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THE MYTH OF DIVINE LAW IN SECULAR SOCIETY

Rabbi Burton L. Visotzky*

During the first six centuries of the Common Era,¹ the rabbis—who were a minority (academics) within a minority (the Jews)—arrogated for themselves the right to determine what they considered to be divine law for their followers.² Because such a powerless minority within the larger culture was willing to do just that should serve as a warning to us today. There are religious movements within this country that seek to impose their version of divine law upon the majority of citizens of this republic. The author, a professor of rabbinic literature at the Jewish Theological Seminary, calls for a strong separation between church and state.³

INTRODUCTION

It seems to me impossible to address the Center for Church/State Studies without reference to our beloved First Amendment. Allow me to begin, then, by noting that the last Congress, and all the more so, the current⁴ almost evenly divided Congress, have been notable for their strong attention to the First Amendment of the United States Constitution. Congress' careful consideration of the First Amendment has been best signified by their particular focus on the first five words of our Bill of Rights: "Congress shall make no law."⁵

* Nathan and Janet Appleman Chair in Midrash and Interreligious Studies, Jewish Theological Seminary of America.

1. That is from approximately 70 C.E. to about 600 C.E. The author uses the abbreviation for Common Era in preference to the Christian calendar designation of A.D., anno domini. B.C.E. stands for Before the Common Era.

2. See the introduction and bibliography to Burton L. Visotzky, *The Literature of the Rabbis, in FROM MESOPOTAMIA TO MODERNITY: TEN INTRODUCTIONS TO JEWISH HISTORY AND LITERATURE* 71-102 (Burton L. Visotzky & David E. Fishman eds., 1999)[hereinafter MESOPOTAMIA].

3. The following is an essay produced from the eighteenth annual Church/State lecture that the author delivered at DePaul College of Law on March 1, 2001.

4. That is the Congress elected in 1998 as opposed to the current Congress elected in November, 2000.

5. I fear that by the end of the current Congress, I and others of similar liberal leanings will be grateful that the current Republican Congress and executive branch accomplished as little as possible. It is essential to hang the shingle of my bias early in this article, lest those unfamiliar with rabbinic literature have difficulty discerning my socio-political Weltanschauung.

For the moment, I will eschew further reference to American politics and jurisprudence and speak, instead, about a topic where I actually have some standing: ancient rabbinic Judaism.⁶ The subject of this essay is "The Myth of Divine Law in Secular Society," which may require some parsing and definition. By "Myth," I do not mean falsehood or fable. Rather, "Myth" refers to the story or narrative that a culture hands down, which provides a foundation for its self-definition. In our current context, myth refers to the narrative of the now famous phrase "Nomos and Narrative," coined by Robert Cover in the *Harvard Law Review*.⁷ My own academic specialty in rabbinic literature is not Nomos, which is law, but rather is focused on rabbinic narrative. Of course rabbinic society was a culture of laws, which means that rabbinic narratives that recounted the lives of the rabbinic saints⁸ shed bright light on its citizens' attitudes towards law.

"Secular society" also needs some definition. Americans generally refer to their own culture as a "secular society," even as they admit that it is based on a "Protestant ethic" or a "Judeo-Christian" ethos. The latter phrase is a post-Holocaust nod from the ecumenically minded Christians to the Jews. Prior to World War II, we called ourselves a Christian culture. There are many today, even in government, who would like to revert this nation to "Christian" culture.⁹ What, then, does "secular society" mean in a rabbinic sense?

First and foremost, this article refers to "secular society" in the rabbinic era. If one does not happen to study rabbinic literature, the "rabbinic era" is often referred to as the Later Roman Empire¹⁰ or Late Antiquity.¹¹ For the purposes of this article, the rabbinic period extends into the early Byzantine era, particularly focusing on rabbinic culture in the Mediterranean world, circa 70-600 of the Common Era.

6. The preeminent Jewish culture of the first centuries of the common era. See MESOPOTAMIA, *supra* note 2.

7. Robert M. Cover, Foreword: *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Cover places nomos, the law, within the context of the narrative or myth of a culture. The narrative thus sustains or undermines the rule of law (nomos) in society.

8. Saints not in the formal Catholic sense, but rather that these rabbis had lives invented for them to illustrate the didactic points the rabbis wished to transmit in their stories.

9. Although they mean something very different than what was meant pre-World War II. Current invocation of "Christian" has strong evangelical and conservative overtones. Prior to World War II, "Christian" referred to liberal Protestantism.

