserting jurisdiction; Cover, *Bonds of Constitutional Interpretation*, cited above in note 40, at 817–33, which analyzes how legal interpretation is bonded to action; Cover, *Violence*, cited above in note 40, at 1601, which discusses the violence inherent in legal interpretation; and Cover, *Messiah*, cited above in note 27, at 201–02, which discusses the special form of commitment to law exhibited by certain messianic groups.

[43] 461 U.S. 574 (1983).

Revenue Service correctly denied tax-exempt status to two private schools with racially discriminatory policies. The Court based its holding on a public policy requirement specific to the Internal Revenue Code, not on the constitutional dimensions of the policy of discouraging racial discrimination in education.[44] The Court also failed to recognize that the schools were asserting a competing claim of value based on their view of the First Amendment.

The *Bob Jones* case provided Cover with a felicitous occasion for challenging traditional constitutional theory.[45] Cover's attack rested on a distinctive view of both the individual and law, a view informed by socio-anthropological theories about how human beings create worlds of meaning.[46] The individual subject and law itself exist only in relation to a meaning-generating community or, in Cover's words, the normative universe of the *nomos*.[47] In the world of the *nomos*, law, as a resource in the larger effort of the community to endow life with meaning, is measured by interpretive commitment: "all collective behavior entailing systematic understandings" and commitments to certain beliefs have "equal claim to the word 'law.'"[48] These commitments are learned and expressed through communal narratives — myths, histories, stories, textual traditions, and *corpus juris*.[49] Because the Bob Jones University and, in particular, the Mennonites, who filed an amicus brief in the case,[50] represented cohesive communities dedicated to a set of moral ideals and defined by a particular historical narrative, their vision of the First Amendment had as much claim to the word "law" as the opinion of the Supreme Court.

As Cover himself later wrote, his position is "close to a classical anarchist one — with anarchy understood to mean the absence of rulers, not the absence of law."[51] The *nomos* "requires no state,"[52] although the state and its institutions (especially the Supreme Court) require a *nomos* of their own.[53] Because the state has no privileged claim to the word "law," state coercion and violence are problematic.[54]

---

[44] *See id.* at 592.

[45] *See* Kahn, *supra* note 40, at 55, 61–62 (discussing Cover's theory as an inversion of traditional constitutional theory).

[46] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 4 n.2, 5 n.7 (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973); and PETER BERGER, THE SACRED CANOPY 19 (1967)).

[47] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 4. In describing the concept of "*nomos*," Cover relies on an eclectic list of modern writers in the fields of social anthropology, cognitive psychology, and literary theory. *See id.* at 4–6.

[48] Cover, *Folktales*, *supra* note 40, at 181.

[49] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 9.

[50] *See id.* at 62 n.180.

[51] Cover, *Folktales*, *supra* note 40, at 181.

[52] Cover, *Nomos and Narrative*, *supra* note 21, at 11.

[53] *See id.* at 18–19.

[54] *See* Cover, *Folktales*, *supra* note 40, at 182.

Authoritative legal interpretation stifles a competing community's law; it is, in Cover's terminology, the jurispathic aspect of interpretation. Cover's vision of law as the expression of autonomous interpretive communities exposes the weakness in traditional constitutional theory, which grounded authority in consent.[55] His theory also undermines contemporary theoretical models, which ground constitutional authority in interpretation.[56] Once we understand the jurispathic aspect of interpretation, we see that interpretation does not support authority; rather, authoritative interpretation kills law.[57] It is the "triumph of the hierarchical order over meaning."[58]

Cover's goal in *Nomos and Narrative* was not merely to challenge prior constitutional models of authority; rather, it was to offer a new conception of how constitutional interpretation should proceed. Thus, he wrote, "[t]he challenge presented by the absence of a single, 'objective' interpretation is, instead, the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another."[59] The Supreme Court cannot hide behind empty jurisdictional doctrines, as it did in *Bob Jones*, but must endow its interpretations with legal meaning; it must create a *nomos*.

How, then, can legal interpretation achieve meaning? Cover stipulated two conditions that are both descriptive and prescriptive: they describe the nature of law in the *nomos*, and they explain how the Court must create a *nomos* through constitutional interpretation. The first is commitment. Interpretation is transformed into legal meaning through personal commitment to a "teleological vision that the interpretation implies."[60] In articulating the relationship of legal meaning to a teleological vision, Cover did not refer to the static, classical natural law conception of law as a means to achieve natural ends, which themselves constitute the good life.[61] Rather, Cover described

---

[55] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 27–28 (2d ed. 1986).

[56] *See, e.g.*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 527 (1982); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

[57] As Paul Kahn observes: "No one has better grasped the splitting apart of authority and interpretation than Robert Cover." Kahn, *supra* note 40, at 54. Kahn continues:

> [Cover's] vision of anarchy suggests that, as a theory of constitutional law, interpretation may remain forever outside of the practical reality of constitutional law. Constitutional law is above all about order and authority. Interpretation, however, seems to lead to anarchy in the place of order. Unless interpretation can somehow be made to support authority — a task that Fiss essentially avoided — Cover's accusation that the work of the courts is the death of law signals the limits of the usefulness of the interpretive approach.

Id. at 63.

[58] Cover, *Nomos and Narrative*, *supra* note 21, at 58.

[59] *Id.* at 44.

[60] *Id.* at 45.

[61] *See* Garet, *Meaning and Ending*, *supra* note 36, at 1810 (discussing Cover's conception of natural law).

a dynamic teleology in which law expresses the striving of communities toward imagined, alternative goals.[62] In addition to this subjective commitment to a vision of future legal possibilities, the creation of legal meaning also entails "an objectified understanding of a demand."[63] The demanding object is the law that the community creates. Cover wrote: "The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law."[64] Thereafter, it perceives that law as the "faithful other"[65] — a set of commandments or obligations addressed directly to the community that reflects the community's common goals. Interpretation has legal meaning when undertaken to aid the community in understanding the obligations of its law.

Thus conceived, legal interpretation has the capacity to transform the human situation, and, in Cover's conception, to achieve a form of redemption. Cover illustrated this point with an example drawn from the American anti-slavery movement. When Frederick Douglass insisted that the Constitution did not permit slavery, despite professional consensus to the contrary, he engaged in a redemptive form of legal interpretation. Douglass embraced a vision of an American legal system free from slavery. His transcendent vision eventually led to the transformation of the legal landscape.[66] Had the *Bob Jones* Court committed itself to an interpretation of the Constitution that affirmed the unconstitutionality of publicly subsidized racism, the Court, too, would have participated in a transformative act.

In sum, Robert Cover's vision of American law is at once deeply troubling and deeply hopeful. Constitutional interpretation remains "essentially contested"[67] because the Supreme Court's authority is primarily a function of its institutional power to support some meanings and to destroy others. This imperial power has virtue. The imperial or "universalist virtues" of modern liberalism provide social peace; they are necessary "to ensure the *coexistence* of worlds of strong normative meaning."[68] But there is a "tragic limit"[69] to the peace that may be achieved because state action, in destroying some meanings, is inevitably bound up with violence.[70] At the same time, *Nomos and*

---

[62] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 9.

[63] *Id.* at 45.

[64] *Id.*

[65] *Id.* The function of narrative, therefore, is to tell the "story of how the law, now object, came to be, and more importantly, how it came to be one's own." *Id.*

[66] *See id.* at 37–40.

[67] *Id.* at 17 (quoting W. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157 (1967)).

[68] *Id.* at 12. Cover acknowledges that "[k]eeping the peace is no simple or neutral task." *Id.* at 60.

[69] Cover, *Violence*, *supra* note 40, at 1629.

[70] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 50 (describing the violence inherent in legal interpretation).

Narrative holds out a rich vision of the possibilities of constitutional interpretation. By reconceiving itself as a *nomos* in its own right, the Supreme Court can participate in the creation of legal meaning and the development of a shared American communal vision.

B. Cover's Vision of Jewish Law

In fleshing out his vision of law in *Nomos and Narrative*, Cover cited a variety of Jewish texts and traditions.[71] He engaged in an elaborate exegesis of the Bible, comparing a precept about the rights of first-born sons in *Deuteronomy* with the narratives of *Genesis*, in which second-born sons are preferred,[72] to illustrate how "precepts and narratives operate together to ground meaning."[73] He quoted extensively from the writings of Joseph Caro to illustrate the difference between culture-specific forces (such as Torah, Temple, and deeds of loving-kindness) that create a *nomos* of strong meaning and the weaker universalist virtues of peace, justice, and truth that sustain such normative worlds.[74] He sprinkled his analysis with references to talmudic stories about the separation of interpretive communities.[75] But these invocations of Jewish texts and traditions are just the tip of the iceberg. None of these themes determined Cover's central arguments. Moreover, as Cover noted, many of these themes easily could have been illustrated with non-Jewish examples.[76]

Apart from the texts cited above, Cover did not discuss Jewish law in *Nomos and Narrative*. Nevertheless, Cover's later work, in particular a little piece written shortly before his death entitled *Obligation: A Jewish Jurisprudence of the Social Order*,[77] hints at why Cover structured *Nomos and Narrative* as he did and why he turned

---

[71] Paul Kahn contends that Cover's use of "unfamiliar" or "out of place" sources is essentially a rhetorical device. Kahn, *supra* note 40, at 55. *Nomos and Narrative* is an "assault [on] an established tradition" — that is, traditional constitutional theory — and on more conventional contemporary formulations like those of Owen Fiss. *Id.* The assault gathers power through the use of new vocabulary and new sources such as biblical exegesis. By shocking our "ordinary legal sensibilities," Cover presents an "immediate challenge to Fiss' confident reliance on the language and habits of the professional, legal community." *Id.*

But, as we shall see, Cover's turn to Jewish sources is not solely a rhetorical move. Immersion in these Jewish sources helped shape Cover's theories from the start.

[72] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 19–21.

[73] *Id.* at 19.

[74] *See id.* at 11–13; *infra* pp. 891, 893.

[75] *See, e.g.*, Cover, *Nomos and Narrative*, *supra* note 21, at 15 n.40.

[76] *See id.* at 10, 13–14. Of course, there also may be intriguing connections between Cover's entire pluralist theory of law and his sense of Jewish identity. Like Horace Kallen's theory of cultural pluralism, which defines democracy as the right of ethnic groups to self-realization (arguably Kallen's solution to being Jewish in America, *see* KLINGENSTEIN, *supra* note 17, at 34–50), Cover's theory of legal pluralism, which insists on the equality of all interpretive subcommunities, is well-suited to the preservation of Jewish legal autonomy.

[77] Cover, *Obligation*, *supra* note 25.

increasingly to Jewish sources to work out the ramifications of his thesis. In *Obligation*, Cover touched on three aspects of Jewish law that had special reverberations for him. When *Obligation* is read in conjunction with *Nomos and Narrative*, Jewish law emerges as an archetype for Cover's vision of the nature of law. Indeed, *Nomos and Narrative* describes an imaginary alternative world of legal meaning — an ideal *nomos* — that corresponds, in large measure, to Cover's later description of Jewish law.

1. The Anarchy of Legal Interpretation. — For one whose position is close to classical anarchism, there is an immediate sympathetic pull to Jewish law. After all, Jewish law is anarchistic in the strictest sense: a transnational system of law that is not dependent on a state. It no longer has a functioning parallel to a supreme court,[78] nor does it operate with a concept of precedent in the conventional sense.[79] Thus, Jewish law provides a test case of a legal system lacking institutional hierarchy, in which law is primarily a system of legal meaning. According to Cover, there was "no well defined hierarchy of law articulating voices in Judaism."[80] True, the rabbis occasionally mourned this lack of authoritarian structure and the concomitant "cacophony of laws,"[81] and associated it with the destruction of the Temple and punishment for sins. On the whole, however, Cover implied, the rabbis reveled in the "plethora of laws."[82] They were able to do exactly what modern theory finds problematic — continue in the face of radically inconsistent and plural understandings of the law. The rabbis created a "myth" of "legitimacy for a radically diffuse . . . system of authority."[83] This myth is the talmudic tradition of the heavenly voice that mediated between the conflicting legal opinions of the Schools of Hillel and Shammai[84] by proclaiming, "[T]hese and these [both] are the words of the Living God."[85]

---

[78] According to Jewish tradition, the Jewish High Court (*Sanhedrin*) was the final arbiter of disputed questions of law. The *Sanhedrin* dissolved sometime during the Judean revolt against Rome. After the destruction of Jerusalem in 70 C.E., the sages reconvened in the town of Yavneh. This assembly succeeded to many of the *Sanhedrin*'s functions, but its rulings lacked the full force of *Sanhedrin* decisions. *See* 14 ENCYCLOPEDIA JUDAICA *Sanhedrin* 836–39 (1972).

[79] No precedential value attaches to the decisions of judges adjudicating cases between individual litigants. The exposition of the law occasioned by a particular case, however, is an authoritative source of law. *See* THE PRINCIPLES OF JEWISH LAW 115–16 (Menachem Elon ed., 1975); Norman Lamm & Aaron Kirschenbaum, *Freedom and Constraint in the Jewish Judicial Process*, 1 CARDOZO L. REV. 99, 127–28 (1979).

[80] Cover, *Obligation*, *supra* note 25, at 68.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 69.

[84] Hillel, who was president of the *Sanhedrin* in about 30 B.C.E., and his partner, Shammai, the head judge of the *Sanhedrin*, each established their own schools of learning, which were often in dispute. *See generally* ISRAEL KONOWITZ, BEIT SHAMMAI U-VEIT HILLEL 9–13 (1965) (THE HOUSE OF SHAMMAI AND THE HOUSE OF HILLEL).

[85] BABYLONIAN TALMUD, *'Erubin* 13b, *translated in* SONCINO, *supra* note 13, 2 *Seder Mo'ed*, at 85 & n.11; *see* Cover, *Obligation*, *supra* note 25, at 68.

This talmudic statement is the foundation of several contemporary pluralist and anti-hierarchical perspectives on the Jewish tradition, a perspective articulated most forcefully by the Jewish historian Gershom Scholem, recently described as a theological anarchist.[86] Scholem cited this talmudic statement as evidence that "[i]t is precisely the wealth of contradictions, of differing views, which is encompassed and unqualifiedly affirmed by [the Jewish] tradition."[87] In *Nomos and Narrative*, Cover elevated this anarchist conception of the Jewish tradition into a statement about the pluralist, anti-hierarchical nature of law itself. A common legal text, whether Scripture or the United States Constitution, cannot prevent multiple (even conflicting) interpretations, nor can it order among them. Accordingly, the different constitutional visions of the *Bob Jones* communities and of the Supreme Court, like the different legal visions of the Hillelite and Shammaite schools, are equally "law." The ideal world of the *nomos* rejoices in this plurality of normative orders and conflicting constitutional visions which are all, in a sense, the "words of the Living God."[88] It sees the filling of the legal universe with diverse laws of diverse communities as a creative and meaningful process, one that is tragically stifled by the liberal state's insistence on centralizing authority, silencing competing normative perspectives, and reducing law to a mechanism of social control.[89]

2. Law as Obligation. — In *Obligation*, Cover focused on the lack of violence in the Jewish legal tradition. According to Cover, the Jewish legal system evolved for nearly 2,000 years without exercising conventional coercive powers over its members.[90] Adherence to the

---

[86] *See* DAVID BIALE, GERSHOM SCHOLEM: KABBALAH AND COUNTER-HISTORY 22, 127–33 (1982) (analyzing Gershom Scholem's interpretation of the Jewish tradition).

[87] GERSHOM SCHOLEM, *Revelation and Tradition as Religious Categories in Judaism*, *in* THE MESSIANIC IDEA IN JUDAISM AND OTHER ESSAYS IN JEWISH SPIRITUALITY 282, 290 (1971) [hereinafter, SCHOLEM, *Revelation and Tradition*]. Scholem, however, was primarily concerned with the anarchistic nature of the Jewish religious, not legal, tradition. *Cf.* GERSHOM SCHOLEM, SABBATAI SEVI: THE MYSTICAL MESSIAH 283 (R.J. Zwi Werblowsky trans., 1973) [hereinafter SCHOLEM, SABBATAI] ("There is no way of telling a priori what beliefs are possible or impossible within the framework of Judaism. . . . The 'Jewishness' in the religiosity of any particular period is not measured by dogmatic criteria that are unrelated to actual historical circumstances . . . .").

[88] Cover, *Nomos and Narrative*, *supra* note 21, at 68 ("We ought to stop circumscribing the *nomos*; we ought to invite new worlds.").

[89] As Cover, in his poetic style, wrote:

> In an imaginary world in which violence played no part in life, law would indeed grow exclusively from the hermeneutic impulse — the human need to create and interpret texts. Law would develop within small communities of mutually committed individuals who cared about the text, about what each made of the text, and about one another and the common life they shared. Such communities might split over major issues of interpretation, but the bonds of social life and mutual concern would permit some interpretive divergence.

Cover, *Nomos and Narrative*, *supra* note 21, at 40 (footnote omitted).

[90] *See* Cover, *Obligation*, *supra* note 25, at 68.

law without coercion derives, Cover asserted, from Judaism's conception of law as a system of reciprocal obligations rather than of rights,[91] in which the obligations of interdependent community members to one another are specified. Thus, all social interaction requires knowledge and performance of the law. Moreover, to secure adherence without coercion, Jewish law, unlike rights jurisprudences, must make strong claims about the law's intrinsic merit.[92] Cover apparently concluded that a reconception of law as obligation, rather than rights, would partially answer his central concern: the problem of the law's violence.[93]

The conception of law as obligation is a central motif of *Nomos and Narrative*.[94] A strong *nomos*, Cover asserted, is organized around interpersonal commitment.[95] Such commitment is characterized by a "recognition that individuals have particular needs and strong obligations to render person-specific responses."[96] It is precisely because each community member is obligated to address the needs of his or her fellow members that the community member, not the state, is the locus of law performance. Hence law is active: law is what each community member does, not what any individual has or receives from the state. Because persons do law, the state and its institutions are largely irrelevant to the practice of law. In *Nomos and Narrative*, judges are pedagogues; they enable persons to do law by elucidating the law's deeper purposes. This image of the law as a system of reciprocal obligations is also critical to Cover's conception of how interpretation generates legal meaning. The law imposes obligations that community members obey because they understand the law as embodying their common goals and aspirations.[97] Legal interpretation in any nomic community (including the Supreme Court) achieves

---

[91] *See id.* at 68–69.

[92] The "ideology" of obligation is therefore a useful counter to the "centripetal forces that have beset Judaism." *Id.* at 69.

[93] Cover's preoccupation with the law's violence runs throughout his writings. *See* Cover, *Bonds of Constitutional Interpretation*, *supra* note 40, at 818–19 (arguing that legal interpretation takes place in the shadow of violence — either the violence of the State or the violence of dissenting communities asserting their right to make law); Cover, *Nomos and Narrative*, *supra* note 21, at 9, 50 (same); Cover, *Violence*, *supra* note 40, at 1628–29 (same).

[94] Ronald Garet observed that the idea of *nomos* in Cover's work approximates the idea of "existence" in the works of Kierkegaard or Sartre. Garet insightfully noted that existence and *nomos* may "carry differences in substance and emphasis — the one stressing consciousness, personhood, and freedom, the other action, communality, and obligation." Garet, *Meaning and Ending*, *supra* note 36, at 1801 n.5; *see also* Tushnet, *supra* note 40, at 1528–29 (noting the "active" character of Cover's conception of law: "law is what we do"; hence, people turn to authority figures to find out what the law is).

[95] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 12.

[96] *Id.* at 13.

[97] *See id.*

meaning by drawing out, through narrative, the values and implications of the obligations imposed by the community's law.

3. The Transformational Capacity of Law. — Law, as understood in *Nomos and Narrative*, is primarily a means of moral and social transformation.[98] "People associate not only to transform themselves, but also to change the social world in which they live."[99] Transformation presupposes a vision of an alternative world that the community desires to realize. "By themselves," these visions "dictate no particular set of transformations or efforts at transformation."[100] The particular role of law is to give these visions "depth of field," by identifying which new normative worlds can and should be striven for immediately.[101]

Cover's conception of the capacity of the law to create new or transformed legal worlds, which he called law's "teleology,"[102] derives from his conception of human nature and community. Human beings, by their nature, constantly strive to transform their worlds in light of alternative possibilities;[103] such world creation is "collective or social."[104] Law's teleology is the internal aspect of law that channels the human desire for transformation into a collective or social activity in the present.

In *Obligation*, Cover linked the concept of law's teleology to Jewish legal philosophy. Drawing on Maimonidean jurisprudence, Cover asserted that Jewish law, unlike rights jurisprudence, has a "systemic telos."[105] All the laws of the Torah — civil, penal, and ritual — have a single purpose, the divine goal of aiding humanity in its striving for

---

[98] *See* Garet, *Meaning and Ending*, *supra* note 36, at 1804–08 (discussing Cover's transformational conception of human nature).

[99] *Id.* at 33.

[100] *Id.* at 9.

[101] *Id.*

[102] Cover, *Messiah*, *supra* note 27, at 202. Cover explained this conception as follows:

> I think I am making a strong claim here for the *teleology* implicit in law and for what is entailed in that teleology: namely a generative capacity through which law not only generates new law but also is at least linked to — if it is not determinative of — the generation of new concepts of the worlds we strive to realize.

Id.; *see also* Garet, *Meaning and Ending*, *supra* note 36, at 1805 (linking Cover's concept of law's teleology to the capacity of law to create new worlds).

[103] *See* Cover, *Messiah*, *supra* note 27, at 201–02. Cover wrote:

> Our concept of our normative selves and environment is in flux. But, as our concept of where we are (normatively) changes, so does our concept of the possible world to which our law impels us to go. A world with "law" is a world in which there are (a) particular processes (bridges) for getting to the future; (b) particular kind of futures that one can get to[;] (c) always (new) future worlds that are held over against our current normative world with an implicit demand that they be striven toward.

Id.

[104] Cover, *Nomos and Narrative*, *supra* note 21, at 11. Therefore, a *nomos* in which law is predominantly a system of meaning implies a "sense of direction or growth that is constituted as the individual and his community work out the implications of their law." *Id.* at 13.

[105] Cover, *Obligation*, *supra* note 25, at 70.

perfection.[106] For Maimonides, the Torah is divine because it is concerned with human transformation and not solely with the mechanics of conventional governance.[107] In language reminiscent of *Nomos and Narrative*, Maimonidean scholar Lenn Goodman describes Jewish law in terms of its relationship to the innate desire of human beings for moral and social transformation.[108] Goodman identifies in the Torah a teleological strain that presupposes a "transcendent goal" in the "strivings of 'natural beings.'"[109] Because humans are "creatures in progress"[110] and divine perfection is infinite, not determinate, the demands of human perfection are not so much prescribed goals as "objects of motivation, striving, aspiration, and desire."[111] The Torah's legislative program channels this desire for perfection by identifying a specific set of immediate efforts at transformation that must be undertaken by the community as a whole.

In short, Cover's three visions of Jewish law were as critical in the development of *Nomos and Narrative* as was its ostensible subject, the *Bob Jones* opinion. One wonders, in retrospect, whether Cover's very use of the term *"nomos"* was a private play on words. *Nomos*, after all, is the Greek Septuagint word for Torah.[112]

II. THE "JEWISH" THEMES IN *NOMOS AND NARRATIVE* AND THEIR PLACE IN CONTEMPORARY LEGAL THEORY

The connections between Cover's vision for American law and his vision of Jewish law is drawn out further in this Part as I dissect, in turn, the three major Jewish themes underlying *Nomos and Narrative*. These themes are situated within the larger context of three debates in contemporary American legal theory about (1) legal interpretation and authority, (2) the conception of law as obligation rather than right, and (3) the transformational potential of the law. Although Cover's work remains the principal focus, I also analyze the writings of other legal scholars who have turned (expressly or more indirectly) to the contrast case of Jewish law.

---

[106] *See id.* (quoting MAIMONIDES, EPISTLE TO YEMEN).

[107] *See* MAIMONIDES, GUIDE OF THE PERPLEXED, at pt. II, chs. 39–40, at 378–84 (Shlomo Pines trans., 1963); Lenn E. Goodman, *Maimonides' Philosophy of Law*, 1 JEWISH L. ANN. 72, 76 (1978).

[108] *See* L.E. GOODMAN, ON JUSTICE: AN ESSAY IN JEWISH PHILOSOPHY 100 (1991).

[109] *Id.* at 101.

[110] *Id.* at 102.

[111] *Id.* at 101.

[112] *Cf.* Cover, *Violence*, *supra* note 40, at 1804 (implicitly equating Torah and *nomos*). On the translation of Torah as *nomos* in the Septuagint and its later influence on Jewish-Christian relationships, see Peter Richardson, Torah *and* Nomos *in Post-Biblical Judaism and Early Christianity*, *in* LAW IN RELIGIOUS COMMUNITIES IN THE ROMAN PERIOD: THE DEBATE OVER *TORAH* AND *NOMOS* IN POST-BIBLICAL JUDAISM AND EARLY CHRISTIANITY 147, 149–53 (Peter Richardson & Stephen Westerholm eds., 1991).