10. See, e.g., J. B. BURY, HISTORY OF THE LATER ROMAN EMPIRE FROM THE DEATH OF THEODOSIUS I. TO THE DEATH OF JUSTINIAN (A.D. 395 TO A.D. 565)(Macmillan & Co. 1958)(1923).

11. PETER BROWN, THE MAKING OF LATE ANTIQUITY (1978).

During the period from the destruction of the Second Temple in Jerusalem (at the hands of the pagan Romans)¹² through the rise of Christianity and up to the cusp of the Muslim conquest, rabbinic Judaism flourished in two great centers: the Land of Israel¹³ and Babylonia.¹⁴ In these two great loci of rabbinic culture, the rabbis—types of eastern, parochial, hellenistic philosophers—composed a great corpus of literature that had as its backbone an enormous complexity of law and ritual.¹⁵ Without a doubt, the rabbis of that era felt that the laws they promulgated and the behaviors and rituals they regulated were human manifestations of divine intent. In other words, what the rabbis preached and practiced was, for them, “divine law.”

Understanding this phenomenon is the subject of this Article. However, I still must explain that the rabbis in the *Realpolitik* of first Roman and later Christian hegemony (and the same holds true, to a varying degree, of Babylonia under Sassanid rule) had very little national political power. To these rabbis, the pagan, polytheistic rulers of Rome were “secular” rulers. Because they were not monotheists, those often-pious pagans had no divine authority and, indeed, they were often perceived by the rabbis (even as they may have collaborated with Roman authority) as the enemies of God. Although it is not polite to say this in mixed company, the rabbis were also not convinced that Christian Rome necessarily spoke with divine authority either. They, too, were perceived as enemies of God rather than as bearers of divine law.

It must be understood at the outset that for rabbinic Judaism, what was perceived to be secular society afforded very little real power for the enforcement of divine law. Under such circumstances, the notion of divine law only extends God’s hegemony to those places where Jews voluntarily submitted to rabbinic authority. While it is true that these communities were often close-knit, it is also the case that many Jews chose to assimilate, observe non-rabbinic forms of religious practice, and even to convert. Only at the end of this period did the Church even begin to assert sufficient political clout to legally restrict Jews to the authority of their ancestral laws.¹⁶ Even then, conversion to Christianity was always held out as an option.

12. This Temple stood atop Mount Moriah in Jerusalem and was the locus of the Levitical sacrificial cult from the 6th century B.C.E. until its destruction by the Roman legions in 70 C.E.

13. Also known as Roman Palestine.

14. Also known as the Sassanian Empire or the Fertile Crescent, and known today as Iraq.

15. See Burton L. Visotzky, *The Literature of the Rabbis*, in MESOPOTAMIA, *supra* note 2.

16. AMNON LINDER, *THE JEWS IN ROMAN IMPERIAL LEGISLATION* (1987).

Before detailing what divine law meant within the confines of the rabbinic community, allow me to preview my themes so that the implications of this article's thesis are apparent from the outset. I will argue that the rabbis arrogated the right to determine divine law for themselves. This assumption of the mantle of divine intention gave the rabbis power within the narrow confines of their own communities. As it happens, that power was diffused among many members of the rabbinic elite. We must remember that the Jewish world was a relatively small and powerless minority of the greater secular society. My thesis is that because religious authority does arrogate the right to determine divine will within religious communities, and because the myth or narrative of promoting divine will is a powerful and profound one, the ability of religious authorities—particularly powerful majoritarian religious authorities—to unduly influence secular society at large is an awesome and possibly dangerous ability. It is in the best interest of the larger "secular society" to insulate itself as strongly as possible from the influences of "the myth of divine law." Fortunately, in American society, there is such insulation in the form of our constitutional wall of separation.

To return to the ancient world, for those Jews who did submit to rabbinic authority, the rabbis regulated their lives in accordance with divine law—with the notable exceptions of death and taxes. The rabbis had no power to inflict capital punishment, nor did they preclude their flock from paying Roman taxes.¹⁷ Nevertheless, rabbis adjudicated torts disputes and other civil actions, they regulated a dizzying array of ritual proscriptions, and they generally enforced the minutiae attendant to the notion of self-government or home rule.¹⁸ But they did so always with the unspoken (and, for the rabbis, unhappy) proviso that Jews could and did opt out of the system. The situation then was not all that different than it is today in twenty-first century America. Rabbis and their communities lived their lives in accordance with their own notions of divine law, but did so within the context of a secular society that also made its demands upon them, however minimal.