It is tempting to imagine some definable link between the turn to the rabbinic model in these areas of contemporary legal debate and today's postmodern sensibility.[113] Recent theories about the limits of knowledge and the inherent ambiguity of texts have had an unsettling effect on legal theory. The uncertain mood of recent legal scholarship is captured in Richard Bernstein's description of the present period as an age of "Cartesian anxiety."[114] Yet historians have used the term "age of anxiety" to describe the period of late antiquity that witnessed the collapse of the classical Greek humanist view of a rationally ordered, neutral cosmos.[115] That humanist ethos is not unlike our own: classical civilization was dominated by impersonal principles, technology, and materialism; not by inter-personal relationships and community.[116] The loss of faith in humanism gave rise to a variety of religious attitudes, including among others, apocalypticism, manifested in nascent Christianity and various Jewish sects, and gnosticism, the affinity of which with nihilism has been noted.[117] It was within this milieu, but also in contradistinction to it,[118] that rabbinic Judaism flourished. In this period, rabbinic Judaism refined its legal system, structured around communal obligations; developed its unique interpretive enterprises, *midrash* and talmudic dialectic, with their seeming rejection of a single "objective" truth; and articulated the

---

[113] I use the term postmodern here to refer to a variety of critical philosophical, legal, and literary theories that, taken together, emphasize the instability of textual meaning, the irretrievability of foundational truths, and the repressive aspects of legal ideologies that identify law with order imposed coercively from above. Postmodern theory often implies a rupture with the philosophic basis of the modern Enlightenment era, which, in the legal context, institutionalizes various ideals as truth, in particular the ideal of the rule of law. But, for a trenchant analysis of the false dichotomy between modernism and postmodernism in the fields of philosophy and legal studies, see DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT 2–12 (1992).

[114] *See* RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 16–19 (1988). By "Cartesian anxiety," Bernstein refers to the anxious mood of those who believe that, in the absence of foundational, objective values — values whose existence is challenged by contemporary hermeneutic criticism — there can be only chaos, relativism, and nihilism. *Id.*; *see also* LEVINSON, *supra* note 28, at 52 (describing conventional American legal culture as founded on an increasingly uncertain basis of constitutional "faith"); Sherwin, *supra* note 2, at 1786 n.5 (describing the anxious mood of contemporary legal scholarship in the wake of its encounter with hermeneutic criticism).

The Cartesian dichotomy Bernstein describes is reflected in many contemporary legal debates that seem to pose a choice between objectivity and relativism, determinacy and chaos, and the rule of law and nihilism. *See* Singer, *supra* note 18, at 4 n.6 (citing Fiss, cited above in note 56, at 741; and Michael Moore, *Moral Relativity*, 1982 WIS. L. REV. 1061, 1063–64).

[115] *See* E.R. DODDS, PAGAN AND CHRISTIAN IN AN AGE OF ANXIETY 3–4 (1965).

[116] *See* 3 M.I. ROSTOVTZEFF, THE SOCIAL AND ECONOMIC HISTORY OF THE HELLENISTIC WORLD 1302–03 (1941).

[117] *See* HANS JONAS, THE GNOSTIC RELIGION: THE MESSAGE OF THE ALIEN GOD AND THE BEGINNINGS OF CHRISTIANITY 270–74, 320–40 (2d ed. 1963).

[118] On the encounter of rabbinic Judaism with Hellenism, see SAUL LIEBERMAN, HELLENISM IN JEWISH PALESTINE *passim* (2d ed. 1962).

distinctive concept of messianic redemption achieved through the practice of law. It is hardly surprising, therefore, that aspects of the rabbinic endeavor would stir "a sudden sympathetic vibration, a sense of empathy, of recognition."[119]

Yet the rabbinic response to the classical age of anxiety was religious in character. Considered within their specific religious context, the goals and methodology of Jewish law are not easily transposed to a secular legal context.

A. Legal Interpretation and Authority

For Robert Cover, the appeal of Jewish law lay in its seeming rejection of both objectivity in interpretation and the identity of law with political structures. Instead, law grows "exclusively from the hermeneutic impulse — the human need to create and interpret texts."[120] Multiple, even conflicting, interpretations of competing schools are reflective of God's truth because each is part of a larger understanding of the values and ideals of the law. Other writers have taken similar approaches. Robert Burt has turned to Jewish law to challenge hierarchical approaches to constitutional interpretation that seek a single truth embedded in the Framers' vision rather than focus on the cumulative search of past and present interpreters for the meaning of the text.[121] Both Cover and Burt imply that the Jewish legal system abandoned the search for a single authentic truth and

---

[119] YERUSHALMI, *supra* note 1, at 113. This turn to the rabbinic model in contemporary legal theory has intellectual parallels in related fields. In the last decade, contemporary literary theorists have advanced classical rabbinic literature as a discursive model compatible with, or antecedent to, critical literary theory. These writers point to the rejection in talmudic dialectic of an objective "truth," *see* DAVID KRAEMER, THE MIND OF THE TALMUD 102–07, 139 (1990), the radical equation in midrashic literature of multiple interpretations of Scripture, and the midrashic use of interpretation to extend the text's meaning rather than to determine original authorial intention. *See, e.g.*, SUSAN HANDELMAN, THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY, at xv (arguing that "there are profound *structural* affinities between the work of our most influential (Jewish) thinkers like Freud, Derrida, and Bloom, and rabbinic models of interpretation"); MIDRASH AND LITERATURE, *supra* note 31, at x (calling attention to the "resemblance between midrash and highly similar critical phenomena which . . . have acquired central importance to contemporary literature, criticism and theory"). *But see, e.g.*, William S. Green, *Romancing the Tome: Rabbinic Hermeneutic and the Theory of Literature*, 40 SEMEIA 147, 147–53 (1987) (criticizing the equating of *midrash* with poststructuralist literary theory); David Stern, *Midrash and Indeterminacy*, 15 CRITICAL INQUIRY 132, 132–35 (1988) (arguing that the phenomenon of multiple interpretations of Scripture in *midrash* bears little resemblance to contemporary concepts of indeterminacy).

It was nearly inevitable, therefore, that the rabbinic tradition would also come to occupy the attention of legal theorists whose faith in the project of constitutionalism has been challenged by the anti-foundationalist turn in contemporary literary philosophy.

[120] Cover, *Nomos and Narrative*, *supra* note 21, at 40 (footnote omitted).

[121] *See* Burt, *supra* note 21, at 1690–94.

substituted, instead, a plurality of equally legitimate constitutional visions (Cover), or a collaborative search for God's meaning through equal attention to past and present meditations on the text, subject to continual revision (Burt). Thus, both situate rabbinic interpretive practice within the framework of contemporary conceptual models of legal discourse that ground the legitimacy of law in a "theory of meaning that rests upon the discursive community."[122]

This invocation of the rabbinic interpretive model as an alternative to reigning Western interpretive theories raises a major methodological question: can we understand this "contrast case" without distorting it through the very use of contemporary Western categories?[123] Instead of directly addressing this question, I hope to provide a framework for understanding rabbinic interpretive practice within its specific religious context.

To appreciate the appeal of Jewish law for contemporary theorists, the arguments implicit in Cover's and Burt's works are set forth below in some detail. Because neither developed full-scale arguments about rabbinic interpretive practice, I shall have to extrapolate from their writings. In pursuing the authors' lines of thought in directions they themselves might not have foreseen, I hope to illuminate the conceptual source of their theories. My critique focuses on themes common to both.

1. The Contrast Case. — Cover's theory about the nature of law is, in part, a frontal attack on the tenets of legal centralism, which until recently was the dominant theory of legal ordering. Legal centralism holds that law is synonymous with the state and that the state's laws are part of a unitary hierarchical legal system.[124] Cover, by refusing to limit the domain of law to official state pronouncements and by insisting on the equality of all communities of interpretation, sanctions a plurality of legal systems. Each legal community may make different truth claims; each may assert a different "constitutional vision."

For Cover, the talmudic concept that the differing legal opinions of the Hillelite and Shammaite schools are both the words of God supported this vision of legal pluralism by implying two propositions.

---

[122] Kahn, *supra* note 40, at 6 (describing contemporary communitarian models of constitutional interpretation).

[123] *See* Steven D. Fraade, *Interpreting Midrash 2: Midrash and Its Literary Contexts*, 7 PROOFTEXTS 284, 293 (1987); Stern, *supra* note 119, at 132–34.

[124] The classic definition of legal centralism is presented in John Griffiths, *What is Legal Pluralism*, 24 J. LEGAL PLURALISM 1, 3 (1986) ("[L]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."); *see also* Bernard S. Jackson, *Jewish Law or Jewish Laws*, 8 JEWISH L. ANN. 15, 19–23 (1989) (linking the ideology of legal centralism in secular Western legal systems to Hans Kelsen's political theory that the legal system must be synonymous with the state to justify coercive action).

First, a legal system can recognize a plurality of conflicting norms or truth claims at the level of legal discourse, each a valid formulation of the law. The proposition that even contradictory legal positions may reflect divine truth is acknowledged by most halakhic authorities[125] and represents a distinctive way of looking at the normative world.[126] In the Jewish legal system, the actual legal norm is not coextensive with the concept of Torah or law in the broadest sense. The Talmud explores the reasons behind even rejected opinions, thus suggesting that all recorded opinions reflect an aspect of truth[127] and are worthy of study as part of the theoretical, conceptual understanding of Torah law.[128] Second, Cover inferred that a legal system can permit behavioral pluralism; it is not always necessary to order among contradictory legal norms. Thus, Cover believed that the "these and these" principle legitimates a "radically diffuse system of authority" that lacks a hierarchically determined authoritative voice.[129] This second proposition raises the far more complex question whether the precise purpose of the talmudic principle Cover invoked is to order among conflicting legal norms. After all, the same heavenly voice that proclaimed the opinions of both Hillel and Shammai to be the words of God also declared that the law is in accordance with the school of Hillel.[130]

The function of this principle is at the core of different halakhic attitudes toward the finality of majority opinion.[131] The "these and

---

[125] *See* Lamm & Kirschenbaum, *supra* note 79, at 102–05 (reviewing authorities who endorse a pluralistic *halakhah*).

[126] *See* Cover, *Obligation*, *supra* note 25, at 68–69.

[127] *See generally* KRAEMER, *supra* note 119, at 139–70 (discussing the Babylonian Talmud's approach to the concept of truth).

[128] *See* BABYLONIAN TALMUD, *Berakoth* 11b, *translated in* SONCINO, *supra* note 13, *Seder Zera'im*, at 64 (equating implicitly the study of any portion of the Talmud — including dissents — with the study of Torah); *see also* DAVID W. HALIVNI, MIDRASH, MISHNAH AND GEMARA: THE JEWISH PREDILECTION FOR JUSTIFIED LAW 105–15 (1986) (discussing the historical development of the independent religious obligation to study Torah (and all its sources) even though no practical legal implications will ensue).

[129] Cover, *Obligation*, *supra* note 25, at 69.

[130] Why the opinions of the school of Hillel rather than Shammai were accepted as authoritative is a question with which the Talmud itself struggles. The heavenly voice supposedly decided the issue after three years of dispute. Elsewhere, the decision to fix the law in accordance with the views of the Hillel school is attributed to the activity of the sages at Yavneh. *See* TOSEFTA, *Eduyyot* 1:1. The Talmud reasons that the school of Hillel deserved to be followed because its disciples were humble and taught the opinions of the Shammai school alongside and, sometimes before, their own. *See* BABYLONIAN TALMUD, *'Erubin* 13b, *translated in* SONCINO, *supra* note 13, 1 *Seder Mo'ed*, at 85–86. The Talmud also suggests that the Hillel school was in the majority. *See id. Yevamoth* 14a, *translated in* SONCINO, *supra* note 13, 3 *Seder Nashim*, at 72. Either rationale suggests that the law may be fixed in accordance with considerations other than the intrinsic intellectual merit of the accepted opinion.

For an historical perspective on the decision to canonize the rulings of the Hillel school, see 1 GEDALIAH ALON, THE JEWS IN THEIR LAND IN THE TALMUDIC AGE 272–75 (Gershon Levi ed. & trans., 1980).

[131] Majority rule is deduced from a scriptural verse, *Exodus* 23:2, and has biblical status.

these" principle explains why the assembly of sages at Yavneh and later the Mishnah scrupulously preserved rejected opinions. Recorded dissents are "law" in that they were once potentially legitimate theoretical articulations of the law and still have intrinsic value. But, some halakhic authorities claim that, at the level of practice, dissents are recorded in order to clarify the rejected position, which can no longer regulate behavior because of the halakhic metaprinciple requiring adherence to majority opinion.[132] In this view, consensus confers a form of objectivity to the majority decision, whether substantive or formal, that deprives the minority decision of further practical significance. Others hold that dissents are recorded to provide the judge with the basis for an alternative outcome in extenuating circumstances or for rehabilitation of the minority opinion by a later court.[133] In this view, halakhic determination lacks absolute finality because there are multiple normative truths.[134] Therefore, the *halakhah* contains rules for its own modification.

Thus, the purpose of the talmudic statement invoked by Cover remains unclear. The statement certainly underscores the value of preserving and studying rejected opinions. These opinions often shed light on the conceptual underpinning of the majority opinion. Dissents are also religiously significant because they are proffered as part of the sincere pursuit of God's will. The "these and these" principle thus reflects a central feature of Jewish law with no clear parallel in American law. Ongoing theoretical legal discourse is a central religious obligation (and, indeed, a form of worship of God),[135] even when divorced from the process of determining behavioral norms.[136] Moreover, theoretical discourse on meanings of Scripture that differ

---

See RASHI, COMMENTARY ON EXODUS 23:2 (discussing majority rule in court decisions). In Jewish law, majority rule connotes not only the adjudication of a dispute by a majority decision of a court, but also the official determination of the law in accordance with the views of the majority of sages. *See* BABYLONIAN TALMUD, *Berakoth* 9a, *translated in* SONCINO, *supra* note 13, *Seder Zera'im*, at 45.

[132] *See* MISHNAH, *Eduyyot* 1:6, *translated in* DANBY, *supra* note 13, at 423 (opinion of Rabbi Judah) (stating that minority opinions are recorded only to clarify their rejection). The Mishnah offers a variety of reasons for preserving dissents. First, later generations should learn from their ancestors, who often were overruled, and should not insist on their own opinion. *See id. Eduyyot* 1:4, *translated in* DANBY, *supra* note 13, at 422. Second, students educated in the dissenting tradition would feel reassured that their tradition was legitimate prior to its rejection by majority opinion. *See id. Eduyyot* 1:6, *translated in* DANBY, *supra* note 13, at 423 (opinion of Rabbi Judah).

[133] *See* TOSAFOT SENS, *Eduyyot* 1:4; *see also* MISHNAH, *Eduyyot* 1:5, *translated in* DANBY, *supra* note 13, at 422 (anonymous opinion); TOSEFTA, *Eduyyot* 1:4 (opinion of Rabbi Judah).

[134] *See* TOSAFOT SENS, *Eduyyot* 1:4 (linking permissible reliance on minority views to the concept that the revelation consisted of a range of options yielding opposing conclusions).

[135] *See* sources cited *supra* note 128.

[136] One might argue that the current trend in American legal scholarship is to separate the practice of law from the theoretical discourse about law. In American legal scholarship this consequence is unintended. In Jewish law, however, it is a structural aspect of the legal system.

from the authoritative legal interpretation of Scripture is supported by the "these and these" principle; such theoretical discourse, however, does not affect the continued validity of the previously determined *halakhah*.[137] Finally, this principle, like other talmudic descriptions of the pluralistic nature of God's revelation,[138] may address the theological difficulty posed by the existence of multiple opinions in a revelatory law system. In tracing all legal opinions to their divinely revealed source, these statements clarify that whichever opinion emerges as the binding norm is reflective of God's will.[139]

The extent to which this talmudic statement legitimates a radically decentralized, pluralistic system of norms poses a more difficult question. On the one hand, the affirmation of multiple halakhic truths paves the way for genuine legal pluralism as each authority pursues his version of the truth by following accepted halakhic methodology. On the other hand, the "these and these" tradition, which ultimately establishes the Hillel view as the binding law, and other talmudic traditions suggest that a major goal of the halakhic process is to prevent fragmentation of the law through the eventual identification of a single rule of conduct.[140] In this view, diverse opinions leading

---

[137] The extent to which ongoing rabbinic theoretical discourse may, nevertheless, be constrained by halakhic determination is unclear. Halivni cites several examples of medieval Jewish biblical exegesis, which explain Scripture differently from accepted *halakhah*. *See* HALIVNI, *supra* note 128, at 105–15. The exegetes assume that Scripture has multiple meanings although only certain meanings are invested with authoritative legal status. There is virtually no rabbinic theoretical discussion that takes issue with the talmudic interpretation of the Mishnah. Halivni cites the opinion of Rabbi Yom Tov Heller, a seventeenth-century talmudist, which arguably permits theoretical interpretations of the Mishnah differently from those of the talmudic *amoraim*, provided one does not decide a practical *halakhah* differently from the Talmud. *See id.* at 113–14. But this reading of Rabbi Heller's opinion remains controversial. *See id.* at 154 n.30; *see also* DAVID W. HALIVNI, PESHAT AND DERASH: PLAIN AND APPLIED MEANING IN RABBINIC EXEGESIS app. IV, at 168–73 (1991) (arguing that the religious importance attached to the rule of practical *halakhah* inevitably constrains exegetes from pursuing speculative discourse in directions contrary to the legal determination).

[138] *See, e.g.*, BABYLONIAN TALMUD, *Hagigah* 3b, *translated in* SONCINO, *supra* note 13, 4 *Seder Mo'ed*, at 10 (stating that all contradictory opinions were given by one Shepherd; one God has given them . . . for it is written, "God spoke all these words" (quoting *Exodus* 20:1)); *see also infra* notes 194–202 (discussing theories of revelation that account for multiple opinions).

[139] *See* Hanina Ben-Menahem, *Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud?*, 6 JEWISH L. ANN. 164, 164–65 (1987). Ben-Menahem contends that these statements allay anxiety that the law actually chosen as a binding norm may not represent the true will of God. *See id.* at 168; *infra* pp. 854–55.

[140] *See* HALIVNI, *supra* note 137, at 121 ("Variety of practice was anathema to the rabbis. It was simply inconceivable to them to allow diversity in behavior. Behavior had to be uniform — and majority rule is the most effective way to enforce uniformity."); Ben-Menahem, *supra* note 139, at 166–67 (concluding that the Talmud generally disfavors legal pluralism, although talmudic law does sometimes countenance it); Michael Rosensweig, *Eilu ve-Eilu Divrei Elohim Hayyim: Halakhic Pluralism and Theories of Controversy*, *in* RABBINIC AUTHORITY AND PERSONAL AUTONOMY 93, 111–12 (Moshe Sokol ed., 1992) (arguing that the very need to reach a binding halakhic resolution, despite the "these and these" principle, is due to the halakhic value

to behavioral pluralism are due to the fact that the *halakhah* has not yet been finally determined. Indeed, only on rare occasions does one find cases of true legal pluralism in which the Talmud explicitly regards two contradictory behavior-regulating norms as equally valid, final resolutions of a legal problem.[141]

The contrast case of Jewish interpretive practice is also the subtext of Robert Burt's recent article directed at unraveling Justice Antonin Scalia's disdain for precedent.[142] Justice Scalia's attitude, according to Burt, is a logical outgrowth of the Justice's view that the Framers' intent is the "only legitimate source of constitutional authority."[143] Accordingly, Justice Scalia must overrule contrary precedents that suggest that constitutional interpretation changes over time and that countenance "an evolving conception of 'fundamental values.'"[144] Burt wished to show that commitment to originalism correlates with a certain conception of social authority that leads to a disregard of precedent. Burt contrasted two approaches to the past: the "inclusively exegetical," and the "selectively authoritative."[145] The "inclusive exegete" views the contributions of past and present generations as "seamlessly cumulative" and therefore, in interpreting the law, gives roughly equal weight to each succeeding generation. The "selectively authoritative" interpreter, by contrast, insists on "clear hierarchical rankings" and respects some past generations and events more than others.[146]

Burt explained the conceptions of authority that flow from these exegetical moods by referring to religious interpretive practice. Those who believe that prophecy is an option, that the revelation is still open, see no reason to defer to prior interpreters of God's word. Because they can communicate directly with God, and thus know the

---

placed on uniformity, discipline, and order). *But cf.* HANINA BEN-MENAHEM, JUDICIAL DEVIATION IN TALMUDIC LAW 86–96 (1991) (arguing that, unlike the Palestinian Talmud, the Babylonian Talmud tolerates legal pluralism).

[141] *See* Ben-Menahem, *supra* note 139, at 169–75. In one well-known inheritance case, the Talmud explicitly concludes that the law may be decided in accordance with either of two opinions. *See* BABYLONIAN TALMUD, *Shebu'oth* 48b, *translated in* SONCINO, *supra* note 13, 4 *Seder Nezikin*, at 298–300. The doctrine of *kim li* is based on a similar perspective. This plea grants a civil defendant the right to have his case adjudicated in accordance with a favorable minority opinion. The net result is the dismissal of the case against the defendant. Several important restrictions limited the scope of this doctrine, however. *See id.*

[142] *See* Burt, *supra* note 21, at 1685–90.

[143] *Id.* at 1687.

[144] *Id.* at 1688.

[145] *Id.* at 1690.

[146] *Id.* Burt noted that these two ways of understanding the past are best thought of as "difference[s] in mood" and not as radically divergent approaches. *Id.* Thus, the inclusive exegete does not necessarily view all prior generations of interpreters as equally situated, but is more willing to engage each prior generation than the selective authoritarian. *See id.* at 1691–92.

original will of the divine author (or framer) of the text, there is no need to consult the views of prior human intermediaries. This conception of interpretation inclines toward hierarchical, "authoritatively pronounced rules" and "clear-cut resolution of conflicting claims."[147] By contrast, those who believe that the revelation is closed must approach God indirectly and discern God's will by studying the various interpretations of His will accumulated over the generations. In this system, interpretation is a consciously collaborative search for shared values among prior, present, and, eventually, future interpreters. This conception of authority is egalitarian: the function of law is not to coerce behavior, but rather to solicit the consent of its subjects to the law's larger goals.[148] Such a conception of law better reflects a "commitment to consensual relationships based on mutually acknowledged equality."[149]

In the text of his essay, Burt did not identify either interpretive practice with any particular religious system. Rather, the religious interpretive traditions are "heuristic devices"[150] that enable Burt to explain and critique Justice Scalia's jurisprudence. Yet, as Jack Balkin has observed, it is often a mistake to prefer the text over the footnotes.[151] In the footnotes, Burt equated the "exegetically inclusive" mode of interpretation and the related egalitarian conception of authority with the predominant mode of rabbinic interpretive practice.[152] Burt's footnotes also discussed a famous talmudic story, the

---

[147] *Id.* at 1692.

[148] Here, Burt advances an argument made in greater detail in Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 471–502 (1984), which drew on New Testament rather than Jewish sources. In *Parables*, Burt observed that the Supreme Court rarely has "power . . . to secure obedience [to its rulings] in practice." *Id.* at 474. Indeed, Burt argued, coercion is not the Court's function; constitutional interpretation is not coercive; it is only persuasive. The Constitution is a pedagogic document invoked by the Court to remind litigants of the deeper values to which they are committed, such as personal identity or social peace. Hence, interpreters of the Constitution are engaged in a perpetual dialogue with the law's subjects to educate them. For an analysis of Burt's argument as an example of anti-formalist, dialogic anarchy, see Tushnet, cited above in note 40, at 1519–27.

[149] Burt, *supra* note 21, at 1696.

[150] *Id.* at 1691 n.30.

[151] *See* Balkin, *supra* note 16, at 276–82.

[152] Burt, *supra* note 21, at 1692 n.32 (citing HALIVNI, *supra* note 128, at 54, 64–65). In arguing that the predominant mode of Jewish interpretive discourse is "justificatory" rather than apodictic, Halivni is referring to the literary form in which laws are expressed, and not to the rabbinic method of deducing behavioral norms. *See* HALIVNI, *supra* note 128, at 7–8, 62–65, 76–92. Halivni's main thesis, therefore, is that Jewish law is predominantly didactic, presented in a literary form that engages the student and explains the conceptual logic of the law. *See id.* at 91. The genre of halakhic discourse exemplified by the Mishnah and medieval codes, which alternates with the commentary form of discourse discussed by Halivni, does not follow the justificatory model, however; such codes are more categorical in style. *See infra* p. 854.

Oven of Akhnai,[153] from which he inferred a lesson about Justice Scalia's interpretive vices. The *Oven of Akhnai* is one of a handful of legal narratives that has captured the imagination of philosophers, psychologists, and literary critics, as well as legal scholars.[154] From a jurisprudential perspective, the *Oven of Akhnai* story and the "these and these" principle invoked by Cover address the same problem: how to order between two conflicting, potentially equally valid, sources of law.[155] For those not familiar with the story, it is worth recounting.