17. The former is a rather clear-cut conscription of rabbinic power—Rome simply would not allow a rabbinic court to execute. The matter of taxes is far more complex because certain rabbis enjoyed exemption from Roman taxes by virtue of their clergy status. Further, the rabbis attempted to impose communal taxes for the support of rabbinic institutions—these were viewed as required contributions by the rabbis themselves, yet Rome, and apparently rabbinic followers, considered these duties entirely voluntary. See LEE I. LEVINE, *THE RABBINIC CLASS OF ROMAN PALESTINE IN LATE ANTIQUITY* (1989).

18. See the study of rabbinic case law by my student, CATHERINE HEZSER, *FORM, FUNCTION, AND HISTORICAL SIGNIFICANCE OF THE RABBINIC STORY IN YERUSHALMI NEZIQIN* (1993).

In the rabbinic era, there was no central authority in rabbinic Judaism. While there was, in theory, a Sanhedrin to determine Jewish law and a Patriarch in Palestine to interpret it (and in Babylonia, an exilarch with powers of rabbinic enforcement), in practice, each communal rabbi served as the arbiter of divine law for his flock. The two points that this Article explores in detail are as follows: how the rabbis arrogated the right to determine Divine Law, and how this power was diffused among them.

Before the destruction of the Jerusalem Temple in 70 C.E., Jewish authority had coalesced around that central locus.¹⁹ The biblical book of Leviticus, in combination with Deuteronomy, made the Temple into Judaism's central shrine, and so it gave the Jerusalem priesthood the responsibility and power for carrying out the cultic functions of divine law. There was then a central body to attend to the laws of the Jews, the Sanhedrin.²⁰ This Sanhedrin was under the powerful influence of the High Priest in the Temple. However, in the year 70 C.E., all of this came to an end.

Following the Temple's destruction, the rabbinic movement grew in authority and power. One of its chief attractions was a shift away from the cultic ritual of the Temple to a more hellenized emphasis on academic study of text as a means of devotion to God. Divine will came to be determined through the study of a text.²¹ This shift from priesthood to Greco-Roman philosophical scholasticism allowed Judaism to flourish without a central cult or centralized authority. Each teacher/rabbi became an interpreter of divine law, and each community of followers became an authentic repository of divine revelation.²²

This diffusion of authority ran the risk of an ever-dissipated Judaism with each community of followers doing "what was right in the eyes of the Lord," yet each becoming its own separate religion. In part to preclude this assimilation into the broader pagan culture, a grand coalition was formed.²³ The rabbis who worked and studied together chose to agree to disagree, yet nevertheless spread a broad umbrella to be as inclusive a movement as possible. Still, from this rabbinic

19. For basic historic background on the era, see SHAYE J. D. COHEN, *FROM THE MACCABEES TO THE MISHNAH* (1987). On the history and literature, see MESOPOTAMIA, *supra* note 2, at 71-2.

20. See HUGO MANTEL, *STUDIES IN THE HISTORY OF THE SANHEDRIN* (1961).

21. See Burton L. Visotzky, *The Literature of the Rabbis*, in MESOPOTAMIA, *supra* note 2.

22. "The words of these and the words of those are the words of the living God," see the BABYLONIAN TALMUD, *Eruvin* 13b, *Gittin* 6b, *Berakhot* 3b.

23. This coalition included rabbis and other leaders from before the destruction, such as members of the Sanhedrin and Temple priests. See COHEN, *supra* note 19; LEVINE, *supra* note 17.

perspective, there were Jewish movements that did not possess the particular ritual and legal criteria necessary for inclusion. Such movements either died out or declared their independence from the Jewish world.²⁴

Part of the rabbinic adaptation of the Levitic cult was the assumption that the law, which had previously applied to the priestly ruling class, now applied to all Jews.²⁵ This was true of certain food taboos,²⁶ as well as the Levitic injunctions for purity.²⁷ These categories intersect in a way that aptly illustrates how the rabbis continued priestly manifestations of divine law even as they democratized it. What is truly of note, however, is the way in which the rabbis not only arrogated for themselves the right to interpret divine law on what had been a priestly injunction but the implications of that *chutzpah* (hubris) on their interpretation of all other divine law.

II.