Rabbi Eliezer ben Hyrkanos (a first-century rabbi) and the sages were embroiled in a controversy over whether a particular earthenware oven was susceptible to uncleanness. Rabbi Eliezer said no; the sages said yes. Rabbi Eliezer proceeded to invoke a variety of fantastic signs to support his view: an uprooted carob tree was thrown a distance of one hundred ells, a stream's current was reversed, and walls nearly tumbled down. The sages were not swayed by these signs. Nor were they moved by Rabbi Eliezer's resort to heaven itself: "If the *halakhah* [the legal rule] agrees with me, let heaven be the proof," Rabbi Eliezer appealed. A heavenly voice then proclaimed: "How dare you oppose Rabbi Eliezer, whose views are everywhere *halakhah*." Rabbi Joshua arose and quoted a biblical proof-text (*Deuteronomy* 30:12): "[I]t is not in Heaven." Rabbi Jeremiah (a fourth-century rabbi) explained the significance of this proof-text as follows: Ever since the Torah was given at Mount Sinai, "we pay no attention to a heavenly voice for God already wrote in the Torah at Mount Sinai (*Exodus* 23:2): 'You must follow the majority.'" The sages then banned Rabbi Eliezer. The story concludes, in one version, with an encounter between Rabbi Nathan and the prophet Elijah. Rabbi Nathan asked, "[W]hat did God do at that moment when Rabbi Joshua proclaimed 'it is not in Heaven'?" Elijah answered, "God laughed and said: 'My children have defeated me, my children have defeated me.'"[156]

For Burt, the *Oven of Akhnai* teaches that legal interpretation and decisionmaking must rest on persuasive and reasoned human discourse, not on the apodictic assertion of self-evidently authoritative

---

[153] *See* Burt, *supra* note 21, at 1691 n.31 (quoting BABYLONIAN TALMUD, *Baba Mezia* 59b, *translated in* SONCINO, *supra* note 13, 1 *Seder Nezikin*, at 352–53 (citations omitted)).

[154] *See* JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 27 n.89 (1965) (collecting references and citing WALTER KAUFMANN, CRITIQUE OF RELIGION AND PHILOSOPHY 238–41 (1959); and Cahn, cited above in note 8); Izhak Englard, *Majority Decision vs. Individual Truth: The Interpretations of the "Oven of Achnai" Aggadah*, 15 TRADITION 137, 143–46 (1975) (collecting additional references); *see also* Garet, *Creation Stories*, *supra* note 36, at 225–26 (discussing the *Oven of Akhnai* narrative).

[155] *See infra* pp. 861–63.

[156] BABYLONIAN TALMUD, *Baba Mezia* 59b, *translated in* SONCINO, *supra* note 13, 1 *Seder Nezikin*, at 352–53.

divine truths to which Justice Scalia is given.[157] Burt thus invokes Jewish law both to criticize authoritarian forms of constitutional interpretation as well as to offer an alternative model of legal discourse, a model more open to unrestricted deliberation and the endless growth of the law.

In short, both Cover and Burt treat the Jewish legal tradition as an ideal-type of legal system. For Cover, the Jewish legal system is a transparent archetype of law because it openly presents law as a plurality of competing constitutional visions, each equally the words of God. For Burt, Jewish law represents a legal system that, in Richard Rorty's description of contemporary ways of perceiving knowledge, "thinks of truth horizontally — as the culminating reinterpretation of our predecessors' reinterpretation of their predecessors' reinterpretation"[158] and appreciates, therefore, that all legal determination remains open, subject to revision by future interpreters. In the American legal system, by contrast, these themes are contested and increasingly suppressed by the present Supreme Court.

In his idealized representation of the rabbinic approach to legal interpretation, Burt captures several qualities of talmudic discourse. First, the literary form of the Talmud invites adherence to the law through persuasive argument rather than through categorical declaration of obligatory truths.[159] Second, Burt grasps the self-contained and ahistorical quality of talmudic study. Talmudic discourse creates a world in which scholars from across the centuries are present together, debating a legal point.[160] Through this mode of discourse, a set of practical norms is transformed into an abstract system of values, the logic of which is subject to continual exploration. This intellectual method of discourse engenders a sense of legal meaning, community, and commitment in Jewish law. Burt proposes an American version of this dialogic mode — in which past and present interpreters of the Constitution sit together on the page,[161] and, through the medium of Supreme Court constitutional interpretation, invite the law's subjects to become absorbed in and persuaded by the dialogue.[162]

Although Burt's conception of legal interpretation as pedagogy designed to persuade, not to coerce, is compelling and comports well

---

[157] *See* Burt, *supra* note 21, at 1691–94.

[158] Richard Rorty, *Philosophy as a Kind of Writing: An Essay on Derrida*, 10 NEW LITERARY HIST. 141, 143 (1978).

[159] *See supra* note 152.

[160] *See* Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's* Nomos and Narrative, 96 YALE L.J. 1836, 1854–59 (1987) (advocating the discursive and dialectic methodology of the Talmud as a model for any educational system).

[161] *See id.* at 1843–59. As Lukinsky notes, the physical lay-out of the talmudic page contributes to this dialogue. The talmudic text is in the center of the page. Diverse talmudic commentaries, spanning many centuries, frame the talmudic text.

[162] *See supra* notes 148–49 and accompanying text.

with the pedagogic nature of talmudic legal discourse, Burt glosses over the question of how the literary form in which legal interpretation is embedded affects the actual process of determining normative law.[163] The Talmud, for example, often invites adherence to authoritative, previously determined or historically transmitted laws through persuasive elaboration of their formal conceptual logic or basis in Scripture. Moreover, the richness of talmudic dialogue, like its later intellectual study, is attributable to the Talmud's focus on theoretical discourse about the law and its logic, in addition to the determination of rules of decision.[164] Finally, Burt's equation of rabbinic interpretive practice with the "inclusively exegetical" mode, in which each succeeding generation has an equal share in developing the law, raises the complex question of how rabbinic interpreters in fact relate to their predecessors.[165]

The conceptual model of rabbinic interpretive practice underlying Cover's and Burt's theories is supported, in part, by the work of at least one contemporary scholar of rabbinic law. José Faur, for example, has argued that contemporary critical ways of thinking about language and legal relationships finally permit an understanding of concepts inherent in the rabbinic tradition.[166] It is worth briefly describing Faur's theories because certain ideas implicit in the works of Cover and Burt are given more explicit formulation by Faur. According to Faur, the conventional positivist account of the Jewish legal tradition is at odds with the actual juridical basis of the law. The positivist approach stresses a hierarchical and authoritarian relationship between God and Israel. According to the juridical con-

---

[163] Of course, Burt may respond that the Supreme Court's role is *not* decisionmaking but pedagogy. This would comport with his earlier theories about the role of constitutional interpretation. *See* Burt, *supra* note 148, at 466, 471–75, 501–02. Burt's model, however, ignores the fact that the Court does adopt rules of decision that shape individual behavior.

[164] *See* EPHRAIM E. URBACH, THE SAGES 616–18 (Israel Abrahams trans., 1979) (documenting the amoraic retreat from giving decisions and the emergence of a clear distinction between theoretical and practical *halakhah*).

[165] *See infra* pp. 852–53.

[166] *See* JOSÉ FAUR, GOLDEN DOVES WITH SILVER DOTS, at xxvi (1986) (arguing that contemporary critical theory "allows for a better understanding" of rabbinic textuality); José Faur, *Understanding the Covenant*, TRADITION, Spring 1968, at 33, 44 (arguing that the ground for the validity of the law in Judaism is based upon an "extrinsic factor, a specific historical pact, not on the basis of a universal principle"). For Faur, the Jewish idea of the covenant "has special relevance for an age of scientific relativism." *Id.* at 36. *See also* Howard Eilberg-Schwartz, *When the Reader is in the Write*, 7 PROOFTEXTS 194, 198 (1987) (reviewing FAUR, cited above; and noting that, for Faur, the contemporary "realization that texts sustain endless readings" is compatible with the rabbinic tradition). Faur's work, like that of the literary theorist Susan Handelman, *see* HANDELMAN, *supra* note 119, at 40–42, has attracted some attention among American legal scholars interested in the relationship between rabbinic interpretive practice and contemporary literary theory. I analyze Faur's views more thoroughly in Stone, cited above in note 10.

ception, a horizontal, consensual relationship between God and Israel was established through a negotiated covenant. The covenant thus created a new sovereign authority, the law, the validity of which is due to "an agreement between God and Israel, not to its intrinsic truth."[167] The rabbinic concept of covenant also assumes that texts are vested with meaning within particular interpretive communities. The covenant creates an author-reader relationship between God and His interpretive community, in which God the author surrenders His work to a community who receives it, thus authorizing interpretation without recourse to His intent.[168] Each generation, in turn, passes on the work to the next generation, for fresh interpretation.

Faur's description of rabbinic hermeneutics breaks new ground. Others have emphasized that the rabbis viewed the revelation of the Torah at Sinai as "including within itself as sacred tradition the later commentary concerning its own meaning."[169] Therefore, the role of the rabbinic exegete was to recover the truth already embedded in the text. Of course, scientific criticism has asserted often enough that rabbinic exegesis was, in fact, the product of unconscious interaction between the text's words and the exegete's personality and experience.[170] Faur implies that such descriptions of rabbinic hermeneutics impose on the rabbinic tradition Greco-Christian conceptions of interpretation, which assume that the true meaning of the text or its author can be discovered.[171] According to Faur, the rabbis understood that the interpretation of Scripture (*midrash*) is a creative activity in which the exegete, as author, creates the meaning of the object being interpreted.[172] Therefore, the goal of midrashic scriptural interpretation

---

[167] Faur, *supra* note 166, at 44. *But see* Stone, *supra* note 10.

[168] *See* FAUR, *supra* note 166, at 12. According to Faur, the surrendering of a text is a legal process referred to in Hebrew as *mesirah*. *See id.* at xxv, 14–16, 124. *Mesirah* is the rabbinic term for the passing of the Torah from one generation to another. *See id.* at 124. *Mesirah* is also used to describe the surrender and registration of documents, as with a court. *See id.* at 88. Faur argues that a court is entitled to interpret a surrendered document as it sees fit, without regard to the parties' intent. *See id.* at 123–24. Hence, use of the term *mesirah* 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 intent. *See id.* at xxv, 14–16, 123–24.

[169] SCHOLEM, *Revelation and Tradition*, *supra* note 87, at 288.

[170] *See id.*; *see also* BIALE, *supra* note 86, at 144 (citing the neo-Kantian Hermann Cohen for the view that the exegete "discovers his own thought in the text through a process of interaction between himself as a thinker and his source").

[171] *See* FAUR, *supra* note 166, at xxvi–xxviii, 24, 28. Faur is implicitly referring to the Greco-Christian tradition of logocentricity, which led to the Western metaphysics of presence, the subject of contemporary literary and philosophic criticism.

[172] *See id.* at 13–14, 122. Faur implies that the rabbinic method of midrashic interpretation does not vary with the genre of material being interpreted. Midrashic exegesis was applied in

is "not to discover the mind of the author but to generate meaning" from the text, independently of the intention of the author.[173] The rabbinic exegete, similar to the deconstructionist,[174] generates textual meaning by making new connections between the various words and particles of Scripture. Faur argues that contemporary ideas about the subjectivity of interpretation and the creative role of the reader are implicit in the rabbinic tradition. He draws support from the statement invoked by Cover that conflicting legal interpretations are both the words of God[175] and the statement that "the Torah is not in Heaven" in the *Oven of Akhnai* story referred to by Burt.[176] When recast into the conceptual terminology of contemporary hermeneutic

---

the same manner to narrative sections of Scripture, legal sections of Scripture and contracts. *See id.* at xxv, 107–08, 124.

As noted, *see supra* note 13, *midrash* is a commentary on Scripture that crosses many genres. Such commentaries are referred to as *midrash aggadah* when the exegesis concerns the narrative sections of the Bible, or when the exegesis consists of homilies, poems, stories, or parables. The term *midrash halakhah* is reserved for interpretation of legal sections of Scripture. It has become standard academic fare to debate whether the rabbinic approach to aggadic (narrative) *midrash* foreshadows poststructuralist theory, which criticizes foundationalist readings of texts. *See supra* note 119.

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 point of departure for the interpretation). There are also important differences, however. The most notable difference is that *midrash* assumes, on the theological level, both the divine unity and sanctity of the text. Often, the different interpretations attached to a single verse are simply multiple variations on a single meaning which effectively foreclose opposing interpretations. *See* Green, *supra* note 119, at 161–62. Sometimes a single message has been attached to a given verse, but has been progressively elaborated in different narrative contexts. *See also* Suzanne L. Stone, *The Transformation of Prophecy*, 4 CARDOZO STUD. L. & LITERATURE 167, 187 n.63 (1992). Finally, unlike poststructuralist theory, *midrash* is unconcerned with reversals of hierarchies. The status of God and man; Israel and the nations; and redemption and exile remain stable. *See* Robert Alter, *Old Rabbis, New Critics*, NEW REPUBLIC, Jan. 5, 1987, at 26, 32.

The debate over the kinship of *midrash* with contemporary literary theory rarely focuses on *midrash halakhah* (legal exegeses), confining its inquiry to *midrash aggadah*. Faur is the first to examine rabbinic legal interpretation in light of contemporary literary theory, thus joining the recent debate on the resemblance between literary and legal texts and the implications for law of interpretative theory in literature. Others have argued, however, that greater interpretive license was exercised in producing *midrash aggadah*, where no legal implications ensued, than in producing legal *midrash*, which is a source of *halakhah*. *See infra* note 181.

[173] FAUR, *supra* note 166, at xxvii; *see id.* at 122.

[174] "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*." *Id.* at xviii (citation omitted).

[175] *See id.* at xviii–xiv.

[176] *See id.* at 13–14. The import of the *Oven of Ahknai*'s statment that the Torah is "not in heaven" is that the Sinai covenant ratified the Torah as formally presented and not the intention of the lawgiver. *See id.*

criticism, these and other rabbinic traditions show that the rabbis anticipated nearly two millenia ago many of the concepts now articulated by contemporary critical theory.

Faur is implicitly claiming, in a variation on the New Criticism,[177] that the scriptural text is sufficient in itself; it does not require the author "to guarantee its true interpretation."[178] This detachment of the scriptural text from its divine source raises an interesting question. Even if the rabbis recognized the inevitable collusion between reader and text in the process of interpretation, how did the rabbis choose the authoritative meaning from among the multiple possible meanings of Scripture that could be generated?[179] Yet, in choosing the authoritative meaning, the rabbis did not act without internal constraints. There were not only implicit constraints stemming from a sense of the range of acceptable meanings that the text could sustain, a sense that may be markedly different from our own,[180] but also constraints that did not derive from Scripture at all. The rabbis had a set of hermeneutical conventions used to analyze the scriptural text. Whatever the pedigree of these rules, the rabbis may have considered them a limited set of authorized procedures for interpreting the legal sections of Scripture.[181] Thus, the more interesting question raised by Faur's

---

[177] On the New Critical school of formalist literary theory, which rejects authorial intent and insists on the autonomy of the literary object, and on the school's place in legal scholarship, see RICHARD POSNER, LAW AND LITERATURE 220–47 (1988).

[178] DANIEL BOYARIN, INTERTEXTUALITY AND THE READING OF MIDRASH 35 (1990). Boyarin cautions against such readings of the *Oven of Akhnai* narrative. *See infra* pp. 858–59.

[179] *Cf.* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 25–26 (1990) (arguing that hermeneutic insights have limited relevance for theories of constitutional interpretation because they only explain the conditions that make reading possible and not how the interpreter then chooses among different theories of interpretation, such as originalism or the search for present values).

[180] *See* HALIVNI, *supra* note 137, at 5–7 (arguing that the early rabbis had their own distinctive sense of the plain meaning of Scripture and consciously sought to discover authorial intention).

[181] Certainly the rabbis present themselves as more constrained in the area of legal *midrash*, by citing fewer types and numbers of exegetical rules relevant for producing legal *midrash* than *midrash aggadah*. *See* LIEBERMAN, *supra* note 118, at 78 (noting that fewer types and numbers of exegetical rules were used in the production of legal *midrash*, than in the production of *midrash aggadah* or in the *asmakhtot* — the *midrashim* which attach pre-existing laws to Scripture); Rimon Kasher, *The Interpretation of Scripture*, *in* MIKRA 547, 577–80 (Martin J. Mulder ed., 1988). As one source put it:

> 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 in determining what constitutes proper halakha, the mode of 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.

HALIVNI, *supra* note 137, app. II, at 159 (footnote omitted).

thesis, and discussed below,[182] is whether the rabbis believed that the divine author guaranteed the interpretive process by providing the interpretive community with authoritative structures for decisionmaking, like the hermeneutical rules themselves or the rule of majority opinion.

Although Cover and Burt each address different aspects of rabbinic interpretive practice, several themes unite their work. For both, the image of collaborative scholarly deliberation in light of multiple and evolving conceptions of truth replaces the traditional image of striving to do God's will through discernment of the one authentic truth. In this idealized model of halakhic discourse, no one is made anxious by the inability to retrieve God's meaning or by the possibility that legal decisions may not reflect the divinely revealed tradition. The halakhic decisionmakers do not exhibit particular deference to the rulings of earlier generations, nor do they experience any great need to preserve the unity and stability of the legal system. The image of God evoked in these writings is that of a distant or absent God, Whose importance rests primarily on the fact that He was the original grantor of the system. For both, the two central narratives of Jewish law — the heavenly proclamation "these and these are the words of the living God," and the vanquishment of the heavenly voice in the *Oven of Akhnai* passage — ensure the validity of this ideal discourse by implying divine approval.

2. The Contrast Case Re-Examined. — Has Jewish law answered the pressing questions of contemporary legal theory, or has contemporary theory answered the pressing questions of Jewish law instead? The encounter between Jewish law and contemporary legal theory has refocused attention on the genuinely pluralist and anti-authoritarian aspects of classical rabbinic thought and has provided a much-needed corrective to charges of excessive formalism, authoritarianism, and originalism leveled at the *halakhah* by post-Enlightenment writers.[183] Nonetheless, the anti-formalist writings of Cover and Burt may push the pendulum too far in the opposite direction.

Any assessment of the balance of constraint and freedom in the halakhic process faces the considerable methodological difficulty of characterizing the Jewish legal system in its totality. No doubt certain historical periods or literary genres of the Jewish legal tradition fit contemporary models of legal discourse more closely than others. Yet within each historical period and literary genre of the Jewish legal tradition, one finds tensions between the free pursuit of multiple halakhic truths and the need for order and uniformity that parallel

---

[182] *See infra* pp. 852, 858–59.

[183] *See, e.g.*, Twersky, *supra* note 3, at 338 n.2 (referencing modern attacks on the authoritarianism of Caro's *Shulhan 'Arukh*).

similar tensions in American law. For example, two recent studies suggest that the contemporaneous Babylonian and Palestinian Talmuds differ precisely in their receptivity to the kinds of themes Cover and Burt wished to stress.[184] According to these studies, the Babylonian Talmud, unlike the Palestinian, is more open to legal pluralism, anti-foundationalist notions of "truth,"[185] anti-authoritarian modes of decisionmaking,[186] and overt judicial deviation from black letter law.[187] Alternatively, consider the genre of the medieval codes. The multiple halakhic approaches followed by the codes reflect different degrees of openness to independent deliberation and pluralism. Thus, a codifier could, as in Burt's ideal model, investigate and assess all previous generations' arguments and underlying sources, and, in the end, base his decision on his own judgment rather than on an "appeal to authority."[188] Another possible approach approximates Cover's pluralist model: a codifier could present all the potential opinions and leave the final determination to the rabbinic authority in the jurisdiction concerned.[189] But one of the most authoritative codifiers, Rabbi Joseph Caro, rejected these approaches as "presumptuous" and limited himself to following the majority consensus of his three greatest predecessors.[190] In short, these contemporary descriptions of Jewish law

---

[184] *See* BEN-MENAHEM, *supra* note 140, at 55–56; KRAEMER, *supra* note 119, at 93–98.

[185] KRAEMER, *supra* note 119, at 93.

[186] *See, e.g.*, BABYLONIAN TALMUD, *'Abodah Zarah* 35a, *translated in* SONCINO, *supra* note 13, 4 *Seder Nezikin*, at 169 ("When they issue a decree in the West [Palestine] they do not reveal its reason for twelve months lest there be a person who doesn't agree [with the reason] and come to deal lightly with it.").

[187] *See* BEN-MENAHEM, *supra* note 140, at 55. Ben-Menahem posits that judicial deviation from black letter law reflects a basic assumption of the Babylonian Talmud that good laws are in themselves inadequate; true justice is achieved only by trusting the judges. *See id.* at 180–81; *see also* Bernard S. Jackson, *Legalism and Spirituality*, *in* RELIGION AND LAW: BIBLICAL-JUDAIC AND ISLAMIC PERSPECTIVES 243, 244–48 (Edwin B. Firmage, Bernard G. Weiss & John W. Welch eds., 1990) (arguing that the process of adjudication in Jewish law is viewed primarily as a relational activity between the parties and the judge, and not as a forum for the application of authoritative rules to cases).

Both Kraemer and Ben-Menahem try to identify some historical and cultural factors to account for these differing moods, including the differing intellectual climates in Palestine and Iran, the differing composition of the two Jewish communities (the Iranian was more decentralized and less assimilated into the rabbinic form), the pressures in Palestine to unify the *halakhah* in the wake of the national disaster of 70 C.E. (in which the *Oven of Akhnai* story may play a part, *see infra* pp. 855–57), the greater need in Palestine to defend against deviant sects, including Christianity, and the unavailability of certain amoraic rabbinic traditions concerning the value of theoretical discourse. *See* BEN-MENAHEM, *supra* note 140, at 86–98; KRAEMER, *supra* note 119, at 112–27. Indeed, Kraemer argues that the critical differences in the recounting of the *Oven of Akhnai* story in the Palestinian and Babylonian Talmuds reflect these divergent moods. *See id.* at 122–24.

[188] Twersky, *supra* note 3, at 324. Twersky notes that this was the method of Rabbi Solomon Luria in his *Yam shel Shelomoh*. *See id.* at 339 n.13.

[189] *See id.* at 340 n.18 (citing HAYYIM BEN BEZALEL, WIKKUAH MAYYIM HAYYIM).

[190] *See id.* at 325 (referring to Rabbi Caro). Twersky notes, however, that Caro only "apparently forfeit[ed] his judicial prerogatives." *Id.*

highlight divergent themes within Jewish law, as much as differences between Jewish and American law.

The shared ambivalence of the American and Jewish legal traditions toward instability, interpretive independence, and pluralism stems from different forces. The usual arguments for legal traditionalism in American jurisprudence, in particular the political theory about the limited role of judges,[191] play little role in halakhic interpretive practice. Halakhic traditionalism stems primarily from two factors: first, the concept that the law is the divinely revealed and historically transmitted word of God; and second, from the deep veneration of the early masters of the tradition. Accordingly, a brief examination of the religious framework within which halakhic interpretive practice takes place should bring into greater relief the similarities and differences between halakhic theory and contemporary theories of interpretation and authority.

(a) The Intersection of Jewish Legal Theory with Religious Concepts. — Arthur Jacobson has observed that revelatory law — a law whose core notion is that "God speak[s] to (or through) a legal person"[192] — is a model often ignored by legal theorists, even though it has much to say about the self-generation of the common law.[193] It is worth exploring briefly how halakhic decisionmakers reconcile their creative activity with the central doctrine that Jewish law is revealed law.

There are several views on the nature of the revelatory process in Jewish law.[194] Some talmudic passages support the view that the Sinai revelation was exhaustive and encompassed all the details of the commandments.[195] In this model, judicial creativity consists primarily in the recovery of the original transmission of oral law to Moses. Moreover, in this model, controversy and pluralism are not inherent features of the law. Controversy stems, instead, from faults in the

---

[191] Political theory about the limited judicial role is often invoked to justify stare decisis. For a concise summary and criticism of the arguments for legal traditionalism in American law, see David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1036–42 (1991). On the broad powers granted the judge in Jewish law, by contrast, and the absence of the principle of stare decisis, see Lamm & Kirschenbaum, cited above in note 79, at 127–28.

[192] Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhman*, 87 MICH. L. REV. 1647, 1686 (1990).

[193] *See id.* at 1685–87. Jacobson does not refer solely to overt revelatory moments, like the doctrine of the Founding Fathers. Rather, he refers primarily to "covert revelations," in which norms are revealed to decisionmakers through ordinary legal interaction. *See id.* at 1687.

[194] *See* Jeffrey I. Roth, *The Justification for Controversy Under Jewish Law*, 76 CAL. L. REV. 338, 351–87 (1988) (surveying the differing attitudes of halakhic authorities to controversy and their relationship to theories of the revelatory process).

[195] *See, e.g.*, SIFRA, *Leviticus* 25:1 ("Scripture wishes to teach us that just as all the rules of the sabbatical year — its principles, details and minutiae — were revealed at Sinai, so the rules of all the commandments — their principles, details and minutiae — were all given at Sinai.").

chain of historical transmission[196] or reflects, as Maimonides held, the rabbinic derivation rather than Sinaitic transmission of the rule in question.[197] Other models, however, are more receptive to the view that controversy and pluralism are inherent features of the halakhic process. Thus, some passages support the view that the revelation covered only general principles.[198] Still other passages suggest that the revelation contained a series of decisional options — that is, the revelation provided an equal basis for permitting or prohibiting conduct.[199] This theory presupposes that God encoded certain conflicts into the law, perhaps to aid comprehension.[200] In this view, the essential characteristics of a legal matter are best grasped by simultaneously contemplating its negation.[201] The task of the scholar is to choose among these encoded ambiguities. The mystical view of revelation as a fragmented process begun at Sinai and still ongoing,[202]

---

[196] Several aggadic *midrashim* suggest, for example, that blocks of the revelation were forgotten during the period of mourning for Moses. *See* BABYLONIAN TALMUD, *Temurah* 15a–16a, *translated in* SONCINO, *supra* note 13, 3 *Seder Kodashim*, at 107–10.

[197] Maimonides subscribed to the view that Moses received the general principles and details of the various laws. *See* MAIMONIDES, COMMENTARY ON THE MISHNAH (Introduction). At the same time, Maimonides held that disagreement among talmudic rabbis indicates that the law in question is derived, not transmitted from Sinai. *See id.*; Gerald G. Blidstein, *Maimonides on 'Oral Law,'* 1 JEWISH L. ANN. 108, 111–13 (1978).

[198] *See Exodus Rabbah* 41:6, *translated in* 3 MIDRASH RABBAH: EXODUS 475 (H. Freedman & Maurice Simon eds. & S.M. Lehrman trans., 1939) ("[C]ould then Moses have learnt it all [the Torah] in forty days? No; but it was only the principles thereof which God taught Moses." (footnote omitted)); *see also* JOSEPH ALBO, THE BOOK OF ROOTS 203 (I. Husik trans., 1946) (expressing a similar view).

[199] *See, e.g.*, PALESTINIAN TALMUD, *Sanhedrin* 4:2. As that source states:

> Rabbi 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 other arguments by which it may be proved unclean. When Moses asked, 'Master of the Universe, in what ways shall we know the true sense of 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.

[200] *See* JOEL ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS 128 n.64 (quoting MEHAREREI NEMERIM, HAGIGAH ch. 1, at 17a (Venice, 1599) (attributed to Nahmanides)) ("We usually comprehend a matter better by its negation and we cannot comprehend it as well inherently. God, therefore, wished to provide us with conflicting opinions so that, when we encounter the correct explanation, we will comprehend it thoroughly.").

[201] *Cf.* J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1671 (1990) (book review) (discussing legal oppositions as involving a relation of conceptual dependence that aids understanding).

[202] *See* SCHOLEM, *Relevation and Tradition*, *supra* note 87, at 298–300 (quoting opinions of Rabbi Meir Ibn Gabbai and Rabbi Isaiah Horowitz). The numerous statements in medieval halakhic writings ascribing legal opinions to personal revelatory insights must be evaluated with caution, however. Often, these statements are merely conclusions reached after intense study, and they are more literary expressions of piety than claims of mystical experience. *See* ISADORE TWERSKY, RABAD OF POSQUIERES: A TWELFTH CENTURY TALMUDIST 291–300 (1962).

which is often combined with mystical belief in the infinite interpretability of the written word, emphasizes the individual intellectual and spiritual characteristics that each person, as a channel of the revelation, brings to the halakhic process. Accordingly, halakhists with strong mystical beliefs may be more receptive to halakhic pluralism and interpretive independence.[203] Some of these descriptions of judicial decisionmaking in a revelatory system emphasize the intuitive aspect of halakhic decisionmaking; others emphasize rigorous, intellectual analysis. A decision reached after exhaustive, logical analysis may attain greater authoritative stature than one based on judicial intuition.

Those who have the authority to interpret in Jewish law accept one or another of these views of revelation. Official authority to interpret the law is vested in the sages of each generation.[204] In addition to formal academic requirements, interpreters of the law must possess a "fear of heaven" (*yirat shamayim*),[205] which, at a minimum, includes a belief in the revelatory nature of the law. According to one rabbinic commentator, the divine nature of conflicting opinions does not refer to their content at all; rather, it refers to the purity of intent of those who express the opinions.[206] This purity of intent constitutes one standard for judging an interpretation. The religious characteristics of the interpreters, therefore, are both descriptive and normative. The scope of authority to interpret the law is derived from

---

[203] *See* SCHOLEM, *Relevation and Tradition*, *supra* note 87, at 293, 303 (arguing that, in the mystical conception, the word of God carries infinite meaning and cannot be applied to a specific context of meaning; legal dissent is the result of this infinite interpretability and is arbitrarily resolved by majority rule or in accordance with a particular school); Robert Bonfil, *Halakhah, Kabbalah and Society: Some Insights into Rabbi Menahem Azariah da Fano's Inner World*, *in* JEWISH THOUGHT IN THE SEVENTEENTH CENTURY 37, 47–51 (Isadore Twersky & Bernard Septimus eds., 1987) (arguing that mystical confidence in the "inner truth" fosters an independent and liberal approach to the traditional literature). Scholem and Moshe Idel dispute whether the mystical conception is the logical consequence of deeper penetration into the talmudic sources concerning revelation and the nature of interpretation, *see* SCHOLEM, *Relevation and Tradition*, *supra* note 87, at 293, or a radical departure from earlier, exoteric approaches, *see* Moshe Idel, *Infinities of Torah in Kabbalah*, *in* MIDRASH AND LITERATURE, *supra* note 31, at 141, 153 n.4, 155 n.131 (arguing that kabbalistic exegesis is "anti-midrashic" both in its 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 the commentator over the text. *Cf.* EPHRAIM E. URBACH, THE HALAKHAH: ITS SOURCES AND DEVELOPMENT 285 (Raphael Posner trans., 1986) (attributing Rabbi Akiva's intellectual independence and original exegetical approach to his mystical faith, which enabled him "to consider what appear to be unlikely interpretations to be the original intention of the text").

[204] This authority is derived from *Deuteronomy* 17:8–11. *See infra* note 251.

[205] BABYLONIAN TALMUD, *Kethuboth* 103b, *translated in* SONCINO, *supra* note 13, 2 *Seder Nashim*, at 662; *see id. Yoma* 72b, *translated in* SONCINO, *supra* note 13, 3 *Seder Mo'ed*, at 327; MAIMONIDES, MISHNEH TORAH, *Laws of the Sanhedrin* 2:7 (listing *yirat shamayim* as a necessary attribute of a judge).

[206] *See* RASHI, COMMENTARY ON THE BABYLONIAN TALMUD, *Hagigah* 3b, s.v. *aseh*.

the institutional location of authority to interpret in a professional group that shares these religious characteristics.

Belief in the revealed status of the law constrains interpretive practice in several ways. First, belief in the revelatory nature of the law includes belief in the revealed status of several systemic rules that govern interpretation and decisionmaking. For example, the hermeneutical conventions used to interpret Scripture and the principle of majority rule are both regarded as divinely revealed Sinaitic norms.[207] The deep consensus about the shared rules of the practice to which halakhic decisionmaking must conform can be compared to liberal consensus theories, such as that of Owen Fiss.[208] Fiss detaches the concept of an "interpretive community" from its destabilizing context.[209] For Fiss, judges are members of a hierarchical professional interpretive community that shares an understanding of "disciplining rules" that characterize adjudication.[210] These shared disciplining rules mitigate the inherent ambiguity of texts and provide a standard for evaluating legal interpretation, thus grounding it in a form of objectivity.[211] Although Fiss makes no claims about the justness or legitimacy of the disciplining rules themselves,[212] in Jewish law the legitimacy of many of these rules is anchored in authoritative tradition.[213] Halakhic interpretation is constrained by these authoritative procedures; those who do not follow the shared rules of the practice are not part of the interpretive community.

Second, the fact that revelation was given at a particular time in history is central to the halakhic process. Jewish law defers to particular past generations — the bearers of the tradition — on the assumption that generations closer to the source of revelation may have privileged knowledge of the traditions or greater wisdom. The tension between the authority of tradition and free deliberation is illustrated by two principles that address the relationship of halakhic decisionmakers to their predecessors. The first states categorically that

---

[207] *See* MAIMONIDES, COMMENTARY ON THE MISHNAH (Introduction) (stating that the hermeneutical conventions were given at Sinai). On majority rule, see note 131 above.

[208] *See* Fiss, *supra* note 56, at 744–46.

[209] *See* Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 767 (1982) (discussing how Fiss anchors the destabilizing concept of an "interpretive community" put forward by the poststructuralist literary theorist Stanley Fish).

[210] Fiss, *supra* note 56, at 744.

[211] *See id.* at 744–47, 762.

[212] *See* Jeanne L. Schroeder, *Subject: Object*, 42 U. MIAMI L. REV. (forthcoming 1993) (manuscript at 64–67, on file at the Harvard Law School Library) (critiquing Fiss's theory).

[213] As with Fiss's disciplining rules, the identity and application of some of these rules — the hermeneutic conventions, for example — are the subject of internal dispute. Nonetheless, they still constrain interpretation and provide a standard for evaluating the interpretation. For further comparison of Fiss's theory and the rabbinic theory of interpretation and authority, see p. 860 below.

later generations are inferior in wisdom to earlier generations.[214] The second asserts that wisdom is cumulative; later scholars are dwarves standing on the shoulders of giants and, therefore, see farther.[215] The latter concept supports the geonic rule that "the law is according to [the] later halakhic scholars"[216] — a rule that promotes intellectual independence and evolution of the law in light of contemporary needs. But later scholars of the talmudic period (*amoraim*) do not disagree with the unanimous opinions of scholars of the earlier Mishnaic period.[217] The reverence for the collective wisdom of the sages whose opinions comprise the Talmud is one explanation for the acceptance of the authority of the Talmud, the legal decisions of which cannot be reopened.[218] Some halakhic authorities even argue that certain post-talmudic material can no longer be challenged.[219] These doctrinal constraints, grounded in interrelated concepts of consent and veneration of the early masters, suggest an ongoing process of canonization of authoritative rabbinic legal literature.[220]

---

[214] *See, e.g.*, BABYLONIAN TALMUD, *Shabbath* 112b, *translated in* SONCINO, *supra* note 13, 1 *Seder Mo'ed*, at 549 ("If the earlier [scholars] were sons of angels, we are sons of men; and if the earlier [scholars] were sons of men, we are like asses."). For an excellent account of how this principle has encouraged suppression of self in halakhic decisionmaking, see Jeffrey I. Roth, *Responding to Dissent in Jewish Law: Suppression Versus Self-Restraint*, 40 RUTGERS L. REV. 31, 74–91 (1987).

[215] For a study of this concept in Jewish law, see Israel Ta-Shma, *Hilkheta Ke-vatar'ei*, VI-VII SHENATON HA-MISHPAT HA-IVRI 405, 417 (1979–80) (*The Law is According to the Later Authorities*).

[216] THE PRINCIPLES OF JEWISH LAW, *supra* note 79, at 55. The rule stipulates that any differences of scholarly opinion from the time of Abbaye and Rava (the talmudic sages of the fourth century C.E.) onward, will be decided in accordance with the views of the later authorities. *See id.* at 55–56; *see also* Ta-Shma, *supra* note 215, at 417 (discussing the relationship between the geonic rule and the concept that later scholars are dwarves standing upon the shoulders of giants).

[217] *See* JOSEPH CARO, KESEF MISHNAH TO MISHNEH TORAH, *Laws of Rebels* 2:1. Caro noted that, according to Maimonides's *Mishneh Torah*, exegetically-derived laws deduced by the High Court may be overturned by a later court. *See id.* Caro tried to resolve the apparent contradiction between Maimonides's view and the fact that post-tannaitic sages do not disagree with unanimous tannaitic opinions by posing the possibility that the post-tannaitic sages "accepted upon themselves" the principle that later generations may not disagree with former generations. *Id.*

[218] The decisions of the Talmud must be accepted as final. *See* JOSEPH CARO, KESEF MISHNAH TO MISHNEH TORAH, *Laws of Rebels* 2:1 (arguing that the people of Israel accepted upon themselves the authority of the Talmud); MAIMONIDES, MISHNEH TORAH (Introduction), *translated in* MAIMONIDES, MISHNEH TORAH: THE BOOK OF KNOWLEDGE BY MAIMONIDES 3b–4a (Moses Hyamson trans., 1967); *cf.* Roth, *supra* note 214, at 47–48 (describing the Talmud as a "continuing session of the [Jewish] High Court" with comparable final authority).

[219] *See* ASHER BEN YEHIEL, PISKEI ROSH, *Sanhedrin* 4:6 (quoting the opinion of Rabbi Abraham ben David (Ravad) that no one is currently worthy to dispute the opinions of *geonim* — the scholars who headed the Babylonian academies from the close of the Talmud until the eleventh century); 9 ENCYCLOPEDIA TALMUDIT *Halakhah* 334–39 (Sholomo Y. Zevin ed., 1971).

[220] *See* SID Z. LEIMAN, THE CANONIZATION OF HEBREW SCRIPTURE: THE TALMUDIC AND

Third, belief in the revealed status of the law has a significant effect on the legal system's attitude toward uniform behavioral norms. Because the law as practiced is supposed to reflect the will of God and achieve substantive ends, conflicting legal propositions that result in behavioral divergence are no less problematic for Jewish law than for other legal systems. The formal significance accorded a majority decision, even by those who accept the possibility of multiple halakhic truths, addresses this theme, as does the cyclical production of code and commentary genres of halakhic discourse. The commentary genre, exemplified by the Talmud, invites divergent interpretation and practice. But, historically, when the proliferation of disputes threatens the essential unity of the tradition, codification of the tradition is undertaken. The codes, exemplified by Maimonides's *Mishneh Torah*, and Caro's *Shulhan 'Arukh*,[221] reduce interpretive divergence and provide a measure of uniformity and certainty concerning legal practice.[222] Indeed, both Caro's *Shulhan 'Arukh* and Maimonides's *Mishneh Torah* endeavor to eliminate diverse interpretations and to "present *ex cathedra* legislative, unilateral views."[223]

Finally, one must not lose sight of the psychological dimension of decisionmaking in a system oriented to God's will. The darker side of the cessation of prophecy is the anxiety and fear that a legal decision may not represent the divinely revealed tradition. This anxiety lurks beneath the *Oven of Akhnai* story. Occasionally, in rabbinic literature, expressions of anxiety are more explicit. An aggadic *midrash*, citing the multiple and conflicting laws, asks: "How then shall I learn To-

---

MIDRASHIC EVIDENCE 14–16, 139 n.22 (1975) (distinguishing between inspired and uninspired canonical literature).

[221] A general description of the codification of Jewish law, including Maimonides's twelfth-century and Caro's sixteenth-century codes, can be found in 5 ENCYCLOPEDIA JUDAICA *Codification of Law* 628, 638–43, 648–56 (1971).

[222] The Mishnah's compilation of the oral law was undertaken, in part, to preserve the unity of the tradition in the face of national upheaval and dispersion after the Roman Wars. The Talmud, which followed the Mishnah, is a commentary on the Mishnah and, as such, emphasizes divergent views. Maimonides's intellectual project in the *Mishneh Torah* was to rescue Jewish law from the morass of contradictory views presented in the Talmud. The *Mishneh Torah*, in turn, was criticized by Maimonides's contemporary, Rabbi Abraham ben David, for laying down uniform rules in the face of halakhic conflict, thus stifling the ability of contemporary halakhic authorities to choose among competing opinions. Centuries later, Rabbi Joseph Caro resuscitated Maimonides's method in his *Shulhan 'Arukh*, citing, as did Maimonides before him, the necessity to set forth the law finally and with exactitude given the lesser wisdom of later generations. *See* Haim H. Cohn, *Maimonidean Theories of Codification*, 1 JEWISH L. ANN. 15, 32–36 (1978). As one commentator put it:

> Attempts to compress the Halachah by formal codification alternate with counter-attempts to preserve the fulness [sic] and richness of both the method and substance of the Halachah by engaging in interpretation, analogy, logical inference, and only then formulating the resultant normative conclusion. Any student who follows the course of rabbinic literature . . . cannot ignore this see-saw tendency. The tension is ever present and usually catalytic.

Twersky, *supra* note 3, at 329.

[223] Twersky, *supra* note 3, at 332.

rah?" The aggadist's answer is: "All of them are given from one shepherd."[224] The aggadist's answer, a variation of the talmudic statement "these and these are the words of God" and the *Oven of Akhnai*'s "follow the majority," is intended to strengthen the student's resolve in the face of a real and persistent fear of misinterpretation.[225] This is a far cry from the anarchic joy in the multiplicity of laws that Cover envisioned.[226] Yet, despite these various assurances, there are occasional indications in the history of *halakhah* of just how crippling such anxiety still could be. Consider instances in which scholars, humbled by the wisdom of prior generations or fearful that their decisions may be wrong and might mislead others, have refused to reduce their decisions to writing.[227]

(b) The Oven of Akhnai. — The *Oven of Akhnai* story, possibly the most frequently cited talmudic passage in modern literature, has served as support for a variety of conflicting propositions. Yet the passage is rarely considered in light of its broader historical and literary setting or with an eye to its reception within the Jewish legal system itself.[228] I first offer an external analysis of the story in its historical and literary context and suggest that the *Oven of Akhnai* narrative affirms the halakhic value of institutional authority, uniformity, and order. I then offer an internal analysis of the halakhic system's own understanding of the passage and suggest that it is precisely the relationship of the community of interpreters with God, the author, that enables the rabbis to relinquish conventional notions of intent — a model unavailable to a secular legal system.

(i) External Analysis. — The joy in the "plethora" of conflicting laws that emerges from the Talmud is, in part, an impression produced by the editorial decision to preserve minority opinions and divergent traditions. Sometimes, the image of peaceful resolution of conflict through discourse or amicable coexistence with conflicting

---

[224] BABYLONIAN TALMUD, *Hagigah* 3b, *translated in* SONCINO, *supra* note 13, 4 *Seder Mo'ed*, at 10. David Stern focuses on this *midrash* as an exemplar of how *midrash* generally seeks to allay rabbinic anxieties that its tradition of interpretation does not represent the authoritative tradition. *See* Stern, *supra* note 119, at 153–56. The response of the midrashic rabbis to the haunting fear that their tradition of interpretation may not represent the authentic heritage of the revelation "was to adopt an interpretive posture that represents the very opposite of Harold Bloom's idea of the anxiety of influence." *Id.* at 154.

[225] *Cf.* BABYLONIAN TALMUD, *Berakoth* 28b, *translated in* SONCINO, *supra* note 13, *Seder Zera'im*, at 172 (describing the prayer said upon entering the academy, that no one will inadvertently cause others to transgress by erring in a matter of *halakhah*).

[226] *See supra* p. 828.

[227] *See, e.g.*, Lamm & Kirschenbaum, *supra* note 79, at 128 (citing a sixteenth-century Polish authority, reported in MOSHE ISSERLES, TESHUVOT HA-RAMA responsum no. 25); *see also* Roth, *supra* note 214, at 86–91 (describing the mixture of deference, humility, and fear of rendering an erroneous decision that has inhibited expression of alternative halakhic viewpoints).

[228] This point was made by Izhak Englard nearly twenty years ago, *see* Englard, *supra* note 154, at 140–42, but requires reiteration in light of the renewed fascination with the story.

traditions masks a far more complicated reality.[229] The *Oven of Akhnai* incident offers a window on this more turbulent history.[230]

The *Oven of Akhnai* story is set in Yavneh in a time of postwar reconstruction, after the Roman destruction of the Second Temple and the loss of the Jerusalem High Court. The assembly of sages at Yavneh was attempting to rebuild Jewish existence, to establish an authority structure to compensate for the loss of the Jerusalem Court, and to minimize fragmentation of the community in light of the proliferation of Jewish sects.[231] In this setting, a dispute arose over the ritual status of an oven. Rabbi Eliezer presented his view about the status of the oven not as a prophetic insight but as a matter of tradition. Early Palestine had a system of decentralized schools of interpretation, each with its own received traditions. In the earlier stages of halakhic development, the transmission of traditions was the principle source of legal determination. Rabbi Eliezer, in particular, was known for his extreme fidelity to received traditions.[232] In this instance, the Patriarch, with the rabbinic academy on his side, invoked the canon of majority rule. Rabbi Eliezer resisted by continuing to rule in accordance with his opinion and was banned by the academy.[233]

---

[229] David Stern presents this thesis elegantly in an article that addresses the difference between multiple interpretations in *midrash* and contemporary notions of indeterminacy. *See* Stern, *supra* note 119, at 141. Stern argues that the conception of polysemy in *midrash* as an inherent feature of Scripture is the result of the "editorial pluralism" of the redactors of rabbinic literature, *id.* at 155, and is a form of "rhetorical denial," *id.* at 161, of the strife-ridden reality of rabbinic society. *See id.* at 155–61.

[230] *See generally* 1 ALON, *supra* note 130, at 314–15 (speculating that the *Oven of Akhnai* story had its roots in the conflict between the Hillelites and the Shammaites); Judah Goldin, *On the Account of the Banning of R. Eliezer ben Hyrkanus: An Analysis and Proposal*, 16–17 J. ANCIENT NEAR E. SOC'Y 85, 97 (1984–85) (concluding that the banning of Rabbi Eliezer probably occurred and was the outcome of a struggle over traditional and more modern methods of decisionmaking in legal controversies). The methodological difficulties of analyzing rabbinic narratives in terms of their historicity are considerable. The *Oven of Akhnai* story purports to be an account of an actual event occurring toward the end of the first century, C.E. The story, in its fuller form, however, cannot be earlier than the third or fourth century, because it cites Rabbi Jeremiah (in the Babylonian version) or Rabbi Hanina (in the Palestinian version), both *amoraim*. Does the story reflect the historical or ideological conditions of the time of its setting, of the time of its telling, or of some combination of the two? On the difficulties of historical reconstruction of rabbinic narratives, see Robert Goldenberg, *History and Ideology in Talmudic Narrative*, *in* 4 APPROACHES TO ANCIENT JUDAISM 159, 159 (William S. Green ed., 1983). On the relationship of historical claims to the process of literary construction, see HAYDEN WHITE, TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM 60 (1978). White noted that, like fiction, historical accounts are built on culturally provided story forms that make the accounts meaningful to the people in the culture.

[231] For an overview of Jewish sects during this period, see MARCEL SIMON, JEWISH SECTS AT THE TIME OF JESUS 17–130 (James H. Farley trans., 1967).

[232] *See* TOSEFTA, *Yebamot* 3:3 ("Rabbi Eliezer never said anything that he had not received as a tradition from his teachers.").

[233] Apparently, Rabbi Eliezer was not alone in his resistance to majority rule, for the Tosefta

Judah Goldin has argued that this debate with Rabbi Eliezer may be the first time that the principle of majority rule was introduced as part of a new intellectual curriculum and applied to suppress an individual tradition.[234] Goldin noted that the political and social upheaval of the postwar period threatened the successful transmission of traditions and rabbinic precedents. Moreover, faced with the twin specter of Christianity from without and sectarianism from within, the rabbis felt the need for a centralized institution to unify practice and ensure proper conduct.[235] Therefore, they committed themselves in the *Oven of Akhnai* incident to an interpretation of Scripture that suppressed individual received traditions contrary to the collective opinion of the sages.[236] Henceforward, majority rule would be applied not only in court cases but also in scholarly debate about the law. Although Goldin's historical reconstruction is open to criticism,[237] the tragic outcome of the *Oven of Akhnai* debate underscores how critical a role the principle of majority rule played in centralizing authority, unifying the law, and fixing behavioral norms.

A contextual analysis of the *Oven of Akhnai* story reveals the Talmud's deep ambivalence about the sages' ban of Rabbi Eliezer. In the Babylonian Talmud, the story is situated within the larger theme of hurting another through words. The talmudic discussion emphasizes the wrong done to Rabbi Eliezer.[238] Rabban Gamliel, the Patriarch who ordered the ban, was nearly drowned on account of Rabbi Eliezer. He was saved at the last moment because the ban "prevented strife from multiplying in Israel."[239] A later commentary, the *Sefer*

---

states that because of the *Oven of Akhnai*, "disputes became many in Israel." TOSEFTA, *Eduyyot* 2:1; *see also* SHIR HASHIRIM ZUTA 29 (Buber ed.) ("On the day that Rabbi Eliezer ben Hyrkanus took his seat in the Academy, each man girded on his sword.").

[234] *See* Goldin, *supra* note 230, at 85.

[235] *See id.* at 91–92.

[236] *See id.*

[237] The debate over the validity of majority rule in our story may have arisen over its applicability in that particular case. It seems that once a majority had voted, none of those present could give a contrary ruling. Whether someone who had not been present at the vote and had received a variant tradition from his teacher could still continue to give a contrary ruling remained an open question. *See* 2 ALON, *supra* note 130, at 467–68 (1984).

[238] The ambivalence expressed in the Talmud about the justice of the ban imposed on Rabbi Eliezer has led some readers to view the story as an illustration of the anti-authoritarian element in Jewish thought. *See, e.g.*, HALIVNI, *supra* note 137, at 108–11 (arguing that the import of the story is to protect the expression of dissenting views by endowing them with divine status).

For overtly polemical turns to the *Oven of Akhnai* story to prove the anti-authoritarianism of the sages who opposed Rabbi Eliezer, see MARC SAPERSTEIN, DECODING THE RABBIS 4–5 (1980). Saperstein cites twelfth-century Christian attempts to portray the rabbis as conscious defiers of God's will.

[239] BABYLONIAN TALMUD, *Baba Mezia* 59b, *translated in* SONCINO, *supra* note 13, 1 *Seder Nezikin*, at 354. In the end, Rabban Gamliel does, in fact, die as a consequence of Rabbi Eliezer's grief. The story ends with the words of Rabbi Eliezer's wife (a sister of Rabban

HaHinnukh, also noted that the ban was imposed to uphold uniformity in halakhic practice and clear lines of hierarchical authority.[240]

Not surprisingly, in the heyday of liberal theory, legal scholars read the *Oven of Akhnai* story as the supreme validation of the rule of law: not only Rabbi Eliezer, but even God (who surely has truth on His side) must submit to the "discipline of the law" and heed the authorized interpreters (even though they be in error) as long as the interpreters abide by the objective principles established for breaking interpretive deadlock.[241] Viewed from this perspective, the *Oven of Akhnai* story reads like a Coverian parable of the jurispathic function of the judge.

An external analysis of the *Oven of Akhnai* story, as an independent statement about the nature of legal interpretation and authority, yields a startlingly similar perspective. The independent import of the story is the refusal to extend legal significance to a tradition backed by a post-Sinaitic form of divine revelation.[242] Two explanations, each based on biblical proof-texts, are offered for this refusal: first, the Torah is not in Heaven; and second, one must follow the majority rule. One need not invoke the second explanation, however, to disregard a tradition backed by a post-Sinaitic revelation; the first explanation is sufficient.[243] The two explanations are linked by a different set of considerations.

According to Rabbi Jeremiah, the substantive implication of the proof-text "It is not in Heaven" is that, from a legal standpoint, *all* forms of revelation — including clarificatory divine voices — have ceased. As a consequence, the legal interpretation of the Torah text cannot be validated by appeal to divine intention expressed in a post-

---

Gamliel): "I have it as a family tradition that all gates [of Heaven] are locked except the gate of grievously wounded feelings." *Id.* at 355.

[240] *See* Englard, *supra* note 154, at 143–44 (quoting *Sefer HaHinnukh* commandment 408).

[241] *See* Silberg, *supra* note 8, at 310–12.

[242] The notion that direct divine revelation (that is, prophecy) had ended predates the *Oven of Akhnai* account. Heavenly voices remained, but these were not synonymous with prophecy. *See* TOSEFTA, *Sotah* 13:4 ("When Haggai, Zechariah, and Malachi, the latter prophets, died, the Holy Spirit ceased in Israel, but even so they [the divine] would notify them [Israel] by means of a heavenly voice").

[243] Englard observed that there is no necessary connection between the two explanations given in the talmudic text for disregarding Rabbi Eliezer's opinion ("It is not in Heaven," and "One must follow the majority."). One need not invoke majority rule to disregard a tradition backed by a divine voice. Indeed, one could argue that majority rule is inapplicable in cases of individual opinions that merit divine revelation. For Englard, therefore, the crux of the story lay in the first explanation ("It is not in Heaven") and its later elaboration; we are to pay no attention to divine voices. This explanation suggests that a halakhic decision issuing from Heaven has no legal import at all. Englard concluded that the statement "One must follow the majority" functions as a dramatic moment for the story by setting a divine voice against collective human opinion. *See* Englard, *supra* note 154, at 145–46. But there is more at stake here, as the text suggests.

Sinaitic revelation. How then is legal interpretation divinely validated? Rabbi Jeremiah's second explanation, that Scripture already stipulates to follow the majority, addresses this question.[244] The divine author has guaranteed the interpretive process by providing the rule authority structure of majority. Correct interpretation is achieved through the consensus of the authorized interpreters who employ human reason and halakhic dialectic.[245]

The irony in this reading of the *Oven of Akhnai* story is that it is diametrically opposed to the interpretive theories of Cover, which insist on "an unmediated relation of each community to the constitutional text"[246] and posit that constraints on meaning must come from outside the process of interpretation.[247] In the *Oven of Akhnai* story, legal meaning is upheld, instead, solely through the institutional hierarchy of a professional community of interpreters, which exercises the authority to decide and whose consensus determines both meaning and behavior. Correctness in interpretation is thus a product of the authority of the interpreters.[248]

---

[244] *Cf.* BOYARIN, *supra* note 178, at 34–37 (offering an analysis that is similar to the one in the text).

[245] *See id.* at 35–36. Boyarin also engages in an extended literary analysis of the *Oven of Akhnai* passage to show "what it says by how it talks." *Id.* at 34. Relying on structural and semiotic theory, Boyarin contends that this story depicts in narrative form "the structural possibility which creates a space for Oral Torah." *Id.* at 35. Proof-texts relied on for the assertion that the Torah is not in Heaven are themselves "not in Heaven." The Torah passage in which this verse appears seems to imply only that the fulfillment of the Torah's commands is not beyond the reach of humans. Rabbi Joshua "reinscribes" the verse in a new context to mean that the Torah is "beyond the reach, as it were, of its divine author." *Id.* Rabbi Jeremiah's comments about majority rule also cite part of another biblical verse, *Exodus* 23:2 ("follow the multitude"), which in its original context seems to have a different meaning. In each instance, a text is cited as "supremely authoritative" for both behavioral and institutional legal stability, and yet, "the local meanings of that authoritative text seem to be undermined." *Id.* at 37. At every turn, then, "God the Author spoke and did not (as it were) know what He was saying: My children have defeated Me; My children have defeated Me." *Id.* at 36.

One of the features of the *Oven of Akhnai* story yet to be investigated is the relationship of "what it says by how it talks" to the underlying legal controversy presented as the initial impetus for the story — the ritual status of the oven. There is an entire genre of rabbinic biographical tales of talmudic sages in which laws of ritual purity are used to underscore themes central to the biographical story. The legal issues, "allegorically interpreted," often reflect the ideological themes presented. *See* Eliezer Segal, *Law as Allegory: An Unnoticed Literary Device in Talmudic Narratives*, 8 PROOFTEXTS 245, 245–46 (1988). The oven in the Akhnai story, for example, is assembled together from different pieces and a question is therefore raised about its susceptibility to cleanness. Is the legal question a literary reflection of the narrative's import, "symbolic of a question of unity within a diversity of opinions"? *Id.* at 252.

[246] Kahn, *supra* note 40, at 60 n.263. Kahn notes that Cover's theory of interpretation is closer to a Protestant vision of interpretation "in which sects can freely multiply as new claims to [the] truth [of the text] are made." *Id.*

[247] *See id.* at 60.

[248] This conception of authority is stated most extremely in the *Sifre*'s comment to *Deuteronomy* 17:11. The Bible passage reads: "According to the law which they shall teach thee and

The rabbinic theory of interpretation and authority proffered in the *Oven of Akhnai* story is thus a specific illustration of the liberal consensus model advocated by Owen Fiss.[249] Fiss argued that "correctness" or objectivity in interpretation is a function of adherence to the disciplining rules authorized by the professional community to whom interpretation is entrusted. The disciplining rules do not prevent disagreement or error; there may even be disagreement over the rules themselves. But the community agrees on the procedures for resolving these internal disputes. The *Oven of Akhnai*, too, asserts that interpretation is entrusted to a professional community that shares a common understanding of the disciplining rules that constrain interpretation. Rabbinic interpretation may be abstractly in error, as the heavenly voice implies. But "correctness" in interpretation is not a function of abstract truth; it is a function of adherence to the authorized professional norms the rabbinic community agrees on — here, majority rule. And, as in Fiss's theory, in the *Oven of Akhnai* story there is but one authoritative interpretive community. The lesson of the *Oven of Akhnai* is precisely the lesson Fiss offers: "[I]n legal interpretation there is only one school and attendance is mandatory."[250] The sages ban Rabbi Eliezer for continuing to rule in accordance with his minority opinion.[251]

---

according to the judgment which they shall tell thee, those shalt do; those shalt not turn aside from the sentence which they shall declare unto thee, to the right hand, nor to the left." *Deuteronomy* 17:11. The *Sifre* reads: "Even if in your eyes they point to the right that it is left and to the left that it is right, obey them." SIFRE ON DEUTERONOMY, *Piska* 154, *translated in* SIFRE: A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY 190 (Reuven Hammer trans., 1986).

Later rabbinic commentators cite the *Sifre* passage as authority for a broad-based rule of deference to rabbinic authority. *See* AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW — BEYOND EQUITY: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW, at xxv–xxviii (1991) (citing various opinions and their differing rationales); *cf.* BEN-MENAHEM, *supra* note 140, at 165–73 (suggesting that in its original context, the *Sifre* passage addressed only the duty of judges to obey the final pronouncements of the High Court).

[249] *See supra* p. 852.

[250] Fiss, *supra* note 56, at 746.

[251] It might be argued that the same logical weaknesses that inhere in Fiss's theory also inhere in the rabbinic conception of interpretation and legitimate authority. Fiss's theory is basically circular. He grounds the objectivity of interpretation in the shared disciplining rules of the professional community, which includes acceptance of an institutional hierarchy of authority. But this acceptance of authority is not prior to interpretation; it is a result of interpretation. The interpreting community creates the very disciplining rules Fiss relies upon to ground interpretation in objectivity. As Paul Kahn points out:

> [Fiss] frequently suggests that authority is a function of the constitutional text itself, as if we could get to the Constitution itself, prior to any interpretation. . . . [T]he Constitution does not first establish institutions and embody values and then become a subject of interpretation. The institutions and values are themselves products of constitutional interpretation.

Kahn, *supra* note 40, at 50–51.

The same critique can be leveled at the rabbinic conception of interpretation and authority.

(ii) The Internal Analysis. — The inherent ambiguities in the *Oven of Akhnai* story explain why rabbinic commentators have taken a much more measured approach to this talmudic narrative than have many contemporary readers. Indeed, rabbinic commentators even disagreed about the reason God laughed upon hearing Rabbi Joshua dismiss the heavenly voice.[252] One commentary read God's laughter as irony: rather than the joyous laughter of a father whose children have bested him in argument, it is the mocking laughter of the Creator at Rabbi Joshua's folly in insisting upon following the majority even in the face of "truth."[253] Most authorities, however, have viewed the *Oven of Akhnai* story as a jurisprudential cornerstone of the Jewish legal system, one that affirms the majority decision.

In his classic survey of rabbinic commentaries on the *Oven of Akhnai* passage, Izhak Englard suggested that the story poses a pro-

---

The rabbis ground objectivity in interpretation in the shared disciplining rules of the rabbinic community, which include the principle of majority rule. But this principle is itself based upon an interpretation of Scripture. *See supra* note 131. In turn, the exclusive authority the rabbinic professional community exercises to interpret Scripture also is a product of the rabbinic interpretation of *Deuteronomy* 17:8–11. That scriptural passage places the authority to interpret the law in the "levitical priests and the judge who is in office in those days." *Deuteronomy* 17:9. The identity of the scriptural institutions of authority with the rabbinic community requires an act of interpretation. *Cf.* Jackson, *supra* note 124, at 26–27 (disputing that *Deuteronomy* 17:8–11 confers authority "on later generations of halakhic scholars *without* involving any act of scriptural interpretation on the part of later readers of the biblical text"); Bernard S. Jackson, *Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature*, 6 JEWISH L. ANN. 3, 5 (1987) (arguing that "[t]here could be no legitimate derivation of authority from the pentateuchal passages on the part of the [halakhic] scholars unless they already possessed the authority to interpret").

The susceptibility of both Fiss's theory and the rabbinic theory to precisely the same critique of circularity only serves to strengthen the identity between the two theories. Although the circularity of Fiss's theory may argue against its validity, the circularity of the rabbinic theory of authority may not "count as an argument for invalidity in a discourse based upon divine revelation, whose structures of significance may be markedly different." Jackson, *supra* note 124, at 27. More importantly, the rabbinic claim to authority does not rest only on an interpretation of *Deuteronomy*; it also rests on the historical claim that the legal tradition was handed down from biblical times to the rabbis, through an identifiable chain of transmission, *see* MISHNAH, *Aboth* 1:1, *translated in* DANBY, *supra* note 13, at 446, and on the continuing acceptance of rabbinic authority by the community.

[252] This coda is absent in the Palestinian Talmud's version of the story. *See* PALESTINIAN TALMUD, *Moed Qatan* 3:1.

[253] *See* Englard, *supra* note 154, at 145 (quoting MOSES OF BISENCZ, DARASH MOSHE).

found problem of normative ordering between two equally authoritative sources of law: divine truth and human law.[254] Most commentators on the story did not address this question directly; instead, they directed their exegetical efforts toward reducing the tension created by elevating a human decision over the expression of divine will. Some commentators attempted to reconcile these two sources of law on formal grounds by contending that God ordained the use of majority rule as a method of uncovering His true will. The consensus-building process of majority reasoning has the potential to yield greater substantive accuracy.[255] Several medieval rationalists offered an explanation similar to the external perspective. They contended that God's will is satisfied by reasoned determination of the law in accordance with the shared rules of halakhic methodology, even if the result is substantively erroneous, because interpretation is entrusted to the professional community.[256] In this view, halakhic determination is a formal process that must be faithful solely to its own internal procedures. Moreover, because error does not contradict God's will, qualified authorities need not fear that their rulings might mislead others into inadvertent transgression and therefore should not shrink from accepting judicial office. Still others posited that the two normative orders correspond to two separate realms of legal discourse,[257] linking the problem posed by the *Oven of Akhnai* story to the heavenly proclamation that the conflicting opinions of Hillel and Shammai are both the "words of the living God." Both address a similar issue: the split levels of meaning of *halakhah*, theoretical and practical. Abstract divine truth is ascertainable only in the heavenly realm of halakhic discourse. In the realm of practical legal determination, halakhic "truth" is achieved by other means, including rational deliberation and majority decision.[258] Abstract truth may be the measure of genuine theoretical discourse; the practice of law, which "seeks order and

---

[254] *See* Englard, *supra* note 154, at 142–46.

[255] *See id.* at 146 (citing MAHARHAL OF PRAGUE, BE'ER HAGOLAH, who argues that both views were authentic but the majority is to be preferred because it transcends the limitations of individual intelligence and thus approaches more closely the "Supreme Intellect"). Similarly, several commentators tried to dispel the implication that the sages' ruling was contrary to divine intention by contending that the heavenly voice did not proclaim a normative statement of *halakhah*. Some commentators argued that the heavenly voice merely affirmed that Rabbi Eliezer's prior opinions were valid *halakhah*. *See id.* at 144 (quoting Rabbi Nissim Gaon, who comments on BABYLONIAN TALMUD, *Berakoth* 19b). Alternatively, some suggested that the heavenly voice was issued out of respect for Rabbi Eliezer, not because his interpretation was "true." *See id.* (discussing TOSAFOT, commenting on BABYLONIAN TALMUD, *Baba Mezia* 59b, s.v. *lo bashamayim hi*).

[256] *See id.* at 143–44.

[257] *See id.* at 145–46.

[258] For an elaborate exposition of this view, see HALIVNI, cited above in note 137, at 101–25.

authority and the continuity of tradition," proceeds on a different path.[259]

A question left unaddressed by Englard's analysis is whether the acute problem of normative ordering posed by the *Oven of Akhnai*, solved later primarily by formal means, is regarded, especially in its initial setting, as a formal and ultimately artificial problem.[260] The problem is artificial because the word of God has no single meaning apart from the determination of the sages.[261] Thus, one can reconceive the problem posed by the *Oven of Akhnai* story by viewing the two normative orders as essentially identical.

This perspective, however, assumes that God is present inside the legal system and is not merely the system's absent grantor. God's presence is established through His Torah. This notion is captured by the midrashic statement that man, in judging and interpreting Torah law, is a partner with God in the creation of the universe, a statement linked to the concept of *imitatio dei*.[262] The vivid image of this creative partnership may account for the rabbinic ability to do exactly "what contemporary criticism finds so problematic"[263] — to maintain two seemingly contradictory relationships to the text: orientation to divine intention and interpretive independence.

This paradoxical formulation depends on a particular conception of how the Torah creates a partnership relationship with God. The midrashic rabbis describe the Torah as the blueprint God used to create the world.[264] The Torah is therefore the singular expression of

---

[259] Kahn, *supra* note 40, at 84–85. Kahn reaches this conclusion after an exhaustive analysis of various contemporary constitutional theories that propose new models of constitutional order, including those of Cover, Fiss, Michelman, and Dworkin. He concludes that upon closer investigation, no theory that relies on ideas of community, interpretation, or discursive particularity has been able to support "a political structure of authority." *Id.* at 81. The lesson for Kahn is that "truth," rather than authority, is the measure of genuine discourse. *Id.* at 84. Therefore, legal theory, which seeks truth through truly open discourse, and constitutional practice, which seeks order and authority and the continuity of tradition, will increasingly part ways. *See id.* at 84–85.

[260] *See* Bonfil, *supra* note 203, at 39, 39–44. Bonfil adopts this methodological framework in analyzing a related problem, the normative conflict between the equally authoritative *halakhah* and *kabbalah*.

[261] *Cf.* RASHI, COMMENTARY ON THE BABYLONIAN TALMUD, *Hagigah* 3b, s.v. *aseh* (commenting that the divinity of conflicting opinions lies not in their content but in the purity of intent of those who offer them).

[262] *See* BABYLONIAN TALMUD, *Shabbath* 10a, *translated in* SONCINO, *supra* note 13, 1 *Seder Mo'ed*, at 35. For the differing interpretations later accorded this statement, see KIRSCHENBAUM, cited above in note 248, at xxxiv–xxxv. *See also* URBACH, *supra* note 203, at 357 (quoting the opinion of the sixteenth-century authority, Rabbi Samuel Eliezer (*Maharsha*), that God desires man to make himself into the partner of God who gave the Torah by developing the *halakhah*).

[263] Eilberg-Schwartz, *supra* note 166, at 203–04.

[264] *See Genesis Rabbah* 1:1–2, *translated in* 1 MIDRASH RABBAH: GENESIS 1 (H. Freedman & Maurice Simon eds. & H. Freedman trans., 1939). For a discussion of this midrash, along the lines presented in the text, see Stern, cited above in note 119, at 148–51.

God's will. "To know Torah, to read and follow the divine blueprint is, in this sense, a way to come to know the divine architect and, ultimately, to imitate Him and construct a human existence modeled after God's creation of the world."[265] Through immersion in the world view and value system of Torah, the rabbis incorporate the divinely revealed will into their own personalities. Rabbinic authority, in turn, is achieved because the community recognizes that a particular sage has come to represent Torah.[266]

The near-identification of Torah with God's will and, in turn, of Torah with its interpreters, explains several features of rabbinic hermeneutics. First, the midrashic interpretive method, which often cuts the scriptural text into discrete phrases or fragments and extracts meaning from each fragment, assumes that every word of Scripture is significant and intentionally included for instructional purposes; the juxtaposition of scriptural phrases in one setting to those in another assumes that Scripture is a unified whole that expresses the divine will.[267] Second, the scriptural text provides a model of God's personality, and in so doing, reveals how God wished His law to be interpreted and developed.[268] Thus, by revealing His personality in the Torah and by the choice of scriptural language, God works in partnership with man and aids man to develop His law.

The blurring of distinction between rabbinic interpretation and God's will is nowhere more vividly presented than in the midrashic imagery of the divine author's active participation in, rather than absence from, the reader's reading of His own work. As one scholar of midrash described it:

> [He is] the learning, [that is,] interpreting God, who quotes the decision of interpreters of his Torah, which aroused the amazement of Moses, who is forced to sit and bind crowns to the letters of the Torah in anticipation of the interpretation of one of his interpreters, Rabbi Akiva . . . and who employs the support of mortal interpreters so that His opinion will prevail as against that of His Heavenly Academy, who are united against Him.[269]

---

[265] Stern, *supra* note 119, at 150.

[266] The sage is often described as a living Torah. *See* BABYLONIAN TALMUD, *Makkoth* 22b, *translated in* SONCINO, *supra* note 13, 4 *Seder Nezikin*, at 156 ("Rava observed: How dull-witted are those people who stand up in deference to the Scroll of Torah but do not stand up in deference to a great Torah personage . . . .").

[267] *See* Stern, *supra* note 119, at 150 (noting that the midrashic atomization of scriptural phrases is based on the view that Scripture is omnisignificant and that the midrashic technique of explaining Scripture through Scripture is based on the concept of the essential unity of Scripture as the expression of the singular divine will).

[268] For further elaboration of how God's personality serves as a model for a theory of justice, see pp. 868–69 below.

[269] SIMON RAWIDOWICZ, *On Interpretation*, *in* STUDIES IN JEWISH THOUGHT 55, 125–35 (Nahum Glatzer ed., 1974) (citations omitted).

Rabbinic interpretation is thus the very opposite of positing God's absence and substituting the discursive community. God is always present through His Torah. In turn, the authority of the discursive community to proclaim the law ultimately is rooted in the purity of intent of those who perceive their task as a continuing pursuit of God's will. Thus, it may be precisely the religious mindset that accounts for the particular way of looking at the normative world that contemporary theorists have found so attractive. The question these theorists should ask now is this: what is an adequate substitute for God's partnership in American constitutional theory?

B. Law as Obligation and Not Right

In *Nomos and Narrative*, Cover theorizes that "the creative process [of law] is collective or social."[270] Because the community comes together in the common project of expressing a law worthy of adherence,[271] the community and the law are correlated. Cover's focus on the correlation of the community and the law has attracted the attention of civic republican revivalists, who wish to transform American society by molding autonomous individuals into a community through participation in legal (or political) discourse.[272] Both admirers and critics of Cover's theory, however, question whether the kind of correlation Cover envisions between law and community is attainable in contemporary American society.[273] This section first draws out Cover's line of thought and then assesses whether the Jewish legal tradition, from which Cover's theory derives, provides a useful countermodel for American law.

1. The Contrast Case. — In *Obligation: A Jewish Jurisprudence of the Social Order*,[274] Cover argued explicitly that the Jewish legal system's conception of law as a set of obligations, rather than a set of rights held by individual subjects who seek to advance private ends, makes possible the correlation of the community and the law.[275] Cover first contrasted the role of violence in both jurisprudences. Rights theory, Cover asserted, has exhibited a marked propensity for violence throughout its long history.[276] Rooted in the "myth" of the social contract, rights theory begins with the premise that individuals are free, autonomous, and discrete subjects, who surrender some of

---

[270] Cover, *Nomos and Narrative*, *supra* note 21, at 11.

[271] *See id.* at 45 ("The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law.").

[272] *See, e.g.*, Michelman, *Traces of Self-Government*, *supra* note 35, at 74 (locating the community of discourse in the Supreme Court).

[273] *See, e.g.*, Sherwin, *supra* note 2, at 1812–13; Tushnet, *supra* note 40, at 1529–30.

[274] Cover, *Obligation*, *supra* note 25. This article was published posthumously.

[275] For an earlier presentation of this thesis, see Silberg, cited above in note 8, at 322–23.

[276] *See* Cover, *Obligation*, *supra* note 25, at 69.

their rights to achieve collective goals, such as security.[277] When linked with Hobbesian political theories of liberalism, this radical "myth of individualism" sets in motion a "monstrous and powerful collective engine,"[278] the national state, "with its almost unique mastery of violence."[279] By contrast, Cover asserted, the Jewish jurisprudence of duty has evolved for nearly two millenia independent of an autonomous state or other hierarchical authority.[280] In the absence of external institutions compelling obedience to the law, the internal structure of the law itself must promote adherence. The "[c]ommon, mutual, reciprocal obligation" at the center of the law makes possible continued adherence to the law without resort to violence.[281]

Cover contended that the differences in the internal organization of thought represented by the words "right" and "obligation" affect the basic ability of each legal system to address human needs. Rights theory is "singularly weak in providing for the material guarantees of life and dignity"[282] that flow from the community to the individual. Legal statements about the individual's right to subsistence or education, for example, become largely "rhetorical tropes"[283] because they indicate only a need, not a solution. Such rights are not even intelligible unless we know to whom they are addressed and by whom they will be satisfied.[284] The notion of "obligation" in the Jewish legal system is not a mere linguistic reversal of the term "right"; rather, the Jewish legal system consists of commandments that specify precisely who is obligated to do what and for whom.[285] The internal organization of the jurisprudence creates a community by imposing responsibilities directly on individuals for the well-being of their compatriots. Accordingly, the law addresses community members directly and in detail. As the jurisprudence develops, further details of the obligations assigned to each member of the community are elaborated so that community members can obey the law without resort to judicial intermediaries.[286] Thus, the locus of legal performance is at the level of each community member.

---

[277] *Id.* at 66.

[278] *Id.*

[279] *Id.* at 69.

[280] *See id.* at 68.

[281] *Id.*

[282] *Id.* at 71.

[283] *Id.*

[284] *See id.*

[285] *See id.* at 71–72.

[286] Arguably, legal formalism, a characteristic of Jewish law, is a byproduct of shifting the locus of legal performance from the judge to the community member. Self-executing obligations must be stated with clarity and particularity. Jewish law consists of many rules formulated in a precise, detailed fashion with certain (sometimes arbitrary) boundaries. *See* Silberg, *supra* note 8, at 323–27 (describing the relationship of the concept of obligation in Jewish law to legal

In an all-too-elliptical paragraph, Cover made one more comparison between the Jewish jurisprudence of obligations and the Western jurisprudence of rights. Drawing on Maimonides's philosophy of Jewish law,[287] Cover asserted that the Jewish concept of commandments not only presupposes a specific purpose for each discrete obligation, but also includes a "systemic *telos*" of intellectual, spiritual, and social perfection.[288] This normative world of obligations is the antithesis of an empty or vain world because, as Cover explained, commandments, in order to so strongly bind the individual, must "make a strong claim for the substantive content of that which they dictate."[289] Moreover, because each of the obligations aids humanity to strive for perfection, aspiration is internal to the system of obligation.[290] Rights theory, by contrast, has systemic coherence despite making no "strong claims about the fullness or vanity of the ends it permits."[291]

Drawing out Cover's line of thought, one can argue that adherence to the law is the result of the intricate interplay between the internal organization of the law as a set of reciprocal obligations and the community's understanding of the strong purpose behind those obligations. First, community members must refer to the law in all social interactions. Disobedience is tantamount to secession from the common project of both the law and the community. Second, the law strongly binds the individual because the doing of the law is a step on the path to perfection, and each step on this path is worthwhile in itself.[292] Hence, the internal structure of the law, rather than the external state, promotes adherence to the law.

2. The Contrast Case Re-Examined. — As compelling as the contrast Cover drew between a jurisprudence of rights and a jurisprudence of obligation is, his treatment of the Jewish jurisprudence of obligations omits any discussion of how two of Judaism's most basic religious ideals, to serve God and to emulate God, intersect with the notion of law as obligation. Furthermore, Cover overstated the lack

---

formalism). For further discussion of this issue, including an elaboration of the religious meaning of fixed, exact halakhic measures, see 1 SELECTED TOPICS IN JEWISH LAW: LEGAL FORMALISM IN THE HALAKHAH 8–9 (Hanina Ben-Menahem ed. & Shmuel Wosner trans., 1988).

[287] *See* MAIMONIDES, MISHNEH TORAH, *Laws of Repentance* 3:4, 8:6, 9:1, *translated in* MAIMONIDES, *supra* note 218, at 84a, 90b, 91a; MAIMONIDES, MISHNEH TORAH, *Laws of Study of the Torah*, 3:13, *translated in* MAIMONIDES, *supra* note 218, at 60a. *See generally* ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH) 419–30 (1980) (describing Maimonides's teleological understanding of commandments as antidotes to vanity, futility, and folly).

[288] Cover, *Obligation*, *supra* note 25, at 70.

[289] *Id.*

[290] *See id.*

[291] *Id.*

[292] *See* GOODMAN, *supra* note 108, at 106–13 (describing the Torah's platform as the projection of "obligations as blessings and blessings as obligations").

of coercive forces in Jewish law.[293] These shortcomings again call into question the utility of the contrast case of Jewish law for American legal theory.

Consider Arthur Jacobson's alternative formulation of how a jurisprudence of duty fuses together the law and the community so that they become one.[294] In any jurisprudence of duty, the source of law in the first instance is God, the issuer of commands. Thus, Jacobson wrote, "[t]he answer to the question, What are my duties?, is that they are what God has commanded. The answer to the question, Why should I perform my duties?, is that if I do not, I shall be a stranger to God."[295] This jurisprudence has two essential features. First, the source of law in the jurisprudence of duty is a deific person who reveals His will and, in so doing, reveals a personality.[296] Second, wrote Jacobson, "the subject of the commands, the ordinary legal person, is God's partner in lawmaking."[297] Because no statement of duty can foresee every situation in which the duty might be applicable, ordinary persons try to discover the exact parameters of their duties by using both the revealed list of duties and God's personality as a model.

Jacobson's formulation goes to the heart of the problem. Educating people into the *paideia* of obligation is not sufficient to correlate the law and the community. Rather, it is the idea of walking with God that causes the correlation. In order to walk with God, persons seek guidance from human tribunals to help them ascertain and fulfill their duties. In such a system, aspirationism and law coincide.[298] Over time, aspirational norms become fixed duties, because the goal of community members is to become like God. Maimonides described the command of *imitatio dei* — to become like God — as the cardinal

---

[293] *See* Cover, *Obligation*, *supra* note 25, at 68.

[294] *See* Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 892–95 (1989) [hereinafter Jacobson, *Legal Plenum*]. Jacobson described his paper as "but a generalization of Silberg's contribution." *Id.* at 878 n.4. Jacobson, unlike Cover, did not wish to examine jurisprudences of right and duty with respect to their propensity for violence or their correlation with morality. Rather, he made a claim for dynamic jurisprudences, in which the source of law is inside the system, *see id.* at 879, and therefore the persons comprising the system constantly seek to fill the universe with as much law as possible, *see id.* at 883; *see also* Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079, 1125–32 (1990) (analyzing further "dynamic" versus "static" jurisprudences).

[295] Jacobson, *Legal Plenum*, *supra* note 294, at 892.

[296] *See id.* at 893.

[297] *Id.* at 894.

[298] *See* KIRSCHENBAUM, *supra* note 248, at 1–58, 109–36, 185–94 (arguing that acts that are theoretically aspirational become practical obligations); Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, *in* MODERN JEWISH ETHICS 62, 70–81 (Marvin Fox ed., 1975) (claiming that aspirational norms are obligatory within the halakhic system).

principle of the Torah.[299] This principle is derived from the scriptural injunction: "And ye shall walk in His ways, they are the right and good path."[300]

If the desire to become like God correlates the law and the community in the Jewish jurisprudence of obligation, what can substitute for this desire in a secular legal system? Possibly, Cover had in mind that the goal of self-perfection is in itself an adequate substitute for the desire to become like God. But to strive for self-perfection presupposes a particular image of perfection or, in other words, a theory of justice. The Jewish legal system solves this problem by extrapolating a theory of justice from the attributes of God and the words of Scripture. Thus, Jewish legislation and judicial decisionmaking are shaped by scriptural ideals that describe God's ways or the ways of the law,[301] such as "that which is upright and good"[302] or "ways of pleasantness."[303] Exploration of the attributes of God is a means of elaborating God's personality and, hence, a theory of justice modeled upon this personality.[304] God's attributes in judging, for example, become a basis for the rabbinic self-understanding of the judicial role.[305] In short, the ultimate measure of the Jewish standard of perfection and concept of justice is God's perfection as recorded in a revealed text.

Cover seemed to have envisioned natural principles of justice, truth, and peace — the "universalist virtues"[306] — as a secular American analogue to the revealed personality of God. American judges must draw on these universalist virtues to create a "committed constitutionalism"[307] — that is, a *nomos* of their own. Thus, Cover

---

[299] *See* MAIMONIDES, GUIDE OF THE PERPLEXED, at pt. III, ch. 54, at 635–38 (Shlomo Pines trans., 1963).

[300] *Deuteronomy* 28:9.

[301] For a list of such ideals, see Lamm & Kirschenbaum, cited above in note 79, at 132–33. For an account of how these scriptural ideals shape rabbinic decisionmaking and legislation, see AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW–HALAKHIC PERSPECTIVES IN LAW: FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW 151–83, 253–85 (1991).

[302] *Deuteronomy* 6:18; *see also* BABYLONIAN TALMUD, *Baba Mezia* 35a, 108a, *translated in* SONCINO, *supra* note 13, 1 *Seder Nezikin*, at 215, 618 (requiring a person to do "that which is upright and good" in dealings with a neighbor, partner, or relative).

[303] *Proverbs* 3:17; *see also* BABYLONIAN TALMUD, *Yebamoth* 15a, *translated in* SONCINO, *supra* note 13, 1 *Seder Nashim*, at 79 (expanding this principle).

[304] Maimonides specifies that the Torah ascribes certain attributes to God to inform Israel "that these qualities are good and right." MAIMONIDES, MISHNEH TORAH, *Laws Relating to Moral Dispositions and to Ethical Conduct* 1:6–7, *translated in* MAIMONIDES, *supra* note 218, at 48a.

[305] *See* Stone, *supra* note 39, at 1159, 1193–97.

[306] Cover, *Nomos and Narrative*, *supra* note 21, at 12, 60. The "universalist virtues" correspond to the three "weak" forces for maintaining a legal system identified by Rabbi Caro: truth, justice, and peace. *Id.* at 12.

[307] *Id.* at 57 n.158.

chastised the *Bob Jones* Court for failing to decide on the merits between two competing constitutional visions: religious educational liberty and racial equality. The universalist virtues, Cover implied, should aid the Court in deciding which of these two redemptionist visions will be supported.[308] But the universalist virtues are not part of the Constitution; they are not part of a revealed text. How then can the Supreme Court identify or define these virtues? Moreover, on Cover's theory, even a committed constitutionalism that appeals to these virtues carries no privileged authority. The *nomos* of the Supreme Court is still only one *nomos* among many: one constitutional vision among a multitude of radically equal constitutional visions.[309] It is precisely because the universalist virtues lie outside the nomic community in American society that Cover's solution seems so at odds with the radical equality of normative understandings of the law that he initially posited.[310] In the end, Cover failed to identify any secular equivalent to the desire to become like God that can correlate law and society.

Cover's tendency to overly romanticize Jewish law also mars his turn to the contrast case as a prescription for American society. His article contains a revealing paragraph about the possible limits of his construct. In discussing the question of women's role in political life, he noted that equality of participation follows from the myth of social contract that fuels rights jurisprudence. It is more difficult to argue for equality of participation in Jewish law because such equality may hinge on equality of obligation, which Jewish law traditionally has not recognized. Although there may be internal reasons to justify gender distinctions in imposing obligations in Jewish law, these reasons do not "in any straightforward way mitigate against complete equality of participation."[311] Cover observed: "The rights rhetoric goes to the nub of this matter because it is keyed to the projection of personality among indifferent or hostile others. The reality of such

---

[308] *See id.* at 60.

[309] *See* Cover, *Folktales*, *supra* note 40, at 182.

[310] Alternatively, the universalist virtues could refer to those values common to the American people. Yet Cover's theory that the true locus of law creation is the discrete and particular community in itself implies that meaningful consensus on important issues is impossible. In Furman v. Georgia, 408 U.S. 238 (1972), Justice Marshall argued that the death penalty is unconstitutional because it is inconsistent with present values, common to all Americans. *See id.* at 360 (Marshall, J., concurring). Mark Tushnet provides a good account of how such nonempirical claims are in reality appeals "to what good citizens in a good society would say if confronted with the practice of the death penalty in our society." Tushnet, *supra* note 40, at 1538. The difficulty of this approach has given rise to the alternative republican concept of "public values," an equally ephemeral concept under current social conditions. *See id.* at 1538–44.

[311] Cover, *Obligation*, *supra* note 25, at 73. Cover cited the fact that childbearing capacity might justify distinctions in obligations, but not distinctions in equality of participation. *See id.*

indifference, hostility or oppression is what the rhetoric of responsibility obscures."[312]

The Jewish legal example fails Cover because a community of obligation does not imply particular moral or political ideals. Legal systems like Jewish law, which traditionally support obligations of role, do not necessarily recognize Western ideals of individual equality, nor need they define the interpretive community so as to allow equal participation of all members.[313] From the internal perspective of Jewish law, this is not necessarily problematic.[314] From the perspective of American society, the distinction is critical and, indeed, is the basis for a powerful critique of the concept of community made by both race theorists and feminists.[315]

Cover also glosses over the question of violence within the community of obligation. For Cover, adherence to the law is solely the product of the internal structure of the law. He fails to mention the ever-present coercive shadow of divine accountability, a real deterrent for those who adhere to this legal system.[316] Jewish legal theory is at times unconcerned with human punishment; it assumes that divine punishment is available.[317] Cover notes, but minimizes, the degree to which the Jewish legal system itself has the potential to support violence against its members.[318] Rabbinic Judaism's attitude toward

---

[312] *Id.*

[313] This is the central problem Paul Kahn identifies with Dworkin's account of legal authority. *See* Kahn, *supra* note 40, at 74–79. Dworkin offers a theory of legitimacy based upon the idea of a "true community," one that is committed to individual equality. *See* RONALD DWORKIN, LAW'S EMPIRE 201 (1986). But this works only as an imaginary construct. It cannot explain actual historical communities. *See* Kahn, *supra* note 40, at 78 n.354.

[314] I do not mean to imply that the issue of women's equality is not at all problematic for Jewish law. The issue currently divides various segments of the Jewish community.

[315] *See, e.g.*, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1874–75 (1987) (arguing that rights-consciousness enhances the participation of minorities and women in the community by allowing them to assert that they are members of the community); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.–C.L. L. REV. 401, 404–05 (1987) (criticizing the Critical Legal Studies movement for promoting the abandonment of rights discourse that aids minorities and in which many minorities still believe).

[316] Maimonides, for example, listed belief in divine reward and punishment as one of the thirteen articles of Jewish faith. *See* MAIMONIDES, COMMENTARY ON THE MISHNAH, *Sanhendrin* principle 11, *translated in* MAIMONIDES, MAIMONIDES' COMMENTARY ON THE MISHNAH: TRACTATE SANHEDRIN 156–57 (Fred Rosner trans., 1981).

[317] The biblical criminal system, with its exceptionally lenient rules of procedure, places almost insurmountable obstacles in the way of a judiciary desirous of convicting a defendant. This lack of coercive power is explicable from a religious standpoint. *See* Stone, *supra* note 39, at 1159, 1193–94. Obedience to the law should not follow simply from threats of human punishment. Obedience should flow principally from love of God and secondarily from fear of God and divine punishment. *See* Arnold N. Enker, *Aspects of Interaction Between Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1144 (1991).

[318] *See* Cover, *Obligation*, *supra* note 25, at 68.

physical and social coercion was, at times, quite permissive.[319] There is a startling record of physical punishments meted out during the medieval period, when Jewish communities were semi-autonomous.[320] Social coercion took the form of accusations of heresy and the imposition of bans.[321] Although diversity in interpretation and practice was tolerated, there were limits. Organized rabbinic accusations of heresy were issued against innovators, from Sabbatian rabbis and Hasidic masters to the leaders of the Reform movement.[322] Excommunication has an even longer history, as the *Oven of Akhnai* story vividly illustrates.[323] Arguably, as soon as significant subcommunities of interpretation arose, excommunication took place. These subcommunities were then no longer members of the initial community. They were, at best, sects.[324] Thus, the community and the law became, and remained, one in the Jewish legal system through the expulsion of those who resisted the identity.[325]

The history of Jewish law in the modern era is ample proof of the difficulty of constituting communities of obligation without religious imperatives or coercion. The Enlightenment, with its loss of faith in the divine, also led to the demise of Jewish communal government. Since then, adherence to the Jewish legal system has fallen sharply, to say the least.

C. Redemption Through Law

In *Nomos and Narrative*, Cover explored the special role of law in creating new or transformed social worlds.[326] To transform social

---

[319] Side by side with the idealized, biblical approach to criminal law enforcement there existed a system of so-called rabbinic emergency powers and executive jurisdiction (the "king's law"), which, as described by Maimonides, had a decidedly Hobbesian flavor. For a fuller account of rabbinic Judaism's attitude toward coercion, see Stone, cited above in note 39, at 1197–1212.

[320] *See* SIMHA ASSAF, HA-ONSHIN AHARE HATIMAT HA-TALMUD: HOMER LE-TOLDAT HA-MISHPAT HA-IVRI 15–49 (1922) (PUNISHMENT AFTER THE CLOSE OF THE TALMUD); AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 402–22 (1979) (discussing the imposition of physical sanctions in the Middle Ages).

[321] *See* Roth, *supra* note 214, at 54–74.

[322] *See id.* (discussing the accusations of heresy directed at Sabbatian rabbis); *see also* 5 HEINRICH GRAETZ, HISTORY OF THE JEWS 391–94 (1895) (describing attempts to excommunicate Hasidic leaders); DAVID PHILIPSON, THE REFORM MOVEMENT IN JUDAISM 103–04 (rev. ed. 1967) (describing bans against the leaders of the Reform Movement).

[323] *See supra* pp. 856–58.

[324] Some of these sects (such as the Karaites) remained affiliated with the Jewish people; others (such as Hebrew Christians) did not. In addition, over time, opposition could abate (as in the case of Hasidism), and thus allow the sect to return to the fold of the rabbinic community.

[325] Tushnet intuits this difficulty in his critique of *Nomos and Narrative*. *See* Tushnet, *supra* note 40, at 1529–30 (arguing that Cover erroneously assumes that nomic communities can be constituted without violence directed at their own members).

[326] *See supra* p. 831.

life through law, legal argument and interpretation must be framed within a larger vision of future, alternative possibilities. Not all visions of the future ideal world and not all means to realize them, however, engage law in the striving to transform social life. Messianic or utopian philosophies, Cover argued, often preclude the transformation of social life because they fail to ground their visions of the future in pre-existing legal contexts that can support new meaning. Cover illustrated this point with the American history of "redemptive constitutionalism," using the Garrisonian abolitionists and Frederick Douglass as contrasting examples.[327] The Garrisonians, analyzing the Constitution's words in accordance with the professional methods of their day, reached the conclusion that the Constitution permitted slavery. Accordingly, they renounced the Constitution and ultimately withdrew from public life into "nomian" insularity.[328] This withdrawal, which was tied to Garrisonian "perfectionism" (a millennial philosophy),[329] precluded legal transformation. Douglass, by contrast, was not content to define his vision in the shadow of the millenium.[330] Instead, he grounded his vision of the future world in a pre-existing legal context. By insisting that the Constitution forbade slavery, Douglass and the radical constitutionalists who coalesced around him laid the groundwork for the transformation of the legal landscape in which slavery was deprived of a foundation in law.[331]

Nonetheless, toward the end of his life, Cover was drawn increasingly to an example of Jewish messianic activity, the sixteenth-century attempt to reinstitute biblical ordination, a condition precedent for the arrival of the messianic age. This Jewish messianic movement, which sought to transform the Jewish social condition by breathing new life into a pre-existing legal institution, led Cover to reassess his position on utopian philosophies. For Cover, this medieval antecedent to the radical constitutionalism of Frederick Douglass exemplified the strong commitment to a teleological vision necessary to realize the redemptive possibilities of legal interpretation.

Cover's implication that messianic activism can promote legal transformation has troubled several students of Cover's writings. Indeed, Cover's utopian turn recently drew sharp criticism from Richard Sherwin, who has argued that Cover's messianic preoccupation, by endorsing the end of days and the end of legal institutions, foreshadows totalitarianism.[332] For Sherwin, Cover's messianism is a vivid example of the dangers that lie ahead if the liberal project is aban-

---

[327] Cover, *Nomos and Narrative*, *supra* note 21, at 33–40.

[328] *See id.* at 36.

[329] *Id.*

[330] *See id.* at 9–10.

[331] *See id.* at 36–39.

[332] *See* Sherwin, *supra* note 2, at 1804.

doned. Sherwin reanalyzed the Jewish historical sources relied upon by Cover and gave them a decidedly different interpretation. For Sherwin, the Jewish historical example illustrates the wisdom of liberalism, which insists upon the separation of faith and law.

Strange as it may seem, we have here a contemporary academic debate about the future direction of American legal theory pitched over a little-known page in the annals of Jewish legal history. The outcome of this debate depends on the proper interpretation of historical events about which even Jewish historians are still unclear.[333] I reexamine this debate for two reasons. First, it presents an ideal opportunity to explore the complex reality of Jewish legal history, which neither Cover nor Sherwin adequately conveyed. Cover concentrated on the messianic dimension and ignored the quest for a powerful centralized legal authority that equally underlay the attempt to renew ordination. Sherwin concentrated on the professionalism of the Jewish legal system and ignored its religious dimension. Second, a better understanding of the rabbinic messianic idea may dispel the bewilderment expressed by students of Cover's writings over Cover's retreat from his earlier claim that utopian philsophies are incompatible with law. I suggest that the rabbinic messianic idea is analogous to Cover's conception of law's teleology.

1. The Contrast Case. — The Jewish event at the center of this debate is Rabbi Jacob Berab's controversial 1538 attempt to revive biblical ordination[334] in the Galilean town of Safed, the gathering point of many great Jewish legists after the Spanish expulsion.[335] In

---

[333] *See* Meir Benayahu, *Hidushah shel ha-Semikhah be-Zefat*, *in* YITZHAK F. BAER JUBILEE VOLUME 248 (1960) (*The Renewal of Ordination in Safed*); Jacob Katz, *Mahaloket ha-Semikhah be-Zefat Bein Rabi Yaakov Berab ve-ha-RaLBah*, 16 ZION 28 (1951) (*The Ordination Controversy in Safed Between Rabbi Jacob Berab and Rabbi Levi Ben Habib*); Schechter, *supra* note 4, at 277–78.

[334] *See generally* J. NEWMAN, SEMIKHAH [ORDINATION]: A STUDY OF ITS ORIGIN, HISTORY AND FUNCTION (1950) (describing biblical ordination). According to talmudic sources, ordination as a judge was required for membership in the *Sanhedrin*. Eventually, any judge ruling on a decision that was not purely civil in nature was required to obtain ordination. *See* BABYLONIAN TALMUD, *Sanhedrin* 5b, *translated in* SONCINO, *supra* note 13, 3 *Seder Nezikin*, at 17. *Semikhah* (biblical ordination) could be granted only by one who had properly received *semikhah* himself. According to Jewish tradition, an unbroken chain of ordination existed from the time of Moses to the time of the dissolution of the *Sanhedrin*. After the dissolution of the *Sanhedrin*, each sage ordained his own disciples. Sometime after the *Sanhedrin* dissolved, the chain of ordination was broken. The exact date is in dispute.

For a historical summary of Rabbi Jacob Berab (c. 1474 C.E. to 1541 C.E.), the Safed school he established, and his role in the renewal of *semikhah*, see Haim Z. Dimitrovsky, *Beit Midrasho shel Rabi Yaakov Berab be-Zefat*, 7 SEFUNOT 41, 41–102 (1983) (*The School of Rabbi Jacob Berab in Safed*).

[335] *See* Schechter, *supra* note 4, at 277–307 (describing the great religious scholars of the sixteenth-century Safed community).

his incomplete essay, *Bringing the Messiah Through Law: A Case Study*,[336] Cover traced the roots of the ordination attempt to two factors. First, the expelled Spanish Jews (many of whom had nominally converted to Christianity under the pressure of the Inquisition) intensely desired to expiate their sins through the reinstitution of biblical punishment. Such punishment could only be administered, they argued, by biblically-ordained judges.[337] Second, the Safed commmunity hoped to speed the coming of the Messiah and the end of the exile.[338] The *Book of Isaiah* hints that the messianic age will be preceded by the "return of the judges,"[339] which, according to Maimonides, refers to those biblically ordained.[340] The renewal of biblical ordination could bring the Messiah.

A legal controversy arose over the community's authority to reinstitute biblical ordination. The dispute centered on the interpretation of Maimonides's statement that biblical ordination could be revived if all the sages in the land of Israel agreed.[341] The rabbis of Safed interpreted this passage to allow the immediate revival of ordination. The rabbis of Jerusalem, however, concluded that, in his later writings, Maimonides seemed to have retreated from his initial suggestion that biblical ordination could be revived.[342] In Cover's words, the proposal exceeded "the normal canons of standard legal reasoning."[343]

These differing interpretive approaches toward the Maimonidean passage, medieval antecedents to the divergent interpretive stances of the Garrisonians and Frederick Douglass toward the constitutional question of slavery, struck a chord with Cover because they refuted his earlier assumptions about the incompatibility of legal transforma-

---

[336] Cover, *Messiah*, *supra* note 27.

[337] These penitents believed they deserved the divine penalty of excision. This penalty could be annulled through the biblical punishment of flogging. *See* BABYLONIAN TALMUD, *Makkoth* 23a–b, *translated in* SONCINO, *supra* note 13, 4 *Seder Nezikin*, at 164.

[338] *See* Cover, *Messiah*, *supra* note 27, at 206–07.

[339] *Isaiah* 1:26.

[340] *See* MAIMONIDES, COMMENTARY ON THE MISHNAH, *Sanhedrin* principle 1, *translated in* MAIMONIDES, *supra* note 316, at 4.

[341] *See id.* at 5 ("And I reason that if there be agreement from all the students and sages to appoint a man of the Academy — that is, that they make him Head — on condition that this be in Israel — then behold that would make that person ordained and he could ordain whomever he wished.").

[342] *See* MAIMONIDES, MISHNEH TORAH, *Laws of Sanhedrin* 4:11 (noting that the manner in which ordination was to be renewed was Maimonides's personal opinion and that further investigation was necessary to reach a definitive answer). The chief representative of the Jerusalem faction, Rabbi Levi ben Habib, argued that this later passage negated the force of Maimonides's earlier views. The later passage must prevail because of the systemic halakhic principle that later opinions of decisionmakers take precedence over earlier ones. *See* Katz, *supra* note 333, at 41.

[343] Cover, *Folktales*, *supra* note 40, at 195–96.

tion and millennialism.[344] In *Nomos and Narrative*, Cover had talked of law as a "bridge" because it connects the world we have to a world we can imagine.[345] Implicit in this metaphor is the idea that the bridge of law not only connects these two worlds, but also holds them apart. Without the bridge of law, reality could collapse into pure vision and foreclose legal transformation.[346] Apocalyptic eschatologies, Cover had argued, are the antithesis of legal transformation because "the immediacy of the end of days" breaks "the 'normal' tension between present and future."[347] In his later essay, *Bringing the Messiah*, Cover asserted, however, that his earlier line of reasoning assumed that messianism "typically had an antinomian cast to it,"[348] belied by the "lawful messianism" of the Safed example.[349] A "lawful messianism," Cover concluded, "entails a special form of commitment that holds to the immediacy of a privileged and strange transformation while insisting on a highly unusual capacity for familiar transformational institutions."[350]

These elliptical statements have puzzled several legal theorists who have tried to discern what Cover had in mind in invoking the Safed rabbis. Ronald Garet, for example, has speculated that the Safed rabbis, like Frederick Douglass, took law seriously in order to bring about a transformation of the social world, but that Cover "could not forgive the rabbis of Safed for crossing the bridge, for offering to put an end once and for all to the 'tension between reality and vision.' The rabbis of Safed failed to understand that law is a device for warding off the Messiah, not a device for bringing him."[351] Garet proceeded to ask: Had the rabbis of Jerusalem agreed to reinstitute biblical ordination, "would the tensely equipoised bridge of law and meaning in Safed have crumbled into something inhuman, unlawful, and meaningless?"[352]

Richard Sherwin has offered a different explanation for Cover's invocation of the Safed rabbis.[353] Sherwin divides Cover's theory of law into "pre-" and "post-messianic" phases. In his pre-messianic

---

[344] *See* Cover, *Messiah*, *supra* note 27, at 201–03.

[345] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 9.

[346] Cover wrote in *Nomos and Narrative*: "'[L]aw' is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds." *Id.* at 10.

[347] Cover, *Messiah*, *supra* note 27, at 202 (summarizing his position in *Nomos and Narrative*).

[348] *Id.*

[349] *Id.* at 204.

[350] *Id.*

[351] Garet, *Meaning and Ending*, *supra* note 36, at 1820–21 (citation omitted).

[352] *Id.* at 1822. Although Garet rightly suggests that Cover seems to have answered that question in the negative, Garet is puzzled by Cover's backing away "from his earlier claim that the pressure of imminent ending robs the spirit of legal meaning." *Id.*

[353] *See* Sherwin, *supra* note 2, at 1799, 1803–13.

phase,[354] represented by *Nomos and Narrative*, Cover identified law with interpretive commitment.[355] This Coverian vision of law, which acknowledges the peaceful, regulative function of judicial decision-makers, is compatible, Sherwin contended, with a "post-modernized liberal vision," which recognizes the ethical ideal of argumentative discourse within an existentialist framework.[356] In Cover's post-messianic phase, represented by *Bringing the Messiah*, Cover identified law with redemption.[357] This Coverian vision of law, Sherwin argued, "foreshadows messianic totalitarianism."[358] Sherwin assumes that all eschatological philosophies tell of "time's end" and, therefore, presage the end of legal institutions.[359] Messianic belief, because it hopes to produce time's end, collapses reality into the vision. This dissolution of reality and vision inevitably leads to unlawfulness; it closes off the possibilities of new legal worlds and denies the role of law in the ethical struggles of humanity.[360]

Sherwin also tried to discern the contemporary import of Cover's case study in messianism. He suggested that Cover considered "the fragments of our constitutional texts and their textual interpretations" to be "like the authoritative texts and interpretations that informed and inspired" the Safed rabbis.[361] The Supreme Court, on the other hand, would "represent a 'familiar transformational institution' akin to the Jerusalem rabbis."[362] Sherwin found this analogy less than helpful because the Safed attempt took place within one insular, normative community with a shared vision of what the Messiah would bring.[363] America, by contrast, does not have a similarly coherent or common tradition; the redemptive impulse, set within the culturally-fragmented American landscape, would result in "messianic totalitarianism" — the inevitable outcome of unconstrained belief imposed by one segment of society on the rest.[364] Cover's original vision of law as interpretive commitment could be rescued, according to Sherwin, only if one acknowledged the "unlawful aspect of messianic immediatism."[365]

---

[354] *See id.* at 1795.

[355] *See id.* at 1798.

[356] *Id.* at 1815. Sherwin argued that the present constitutional system of divided governmental powers situates discourse among different groups, thus promoting "intersubjective communication." *Id.* at 1822–27.

[357] *See id.* at 1799–1815, 1828.

[358] *Id.* at 1813.

[359] *Id.* at 1804 ("Once the imaginary line separating one world from another dissolves, the imperial order of social structure dissolves with it.").

[360] *See id.* at 1814.

[361] *Id.* at 1812.

[362] *Id.*

[363] *See id.*

[364] *Id.* at 1813.

[365] *Id.*

Sherwin also turned to Jewish law to support his argument; specifically, to demonstrate the timeless truth of certain liberal insights, even in a postmodern age. Sherwin focused not on Rabbi Berab, the initiator of the Safed experiment, but on Rabbi Caro, the most prominent member of the Safed group. The life story of Caro is the stuff of history. His two legal codes, the *Shulhan 'Arukh* and the *Beit Yosef*,[366] were methodological masterpieces, although the former sometimes was criticized by contemporaries as overly arid and lacking in justificatory richness.[367] This consummate legist also was the author of a fifty-year diary of mystical encounters with his *Maggid* (mentor-angel), who appeared to him as the personification of the Mishnah.[368] In his mystical diary, Caro's mentor assured Caro that "through you, biblical ordination will be restored."[369] Despite Caro's mystical visions and urgent wish for the restoration of ordination, Sherwin contended that Caro "produced a commentary that accepted without critical gloss a provision directly conflicting with the authority of the Safed rabbis' defiant act."[370] Caro is a "paradigm" of the virtues of liberalism, Sherwin submitted, because "[i]n an act of faith, he dared to hasten the Messiah's coming; in a professional act of legal interpretation, he allowed the messianic moment to be kept apart from reality."[371] This separation of faith and law is critical to sustain the legality of state power.[372]

In sum, the Safed experiment has become a parable for contemporary American society: for Cover, a parable about the special commitment to law needed for radical transformation of the social world; for Sherwin, a parable about the liberal wisdom of segregating belief from the public arena of law.

2. The Contrast Case Re-Examined. — Cover identified two factors that led to the Safed experiment: the desire for a forum in which to expiate sins more fully (a factor that may have been more rhetorical than real) and messianic fervor.[373] Cover failed to recognize, however,

---

[366] The *Shulhan 'Arukh* is a summary digest of Caro's more comprehensive code, the *Beit Yosef*. The *Beit Yosef* includes the sources, commentaries, and dissents for the rulings it contains.

[367] *See* Twersky, *supra* note 3, at 333 (citing Rabbi Mordecai Jaffe as the foremost of the contemporary critics).

[368] *See* Schecter, *supra* note 4, at 265–70.

[369] WERBLOWSKY, *supra* note 4, at 125 (quoting chapter *Vayikra* in Rabbi Joseph Caro's *Maggid Mesharim*).

[370] Sherwin, *supra* note 2, at 1813.

[371] *Id.* at 1814.

[372] *See id.*

[373] *See* Cover, *Folktales*, *supra* note 40, at 193; Cover, *Messiah*, *supra* note 27, at 205–06. At the time, there was substantial halakhic dispute as to whether even flogging by biblically ordained judges would expiate sins in the manner hoped for by the penitents. Although the missives between the Safed and Jerusalem rabbis referred to the need for biblical flogging, this issue, Katz asserts, even then was considered a rhetorical distraction. *See* Katz, *supra* note

that a major objective of the Safed movement, like its contemporary revival,[374] was the reestablishment of a powerful, centralized, rabbinic institution in the land of Israel, a Jewish Supreme Court, that would reign legally and spiritually over the dispersed Jewish communities.[375] This centralized authority would have the long-lost power granted to the *Sanhedrin* to unify the law and would be able to impose the full range of biblical punishment, not only against sinners, but also against judicial dissenters.

The rabbinic center envisioned by the Safed community came about, to a large extent, and lasted well into the mid-seventeenth century.[376] Berab himself ordained four disciples, including Rabbi Joseph Caro. Caro and his colleagues, in turn, ordained others.[377] There is evidence that Caro bypassed the Jerusalem camp by obtaining the consent of various diaspora scholars and receiving a second ordination.[378] Sephardic rabbinic communities throughout the Ottoman empire deferred to the rulings of the Safed group[379] until, finally, the Safed rabbinic center fell apart.[380] It is not surprising that Cover failed to focus on this aspect of the Safed experiment, the specific goals of which — to increase the authority of the professional community of legal interpreters, to reduce legal controversy, and to restore coercive sanctions — are antithetical to Cover's project.

Sherwin, in turn, has distorted Cover's viewpoint by failing to focus on the normative rabbinic concept of messianism. Recall the following interrelated propositions put forth by Sherwin: the Safed experiment was the product of messianic immediatism inspired by

---

333, at 42–44. *But see* NEWMAN, *supra* note 334, at 159 (arguing that the penitential motive was critical).

[374] A call for the reinstitution of the *Sanhedrin*, along the lines proposed by Berab, resurfaced with the inception of the modern Israeli state. *See, e.g.*, Y.I. MAIMON, HIDUSH HA-SANHEDRIN BE-MEDINATENU HA-MEHUDESHET *passim* (1967) (The Renewal of the *Sanhedrin* in Our Renewed State). Rabbi Maimon's proposal to reinstitute a high court was opposed by a majority of Israel's rabbis. *See* Roth, *supra* note 214, at 42, 96 n.250.

[375] *See* Benayahu, *supra* note 333, at 259–60 (noting that although messianism was a decisive factor in the attempt to renew *semikhah*, the desire for centralization was an independent, equally central motivation, and that the two cannot be separated); Schecter, *supra* note 4, at 277 (stating that Berab aimed to re-establish "the *Sanhedrin* . . . which would wield supreme authority over the whole of Israel"); Twersky, *supra* note 3, at 339 n.12 ("[Caro's] striving for a powerful, central authority is unmistakable (and, incidentally, something he shared with his Sephardic teachers and colleagues — e.g., the great R. Jacob Berab).").

[376] *See* Benayahu, *supra* note 333, at 251–53.

[377] *See id.* at 249–50.

[378] *See id.* at 251–53.

[379] *See id.* at 252–53 (citing halakhic sources indicating that the authority of the Safed group extended well beyond the Eastern communities and as far as Italy and France).

[380] With the death of Caro and the dwindling of economic support from diaspora Jewish communities, Safed slowly ceased to be a center of spiritual and legal authority. *See* Schechter, *supra* note 4, at 307–09.

extreme mystical beliefs;[381] messianic immediatism inevitably leads to antinomianism; the messianic era is the end of days; and, by glorifying the Safed attempt, Cover endorsed the end of legal institutions.[382] Does the little we know of the Safed experiment support any of these propositions? Even assuming that Berab's principal motivation was messianic fervor rather than the desire for a national legal center (indeed, the two are often inseparable in Jewish thought),[383] normative rabbinic messianic beliefs hardly contemplate the end of legal institutions.

Unlike Caro, Berab was not a recognized mystic; extreme mystical beliefs played no role in his messianic endeavor.[384] Berab's messianic vision (and Caro's) should be understood in light of normative rabbinic conceptions of the messianic age, which incorporate the messianic idea within a halakhic framework. The essential element of rabbinic messianism is "Israel's return to live as God's people under God's law."[385] Maimonides, the first to offer a systematic doctrine of messianism, stipulated that the sign of a true messiah is fidelity to the law.[386] In the messianic period, there will be no substantive change in either the content of Jewish law or in its method of study. Gershom Scholem, the masterful historiographer of the Jewish messianic idea, described the Maimonidean vision, dominated by halakhic motifs and a quest for institutional order, as merely restorative and barely utopian.[387] Scholem's historiography, which may have led Sherwin to associate

---

[381] *See* Sherwin, *supra* note 2, at 1812 n.131.

[382] *See supra* p. 877.

[383] Messianism, in normative rabbinic thought, is intricately tied to the restoration of political normalcy, and with it, the reinstitution of the *Sanhedrin* and other institutions of Jewish life disrupted by the exile. *See infra* notes 385, 391 and accompanying text.

[384] Sherwin makes much of the connection between mysticism and messianism. According to Sherwin, an excess of religious fervor fostered by mysticism led Berab to attempt the reinstitution of biblical ordination. *See* Sherwin, *supra* note 2, at 1812 n.131. But Berab was probably not a mystic. *See* Benayahu, *supra* note 333, at 261 (arguing that there is not a single hint in the sources that Berab or his family, who continued the ordination attempt, were involved in kabbalistic activity). This fact refutes the notion that mysticism played a necessary part in the ordination controversy. *See* Katz, *supra* note 333, at 39 (concluding from Berab's example that Jewish messianic outbreaks do not depend on a mystical philosophy).

[385] GOODMAN, *supra* note 108, at 171. By contrast with the apocalypticism of various Jewish sects in and around the first centuries, classical rabbinic Judaism insisted, by and large, that "nothing distinguishes this world from the messianic days except the subjugation of kingdoms [that is, the end of alien domination]." BABYLONIAN TALMUD, *Sanhedrin* 91b, *translated in* SONCINO, *supra* note 13, 3 *Seder Nezikin*, at 613. As with most matters of religious beliefs, the midrashic-talmudic sources present a variety of views. *See, e.g.*, *id. Sanhedrin* 98b–99a, *translated in* SONCINO, *supra* note 13, 3 *Seder Nezikin*, at 665–69 (rebuking, yet recording, Rabbi Hillel's view that a messiah would no longer come because the benefits of the messianic age already were reaped in the reign of King Hezekiah).

[386] *See* Amos Funkenstein, *Maimonides: Political Theory and Realistic Messianism*, 11 MISCELLANIA MEDIAEVALIA 81, 85 (1977) (summarizing Maimonides's messianic doctrine).

[387] GERSHOM SCHOLEM, *Toward an Understanding of the Messianic Idea in Judaism*, *in* THE MESSIANIC IDEA IN JUDAISM AND OTHER ESSAYS IN JEWISH SPIRITUALITY, *supra* note 87, at 1, 24–32.

Jewish messianism with antinomianism,[388] concentrates on the potentially anarchic and antinomian undercurrent in populist Jewish messianic movements.[389] For Scholem, these movements were creative antidotes to the deadening forces of halakhic Judaism and normative law.[390]

But, even though the messianic age described by Maimonides does not require a miraculous change of the cosmic order, Maimonidean messianism reflects strong utopian elements. Political autonomy and effective communal governance in accordance with the institutions outlined in the Torah are one aspect of the messianic promise. The deeper vision that animates Maimonidean messianism is human transformation.[391] Although nothing more is promised by the messianic idea than the restoration of the full practice of Torah, Torah law is designed to bring about nothing less than collective spiritual, intellectual, and social perfection. Maimonides's messianic doctrine, in turn, is a philosophic elaboration of themes already evident in the earlier midrashic discussion of the messianic days.[392] The messianic age is not the end of days, but a redemptive phase of history. Messianic redemption is a public, communal event. There will be a reign of peace in which evil — pestilence, famine, and war (though not tragedy) — disappears, so that humanity will be able to devote itself to the study and fulfillment of the law. Thus, the transformation of human nature and society that will occur in the messianic age is the result of the more perfect fulfillment and understanding of the Torah's laws that the age itself makes possible.[393] This messianic vision af-

---

[388] Sherwin cites Scholem's work in his article. *See* Sherwin, *supra* note 2, at 1800 n.54.

[389] The quintessential account of radical, populist manifestations of Jewish messianism is in SCHOLEM, SABBATAI, cited above in note 87.

[390] Thus, in his classic article, *Redemption Through Sin*, Scholem traces the history of antinomianism in the Jewish tradition from the gnostic sects of the early centuries to Sabbatianism and then Frankism, the nihilistic forces of which, according to Scholem, permanently put an end to medieval ghetto existence and brought forth the modern era. Sabbatianism, for Scholem, gave rise to every significant modern intellectual Jewish movement from Hasidism to Reform Judaism to revolutionary idealism. The catalyst for these creative forces was the idea of messianism. *See* GERSHOM SCHOLEM, *Redemption Through Sin*, *in* THE MESSIANIC IDEA IN JUDAISM AND OTHER ESSAYS IN JEWISH SPIRITUALITY, *supra* note 87, at 78, 78–141.

Recent studies provide a needed counterbalance to Scholem's historiography by demonstrating that messianism (and the yearning for redemption and spiritual center that it implies), even at its most nomian extreme, is a vital element of rabbinic Judaism. *See* ELISHEVA CARLEBACH, THE PURSUIT OF HERESY 16–17 (1990) (noting that Scholem's historiography fails to explain why, decades after the apostasy, "some of the greatest rabbinic figures were Sabbatians, and some of the most avid Sabbatian ideologues and kabbalists were learned rabbis").

[391] Political normalcy is an instrumental prerequisite for the return of the prophetic faculty, and with it, complete spiritual and intellectual fulfillment. *See* TWERSKY, *supra* note 287, at 476–77.

[392] On the mix of realism and utopianism in midrashic-talmudic descriptions of the messianic age, see JUDAH GOLDIN, *Of Midrash and the Messianic Theme*, *in* STUDIES IN MIDRASH AND RELATED LITERATURE 359, 371–78 (Barry L. Eichler & Jeffrey H. Tigay eds., 1988).

[393] *See* GOODMAN, *supra* note 108, at 161.

firms the role of law in the ethical struggles that are part of human existence.

Although the Safed and Jerusalem rabbis shared a common vision of the content of the messianic age, they parted company over the question whether concrete legal activity could bring that age about. According to the Safed camp's interpretation of Maimonides's writings, the rabbis had a positive role to play in restoring a legal center and in preparing the way for the Messiah. According to the Jerusalem camp, however, Maimonides, in his later writings, indicated that no practical implications could be drawn from his initial statement as to how to reinstate ordination.[394] Moreover, elsewhere Maimonides had implied that God will choose the appropriate time to bring the redemption; humanity should not try to hasten that time through its own actions.[395]

Cover was drawn to the messianic activists who insisted on a legal interpretation that was strongly committed to a teleological vision.[396] Such legal interpretation, Cover tells us, is part of the struggle to create a better world by seeing radical new possibilities in familiar legal institutions. Just as Frederick Douglass insisted that the Constitution forbade slavery, Berab insisted that Maimonides authorized the realization of the condition precedent for the messianic age. The messianic activism of the Safed rabbis reflected their intense desire to realize in the present the communal, moral, and social transformations attainable with the full practice of Torah law. Indeed, for Cover, the will of the Safed rabbis to create the condition precedent for the messianic age illustrated a new measure of commitment for those who wish their visions of the future to be taken seriously as law. The willingness to do violence is no longer the measure of commitment to a legal vision, as Cover previously insisted.[397] There is, instead, the commitment of "madness";[398] a willingness to take responsibility for dramatic social change through radical legal interpretation. Yet, in the context of their respective times, Berab's interpretation was no more radical than Douglass's. Contrary to Sherwin's conclusion, Cover's analysis of the Safed incident reaffirms his original vision of law as interpretive commitment.

---

394 *See supra* p. 875.

395 *See* MAIMONIDES, COMMENTARY ON THE MISHNAH, *Bechorot* 4:3. ("It will come to pass when God wills it."); MAIMONIDES, MISHNEH TORAH, *Laws of Kings* 13:2 ("[W]ith respect to all these matters, no one can know how they will come about until they take place. For these matters are not stated explicitly by the prophets and the sages have no [reliable received] tradition about them.").

396 Cover states: "I am making a strong claim here for the *teleology* implicit in law and for what is entailed in that teleology . . . ." Cover, *Messiah*, *supra* note 27, at 202.

397 *See* Cover, *Bonds of Constitutional Interpretation*, *supra* note 40, at 817–21; Cover, *Violence*, *supra* note 40, at 1609–17.

398 Cover, *Messiah*, *supra* note 27, at 204.

In siding with the activist Safed rabbis, however, Cover may have missed the deeper teleological significance of the messianic idea — a significance not lost on all messianic quietists. Although a strand of rabbinic tradition envisioned the messianic eruption as a sudden intrusion at the moment when Israel was most spiritually and politically impoverished,[399] an equally significant strand of rabbinic tradition, relied on by the Jerusalem opposition,[400] agreed that human action can hasten the coming of the Messiah. Israel's increased dedication to and observance of the law are the means to bring about the messianic age.[401] Through this increased commitment, the community begins to realize the moral and social transformations that the law intends. Messianic redemption, in this view, is the product, as much as the cause, of communal transformation.[402] By holding out the promise of redemption through increased dedication to the ideals and practice of Torah law, the messianic idea, like Cover's conception of law's teleology, channels the human desire for moral and social transformation into collective activity in the present.[403] The attempt to bring the Messiah before this process of ethical transformation nears completion may diminish the teleological significance of the messianic idea. The most effective means of engaging law in the struggle to realize moral and social transformation is not necessarily to seize on physical manifestations of the messianic age, such as a rebuilt Temple or a renewed High Court.[404]

Cover himself noted the risks of such public activity. The perception that reality cannot be brought to coincide with the new demands made upon it — that the messianic age will not appear solely because one wills it — can lead to despair. Such despair may end in a turn

---

[399] *See* MIDRASH ON PSALMS, *Psalms* 45:3, *translated in* 1 THE MIDRASH ON PSALMS 450 (William G. Bravde trans., 1959) ("When you have gone down to the very bottom of the pit, in that hour, I shall redeem you.").

[400] *See* Katz, *supra* note 333, at 40.

[401] *See* BABYLONIAN TALMUD, *Sabbath* 118b, *translated in* SONCINO, *supra* note 13, 1 *Seder Mo'ed*, at 582 (speculating that if all Jews kept two Sabbaths in succession properly, the Messiah would come immediately); *id. Sanhedrin* 97b, *translated in* SONCINO, *supra* note 13, 3 *Seder Nezikin*, at 660 ("If Israel repent, they will be redeemed . . . ."); *id. Yoma* 86b, *translated in* SONCINO, *supra* note 13, 3 *Seder Mo'ed*, at 428 ("Great is repentance, because it brings about redemption . . . .").

[402] *See* GOODMAN, *supra* note 108, at 156–94.

[403] Goodman writes, "Just as human strivings inform our vision of the messianic future, so the conception of that future gives orientation to those strivings and imparts a meaning to them even when they fail of their proximate goals. If messianism is the regulative idea that orients us toward the transformation of human nature, then messianism is latent in the Torah as tragedy is latent in Homer." *Id.* at 165.

[404] This conception of the messianic idea is hinted at in talmudic-midrashic exhortations not to run to rebuild the Temple. *See, e.g.*, BABYLONIAN TALMUD, *Nedarim* 40a, *translated in* SONCINO, *supra* note 13, 3 *Seder Nashim*, at 128 ("If the young tell you to build [the Temple] . . . hearken not to the young, for the building of youth is destruction . . . .").

inward to esoteric solutions such as mysticism (as Cover stated was the case in Safed after the attempt died out)[405] or to complete rejection of exoteric solutions realized through law (as in the case of the Garrisonians).[406] For Sherwin, mysticism also represents the antithesis of law. But whereas Cover was wary of a retreat into private life, Sherwin fears that mysticism embraces a totalitarian vision of truth that threatens the central freedoms liberalism protects. Accordingly, Sherwin invoked Caro, the devout mystic and renowned legist who, Sherwin contended, never allowed his private mystical yearnings to intrude on his public halakhic activity.[407]

Sherwin's assessment of Caro is problematic, however. First, Caro did not accept "without critical gloss a provision that directly conflicted with the authority of the Safed rabbis' defiant act," as Sherwin has contended.[408] No such directly conflicting provision exists. In his gloss to Maimonides's work, Caro merely refrained from commenting substantively on Maimonides's statements about ordination, statements that are susceptible to a range of interpretation.[409] Caro's silence does not imply approval or disapproval.[410] In fact, Caro asserted in his own legal code (the *Beit Yosef*) that "according to Maimonides, ordained Rabbis would be thinkable even today."[411] More importantly, Sherwin misses the essence of Caro's character. Despite Caro's general silence in his halakhic writings about his inner

---

[405] *See* Cover, *Folktales*, *supra* note 40, at 197. It is not at all clear that the increasing prominence of mystical activity in Safed was tied to the failure of Berab's movement, however. *See generally* Schechter, *supra* note 4, at 307–09 (discerning no cause and effect relationship).

[406] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 36 (discussing the withdrawals of Garrisonians and religious sectarians from the "general and public *nomos*").

[407] *See* Sherwin, *supra* note 2, at 1813, 1814 nn.136 & 138.

[408] *Id.* at 1814.

[409] *See* JOSEPH CARO, KESEF MISHNAH TO MISHNEH TORAH, *Laws of Sanhedrin* 4:11. The *Kesef Mishnah* was written toward the end of Caro's life. By that time, Caro may well have determined that the current consensus did not support his particular interpretation of the Maimonidean passage and therefore remained silent.

[410] *See* WERBLOWSKY, *supra* note 4, at 127.

[411] JOSEPH CARO, BEIT YOSEF, *Hoshen Mishpat* 295:5. Caro's comments elsewhere that "we do not at the present time have courts operating pursuant to biblical ordination" can be explained on several grounds. *Id. Orah Hayyim* 607:2; JOSEPH CARO, SHULHAN 'ARUKH, *Even Haezer*, 177:2. Katz contends that Caro's comment is a reference to the fact that the ordination initiated by Rabbi Berab, and passed on for at least two generations, was not in fact used in practice. *See* Katz, *supra* note 333, at 36. Benayahu, on the other hand, makes a strong case that the biblical ordination held by Caro and others was in fact exercised. Caro's statement that "we do not at the present time have courts operating pursuant to biblical ordination" was a reference solely to the status of judiciaries in the jurisdictions outside Safed, to which his codes were addressed. *See* Benayahu, *supra* note 333, at 250–51. Benayahu bases his case on the language of the ordinations, which authorized the ordained to exercise biblical jurisdiction. *See id.* at 250.

spiritual life and mystical aspirations,[412] Caro's mysticism and spiritual fervor was a vital part of his halakhic activity.[413] Although he did not draw from his mystical diary in elucidating the *halakhah*, in several notable instances he drew on the *Zohar*, the basic mystical text of the kabbalists.[414] Indeed, Caro relied on the *Zohar* more than any prior halakhist, and he did so in the legalistic codes of the *Shulhan 'Arukh* and *Beit Yosef*.[415]

In sum, Caro is not an exemplar of the separation of faith and law, but of halakhic Judaism, with its complex fusion of faith and law.[416] As Cover sensed, *halakhah* proper is almost always connected to a teleological understanding of the law. According to Isadore Twersky, this teleological understanding is ordinarily expressed in one of two ways: either by "construction of an ideational framework which indicates the ultimate concerns and gives coherence, direction and vitality to the concrete actions," or by "elaboration of either a rationale of the law or a mystique of the law which suggests . . . motives for the . . . commandments."[417] These teleological frameworks complement halakhic practice by joining it to a contemplative or emotional quest, thus energizing and spiritualizing the practice of law.[418] As Twersky insightfully observed, the terseness of the *Shulhan 'Arukh* and Caro's general reticence about his passionate spiritual yearnings

---

[412] *See* Twersky, *supra* note 3, at 343 n.43.

[413] *See* Jacob Katz, *Post-Zoharic Relations Between Halakhah and Kabbalah*, *in* JEWISH THOUGHT IN THE SIXTEENTH CENTURY 283, 297, 301–04 (Bernard D. Cooperman ed., 1983) ("Karo revealed his deep commitment to Kabbalah by granting it a decisive role in the halakhic context as well."). Sherwin's conclusion that Caro did not allow his mystical philosophy to intrude on his halakhic activity is apparently drawn from Caro's biographer, Werblowsky. *See* Sherwin, *supra* note 2, at 1814 nn.136 & 138. Werblowsky wrote of "Karo's well-known unwillingness to allow kabbalistic considerations or mystical experiences to influence halakhic decisions." WERBLOWSKY, *supra* note 4, at 184. Katz argued that Werblowsky is only half right. Although Caro's halakhic reflections in his mystical diary were not incorporated into his halakhic writings, kabbalistic considerations based on mystical sources such as the *Zohar* are "part and parcel" of Caro's halakhic works. *See* Katz, *supra*, at 302.

[414] The *Zohar* is the central document of kabbalistic literature. It is a collection of midrashic statements, laws, homilies, and various topical discussions. *See* 16 ENCYCLOPEDIA JUDAICA *Zohar* 1194–1215 (1972). Caro specifically mentions the *Zohar* as one of his legal sources. *See* JOSEPH CARO, *Beit Yosef* (Introduction).

[415] *See* Katz, *supra* note 413, at 301–04.

[416] *See* Twersky, *supra* note 3, at 335–37 (arguing that in Caro's thought, and in halakhic Judaism generally, faith and law are inseparable and that the "[l]aw is dry and its details are burdensome only if its observance lacks vital commitment").

[417] *Id.* at 333.

[418] For further elaboration of the relationship between *halakhah* and various "meta-halakhic" systems that spiritualize the practice of Jewish law, see Isadore Twersky, *Religion and Law*, *in* RELIGION IN A RELIGIOUS AGE 69, 69–74 (S.D. Goitein ed., 1974) [hereinafter Twersky, *Religion and Law*]; and Isadore Twersky, *Talmudists, Philosophers, Kabbalists: The Quest for Spirituality in the Sixteenth Century*, *in* JEWISH THOUGHT IN THE SIXTEENTH CENTURY, cited above in note 413, at 431, 431–34 [hereinafter Twersky, *Talmudists*].

reflect Caro's understanding of *halakhah* as the "coordination of inner meaning and external observance."[419] Caro adhered to normative kabbalistic (mystical) philosophy, which tries to influence the divinity and repair the cosmic structure by scrupulous observance of the law. Normative kabbalistic practice thus deepens the search for the teleological significance of doing the commandments — the object of the *halakhah*.[420] Mystical philosophy is only one way of spiritualizing the law. More classical forms of philosophical speculation such as that of Maimonides are another. These medieval examples supplemented *aggadic midrash*, the spiritual counterpart of talmudic dialectic.[421]

The delicate balance of faith and law demanded by the halakhic system is not easy to maintain, however. Indeed, Sherwin's portrait of Caro, which posits that Caro never allowed his mystical beliefs to influence the formulation of practical norms of *halakhah*, touches upon a central issue in Jewish legal thought. The *halakhah* represents the exclusive, legal concretization of the Jewish religion. In theory, therefore, the halakhic system should be autonomous and self-sufficient. It may be illuminated or enriched by various spiritual systems, whether philosophical, mystical, or pietistic.[422] But, halakhic norms should not be determined by these spiritual systems. Yet, it is difficult to maintain such strict division between spiritual teachings and the practice of law in a religious legal system. This is especially the case when these spiritual systems, such as *kabbalah*, contain norms as well as reflections on the foundations and goals of the *halakhah* itself.[423] A halakhist steeped in these spiritual sources is necessarily influenced by them. Occasionally, as in the case of Caro, the influence that *kabbalah* can exert on the halakhic process is direct and explicit. More often, the influence is indirect; these sources shape the internal sensibility of the halakhic decisionmaker.[424] As I suggest in the next

---

[419] Twersky, *supra* note 3, at 336.

[420] This branch of kabbalistic thought is referred to as "theurgy." MOSHE IDEL, KABBALAH: NEW PERSPECTIVES 156–72 (1988) (linking kabbalistic myths to the rationales for observance of the commandments).

[421] *See* SIFRE ON DEUTERONOMY, *Piska* 49, *translated in* HAMMER, *supra* note 248, at 106 ("If you wish to know He Who spoke and World came to Be. . . study *aggadah*."). *Midrash aggadah* is aptly described as an extended conversation with God that filled the void left by the loss of prophecy. *See* Stern, *supra* note 119, at 153.

[422] *See* Katz, *supra* note 413, at 284; *see also* Twersky, *Talmudists*, *supra* note 418, at 433–34 (describing the prevalent type of talmudist who, "through the ages, ordinarily and rather naturally combined halakhic study with some meta-halakhic discipline").

[423] *See* Katz, *supra* note 413, at 283–86.

[424] Various studies address the extent to which *kabbalah* has influenced the halakhic process. *See* Bonfil, *supra* note 203, at 43–44 (analyzing the exegetical efforts of mystics, for whom *kabbalah* is as authoritative as *halakhah*, in order to reduce conflicts between the two sources of law); Katz, *supra* note 413, at 287–304 (analyzing the effect of *kabbalah* on the formulation of halakhic norms).

Part, Cover's theory of the nature of law recalls the complex and often tense relationship in the halakhic system between normative law and spirituality.

III. THE "JEWISH VOICE" IN CONTEMPORARY AMERICAN LEGAL THEORY

No one has spoken more eloquently than Harold Bloom about the Jewish voice in literature, a voice he identifies with a "tradition of very recalcitrant Jewish texts"[425] and the "intense obsession with interpretation, as such."[426] Less attention has been paid to the Jewish voice in legal culture,[427] although some legal theorists have spoken about the prophetic voice of Justice Brandeis[428] and other theorists about how talmudic study engenders certain intellectual habits.[429] I want to discuss briefly a different Jewish voice, the tendency to think in oppositional or paradoxical interdependencies.[430] Although this

---

[425] HAROLD BLOOM, *Free and Unbroken Tablets: The Cultural Prospects of American Jewry*, *in* AGON: TOWARDS A THEORY OF REVISIONISM 318, 321 (1982).

[426] Harold Bloom, *Foreword* to YERUSHALMI, *supra* note 1, at xxiii ("I think that finally [Freud's and Kafka's] Jewishness consists in their intense obsession with interpretation, as such.").

[427] The attempt here to identify a "Jewish voice" in American legal culture assumes that there is a deep structure to the Jewish legal tradition, passed on through direct immersion in Jewish legal texts and traditions and carried over, sometimes unconciously, to different legal contexts. The culture-specific origin of this voice in Jewish textual traditions, language, and history distinguishes this search for a "Jewish voice" from the problematic effort to identify a distinctively "feminine voice." *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1972). Indeed, observers of the process of Jewish assimilation in America correctly note that this distinctive Jewish voice may well be irretrievably lost when it is removed from its source in particularist Jewish texts and traditions. *See, e.g.*, BLOOM, *supra* note 425, at 321–29; Monroe Price, *Text and Intellect*, 33 BUFF. L. REV. 559, 571 (1984).

[428] *See* ROBERT A. BURT, TWO JEWISH JUSTICES 126–27 (1988) (comparing Brandeis with the prophets of Israel and arguing that "Brandeis sustained his identification with the outcast [in America]"); Touster, *supra* note 10, at 577 (describing Brandeis as prophetically sensitive to the "dangers of social division, the need for openness in the social fabric, and for generosity in the body politic").

[429] *See* Price, *supra* note 427, at 565–70; *see also* Jeffrey Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial*, 38 JEWISH SOC. STUD. 195, 222 (1976) (questioning whether the preeminence of Jewish judges in American law is due to "a certain subtlety of mind which comes from dealing with an abstract question" in talmudic study (citation omitted)).

[430] *See* KLINGENSTEIN, *supra* note 17, at xiii–xvii. Susanne Klingenstein's study of immigrant Jewish intellectuals who came to the American academy with training in Jewish texts suggests that they carried into their scholarship an ability to think in paradoxical or oppositional interdependencies, *see id.*, a mode of thought elevated by Morris Cohen into a philosophical formulation, the principle of polarity, *see id.* at 75.

mode of thought is not unique to Jews, many contend that it is part of the "deep structure" of midrashic thought.[431] Multiple, even conflicting, interpretations of Scripture appear side-by-side; the differing opinions of the sages are all the words of God. "Opinions that in human discourse appear as contradictory or mutually exclusive are raised to the state of paradox once traced to their common source in the speech of the divine author."[432] Others argue that in *midrash*, "[a]ll is determined, and yet all is open."[433] The ontological dialectic posed by Rabbi Akiba, "All is foreseen, but freedom of choice is given,"[434] is mirrored in the relationship of halakhic freedom to the oral law.[435] Halakhic freedom, captured in the midrashic image of a bemused Moses sitting in the academy of Rabbi Akiba and unable to comprehend a word of the discussion,[436] coexists with the all-encompassing aspect of the revelation, which includes, as one midrashic saying goes, "[t]he very words a disciple of the sages will say before his teacher."[437] These midrashic statements capture the "dual image" of the *halakhah* itself: The Torah is from Heaven, yet it is not in Heaven.[438]

Such paradoxical formulations resist compartmentalizing the divine and human elements of the Jewish legal tradition. These two elements seem at times in irreconcilable conflict. The *Oven of Akhnai* narrative, for example, poses this conflict in stark form, a conflict only a few medieval commentators were willing to resolve decisively in favor of one or the other element. The midrashic conception of law, in which divine and human elements are interdependent, resists such decisive resolutions, preferring to maintain, without reconciling, both elements as parts of a paradoxically unified whole.

---

[431] *See* Stern, *supra* note 119, at 147.

[432] *Id.* at 155.

[433] Betty Roitman, *Sacred Language and Open Text*, *in* MIDRASH AND LITERATURE, *supra* note 31, at 159, 160.

[434] MISHNAH, *Aboth* 3:15, *translated in* DANBY, *supra* note 13, *Aboth* 3:16, at 452.

[435] *See* Roitman, *supra* note 433, at 160.

[436] *See* BABYLONIAN TALMUD, *Menahoth* 29b, *translated in* SONCINO, *supra* note 13, 1 *Seder Kodashim*, at 190.

[437] PALESTINIAN TALMUD, *Peah* 2:6 (17a). The quintessential analysis of this paradoxical formulation of the rabbinic doctrine of revelation remains that of Scholem. *See* SCHOLEM, *Revelation and Tradition*, *supra* note 87, at 282–30; *see also* HALIVNI, *supra* note 137, at 72 (discussing rabbinic efforts to maintain, but not reconcile, the plain and applied meanings of Scripture, despite their contradictions).

For a discussion of the rabbinic tolerance of paradox and the virtues of emulating the rabbis in constitutional interpretation, see David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 62–66 (1990). *But see* George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1264 (1985) (describing the vices of paradoxical thinking).

[438] THE PRINCIPLES OF JEWISH LAW, *supra* note 79, at 53.

The continual process of holding together the interdependent yet sometimes seemingly conflicting divine and human, or ideal and normative, elements of the Jewish legal system within a unified whole manifests itself in different ways in Jewish legal history. Medieval Jewish thinkers interested in the Jewish political tradition addressed one aspect of this problem, the potential conflict between the ideals of Torah law and the need for conventional forms of authority. This potential conflict is already evident in early descriptions of Israel's monarchy. The goals of the monarchy, to achieve security and preserve social order, were often in tension with the idealized constructions of Torah law, particularly as portrayed by the prophets. Several medieval jurists sought to effect a more organic synthesis between the utopian ideal and the need for institutional order. They offered different legal bases for the authority of the king and the king's successor institutions to administer a more social form of justice than the ideal justice expressed in Torah law.

One recent thesis, which interweaves several themes touched upon in this Article, focuses on the two legal orders that coexist in Jewish law: the Sinaitic and the Noahide.[439] The Sinaitic order sets forth the obligations of members of the covenantal community; it consists of positive and negative obligations structured around ideals of holiness, election, and emulation of God. These obligations are largely unenforceable; they are undertaken not because of coercion but rather out of commitment to, and love of, God. Indeed, given the rabbinic conception of Sinaitic criminal procedure, it is virtually impossible to punish even murderers.[440] By contrast, the Noahide Code is the legal code given by God to all humanity before the revelation at Sinai. According to traditional thought, the Noahide order was superceded for Jews by the Sinaitic revelation and therefore applies only to non-Jews. This Code consists primarily of negative duties — divine norms given to those who inhabit a conventional political domain. One of these commandments, to secure social peace by coercing certain standards of behavior, has no explicit parallel in Sinaitic law.

Several rabbinic jurists, nonetheless, viewed these two contrasting legal orders as interdependent. The Noahide commandment to ensure social order through coercive law enforcement was thought to be the legal source of the Jewish king's power to render judgment against those who breached the social order. The king passed judgment under the more effective rules of judicial procedure prescribed by Jewish law for non-Jewish polities. Directly or indirectly, this Noahide com-

---

[439] For a full analysis of the two legal orders and their interaction in Jewish law, see generally Stone, cited above in note 39.

[440] *See id.* at 1189.

mandment also was viewed by some authorities as the legal or conceptual source for a variety of Jewish governmental institutions, as well as the civil state, to exercise coercive judicial powers, contrary to Sinaitic judicial procedure, to preserve order in Jewish society.[441] The interrelationship of these two legal orders in halakhic theory is one example of how the Jewish legal system maintained two opposing forms of government, the aspirational and the conventional, within a single system of law.

The effort to maintain both utopian ideal and conventional forms of authority can also be found, in different form, in the struggle to balance the demands of normative law with the spiritual dimension of the Jewish religion. According to Isadore Twersky, the coexistence of law and religion within a single legal system explains the "tense, dialectical" quality of the *halakhah* itself.[442] The *halakhah* is the concrete expression of "theological ideals, ethical norms, ecstatic moods, and historical concepts."[443] But it "never superceded or eliminated" these concepts.[444] These forces give halakhic practice a vibrant spiritual underpinning, yet, at the same time, threaten to intrude into the halakhic process or to compromise its autonomy.[445] Without these strong spiritual forces, however, the halakhic system could atrophy. The ongoing tension engendered by the need to coordinate these strong internal forces with the external demands of normative law is, Twersky notes, "the 'problem'"[446] of the *halakhah* and its "true essence."[447]

This very particular intellectual grammar is captured in Cover's description of the nature of law. Cover wrote in *Nomos and Narrative* that "[l]aw may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative — that is, as a connective between two states of affairs."[448] When Ronald Garet reflected upon the image of the bridge in Cover's writings, he recalled Hart Crane's poem, *The Bridge*.[449] The image of the bridge immediately

---

[441] *See id.* at 1185.

[442] Twersky, *supra* note 3, at 336. The term "dialectic" is employed in the Heraclitean sense of an "ongoing, tempestuous struggle." Twersky, *Religion and Law*, *supra* note 418, at 69–70.

[443] Twersky, *supra* note 3, at 336.

[444] *Id.*

[445] *See* Katz, *supra* note 413, at 283–86; Twersky, *Talmudists*, *supra* note 418, at 450 n.1; *supra* p. 886.

[446] Twersky, *supra* note 3, at 336.

[447] Twersky, *Religion and Law*, *supra* note 418, at 70.

[448] Cover, *Nomos and Narrative*, *supra* note 21, at 9.

[449] As Garet quotes Crane:

> And it was thou who on the boldest heel
> Stood up and flung the span on even wing
> Of that great Bridge, our Myth, whereof I sing!

Garet, *Meaning and Ending*, *supra* note 36, at 1801 (quoting HART CRANE, *The Bridge*, *in* THE COMPLETE POEMS AND SELECTED LETTERS AND PROSE OF HART CRANE 43, 94 (Brom

brought to my mind, however, Twersky's penetrating summary of the tempestuous quality of the halakhic system. "Halachah itself," Twersky explained, "is, therefore, a coincidence of opposites: prophecy and law, charisma and institution, mood and medium, image and reality, the thought of eternity and the life of temporality."[450] Twersky, to whom Cover often cited,[451] wrote these lines in an effort to capture the tense coexistence of extreme mysticism and extreme normativity in Joseph Caro's legal work.

In *Nomos and Narrative*, Cover drew upon Caro's writings to create a conceptual model of two contrasting legal orders, the paideic and the imperial.[452] In the paideic legal order, law is entirely a system of meaning. Adherence to a set of common obligations flows from commitment and understanding, rather than from coercion. The paideic legal order is "celebratory," "expressive," and a source of personal growth.[453] It embodies "culture-specific designs of particularist meaning" akin to the three "strong" forces of Torah, Temple, and deeds of kindness needed — according to Caro — initially to create the Jewish world.[454] In the imperial legal order, epitomized by liberal Western communities, "norms are universal and *enforced* by institutions" in the interest of effective social control.[455] These universal norms are the weaker forces of justice, truth, and peace needed — according to Caro — to maintain a world already in existence.[456] The imperial legal order consists of "systematic hierarchy," "rigid social control over . . . precepts," and the "discipline of institutional justice."[457] There is little interpersonal commitment, save the minimal requirement to refrain from violence.

Cover argued that no legal system is created or maintained solely in the paideic or imperial pattern.[458] These two opposing orders coexist in all legal systems. Unlike much contemporary legal scholarship, which often depicts law as a plurality of disparate and competing goals that defy synthesis,[459] Cover insisted that the dual goals

---

Weber ed., Anchor Books paperback 1966)). Garet describes Crane's poem as "an earlier recourse to a bridge as a symbol of mythogenesis, of courageous storytelling amid doubt and despair." According to Garet, Crane saw the bridge as a "symbolic path between America's past and future." *Id.* at 1811.

[450] Twersky, *supra* note 3, at 336.

[451] *See, e.g.*, Cover, *Nomos and Narrative*, *supra* note 21, at 15 n.39; Cover, *Obligation*, *supra* note 25, at 69–70 (discussing Twersky's analysis of Maimonides's thoroughgoing teleological system).

[452] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 12–13.

[453] *Id.* at 13.

[454] *Id.* at 12.

[455] *Id.* at 13.

[456] *See id.* at 12–13.

[457] *Id.* at 16.

[458] *See id.* at 14.

[459] For an excellent summary of the role of pluralism in contemporary conceptions of law,

of law — as utopian ideal and social order — are in tension with one another, yet are interactive and interdependent. Law is the product of this paradoxical interaction.[460]

Cover's theory of law provides a brilliant conceptual structure for analyzing the Jewish legal system.[461] The application of Cover's theory of law to secular legal systems is more problematic, however. Cover's theory suggests not only that paideic legal systems must turn to imperial forces to survive, but also the converse. That is, an imperial legal system cannot maintain itself without the paideic, ideal, and prophetic elements which address humanity's intellectual, emotional, and spiritual nature.[462] Thus, when Cover argued for the implicit teleology of law, he urged the articulation of an ideational framework for the practice of law in American society; one that reflects, in Twersky's words, "ultimate concerns and [that] gives coherence, direction and vitality to the concrete actions."[463] Cover was surely right that, as social beings in search of meaning, we will continually strive to express our feelings and intellect in all endeavors of social life. It remains to be seen, however, whether it is possible to create a coherent ideational framework out of "American" sources.[464] Hopefully, the search for such ideational frameworks will prove to be a satisfying endeavor, as satisfying for some as is the spiritual, intellectual, and emotional quest in Jewish law.

---

see Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 474–78 (1987).

[460] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 9.

[461] *See* David N. Myers, *Book Review*, 12 AJS REV. 282, 289 (1987) (suggesting that Cover's work provides a provocative framework for understanding Maimonidean messianism); Stone, *supra* note 39, at 1212–13 (applying Cover's construct to the interaction of the Sinaitic and Noahide legal orders in halakhic thought).

[462] The theme of the judge as "prophet" appears in Cover, *Folktales*, cited above in note 40, at 189. Cover writes that "[a]s a judge, one must be other than the King . . . because of the need to intitutionalize the office of the Prophet." *Id.*

[463] Twersky, *supra* note 3, at 333.

[464] Precisely what sources should be used to construct an American ideational framework or conception of the good is a topic that legal theory is only now beginning to address seriously. Suggestions range from public values, to systematic moral philosophy, to the theology of the Constitution's framers, to the transcendental religious or moral beliefs of individual judges. *See, e.g.*, KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239 (1988) (arguing that "occasional reliance by judges on religious convictions is not improper"); Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979) (discussing the role of moral philosophy); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1087 (1990) (arguing that "accommodation of our differences requires a public conception of justice" that generates a consensus). The vagueness of many of these approaches, however, coupled with the unlikelihood of their adoption or viability in current American society, has led Mark Tushnet to call this search "contemporary legal utopianism." Tushnet, *supra* note 40, at 1544.

CONCLUSION

It seems fitting that this analysis of Jewish themes in contemporary American legal scholarship, especially as expressed in the work of Robert Cover, should begin and end with an invocation of Rabbi Caro. Caro is a looming presence in Cover's mature work. In the opening pages of *Nomos and Narrative*, we encounter Caro's *midrash* on the strong particularist forces — Torah, Temple, and deeds of kindness — needed to create a world that did not exist before, and the weaker forces — truth, justice, and peace — sufficient to preserve that which already exists.[465] Caro's *midrash* became the basis for Cover's dichotomy between the paideic *nomos*, where legal meaning is created, and the imperial state, which holds the various paideic worlds together through an appeal to the weaker universalist virtues. We encounter Caro again in the Safed movement. In all probability, Cover came across this little-known incident in reading Caro's biography.[466] It is anyone's guess whether Cover's position about the nature of law itself was stimulated by reading Twersky's essay on Caro's halakhic thought. I think so, because I believe Robert Cover was obsessed with Rabbi Joseph Caro. Caro was a lawyer, a mystic, and a messianist and, as it seems, so was Robert Cover.

If Caro's *midrash* is correct, an understanding of the universalist virtues, whether denominated justice, truth, peace, or simply "the Good," is not sufficient for the establishment of a legal system. A legal system ultimately derives its shape from the culture-specific forces of a particular history and a particular discourse.[467] Theorists will need to look to America's particular history and particular form of legal discourse to make sense of the American Constitution.[468] They will need to bring to light the American counter-text to the Constitution — that is, the more subterranean and suppressed traditions, myths, and stories that have shaped and continue to shape America.[469] In so doing, they should be cautious not to derive too

---

[465] *See* Cover, *Nomos and Narrative*, *supra* note 21, at 12.

[466] *See* WERBLOWSKY, *supra* note 4, at 122–24, *cited in* Cover, *Messiah*, *supra* note 27, at 216 n.8; *see also* Cover, *Violence*, *supra* note 40, at 1605 n.10 (describing Caro's visions of martyrdom to illustrate the violence in which dissenters may engage to realize their law).

[467] *See* Hyland, *supra* note 16, at 1597 ("Every law is . . . embedded in a particular cultural tradition, and designed for a particular people.").

[468] *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 454 (1989) (arguing that "[n]either Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber, provides the key" to the distinctly American Constitution).

[469] Stephen Wizner rightly pointed out to me that Robert Cover's earlier work, *Justice Accused*, invokes the American counter-text to the Constitution. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154–58 (1975) (discussing the utopian abolitionists' anti-slavery understanding of the Constitution); *see also* Michael S. Paulsen,

many lessons from the counter-text of Jewish law. For, in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a *nomos*, in the Maimonidean sense of the term.[470] But it will not be Torah.

Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused, J.L. & RELIGION 33, 35–38 (1989) (applying the themes of *Justice Accused* to the abortion controversy).

[470] Maimonides uses the term "nomos" to refer to a *man-made* system of law, second in perfection to the divine law of Torah, but nonetheless directed to the "abolition . . . of injustice and oppression" and to "the arrangement . . . of people in their relations with one another and provision for their obtaining . . . a certain something deemed to be happiness." MAIMONIDES, GUIDE OF THE PERPLEXED, at pt. II, ch. 40, at 383 (Shlomo Pines trans., 1963).