In theory, God gave the Law at Mount Sinai. In the rabbinic myth, God not only gave the Ten Commandments but gave all Five Books of Moses, the works of the Prophets, the Holy Writings (i.e., the entire Hebrew Bible), rabbinic works, such as the Mishnah, all other rabbinic rulings, rabbinic narrative, and “even what a senior disciple would offer as a novel interpretation” to Moses at Sinai.²⁸ But whether these laws were truly divine law, had divine authority or, indeed, may have been entirely rabbinic, and therefore human, may be well illustrated by turning to a question of ritual purity as it applies to food taboos.

In Late Antiquity, cooking in an oven was not quite the same as it is today. In Roman Palestine, clay ovens were the norm. They were mounds of clay hollowed out in the center. At the bottom of the hollow, a cook would place coals; atop those, the container of food to be cooked and a straw or mud top would cover the aperture. The clay would heat up and bake hard, and the householder would have a

24. Christianity is one example.

25. See MESOPOTAMIA, *supra* note 2, at 85-6.

26. What are referred to in rabbinic literature as *shehitat hullin*, profane (meaning outside the Temple precincts) slaughter, now known as the “kosher” laws.

27. Which were originally enacted for the priesthood during service in the Temple, now democratized for all Jews of the strict rabbinic community.

28. Leviticus Rabbah 22:1-26:13. On rabbinic interpretation and the limits to it, see BURTON VISOTZKY, FATHERS OF THE WORLD: ESSAYS IN RABBINIC AND PATRISTIC LITERATURES 28-41 (1995). For the various works cited, see Ora Horn Prouser, *The Hebrew Bible*, in MESOPOTAMIA, *supra* note 2, at 9-36 and Burton L. Visotzky, *The Literature of the Rabbis*, in MESOPOTAMIA, *supra* note 2.

lovely crock-pot. The problem with such an oven was that it could become ritually impure through a variety of means—for example, a bug or small lizard could crawl across the surface—and the only means of purifying an earthenware oven was, alas, to smash it. Earthenware objects could not be made ritually fit once tainted.²⁹

However, along came a fellow called Ochnai who invented, if you will, a self-cleaning oven. By interposing layers of sand with layers of clay, Ochnai felt he had developed a mode of assuring perpetual ritual fitness. The sand would bake hard into glass, and neither sand nor glass could contract ritual impurity. So Ochnai sought to bring his oven to market as a great invention for the pious cooks of the rabbinic community. Not only that, but he had a champion—a lobbyist if you will—who was one of the most frequently cited rabbinic authorities: Rabbi Eliezer ben Hyrcanus.³⁰

Let me turn at this point to the Talmudic passage that tells this tale. The story is set in the generation immediately following the destruction of Jerusalem. The Talmud teaches this story:

The other sages surrounded him like a serpent and continued to declare such an oven ritually unfit. It is taught that on that day Rabbi Eliezer offered every legal argument in the world, but they did not accept them.

He then said, “If the law is the way I propose, let this carob tree prove it.” The carob tree uprooted itself and moved one hundred cubits—although there are those who say it moved four hundred cubits. They replied to him, “One cannot bring a legal argument from a carob tree.”

He then said, “If the law is according to my opinion, let this aqueduct prove it.” Whereupon the water in the aqueduct reversed its flow! They replied to him, “One cannot bring a legal argument from an aqueduct.”

He then said, “If the law is according to my opinion, let the walls of this academy prove it.” The walls of the academy began to incline dangerously inward.

29. The details of this type of earthenware oven and the ritual law applying to it described in this paragraph may be found in YEHOSHUA BRAND, *CERAMICS IN TALMUDIC LITERATURE* (1953) (Hebrew). The impurity these vessels could contract is spelled out in the biblical book of Leviticus and in the Mishnaic tractates on Impurities, for which see Burton L. Visotzky, *The Literature of the Rabbis, in MESOPOTAMIA*, *supra* note 2.

30. See Burton L. Visotzky, *The Literature of the Rabbis, in MESOPOTAMIA*, *supra* note 2, 74-96. On Rabbi Eliezer ben Hyrcanus, see H. L. STRACK & G. STEMBERGER, *INTRODUCTION TO THE TALMUD AND MIDRASH 77* (Markus Bockmuehl trans., 1991).

But Rabbi Joshua rebuked them, "If the disciples of the sages are debating the law with one another, what's it your business?" They did not fall out of respect to Rabbi Joshua, but nor did they resume their proper position out of respect to Rabbi Eliezer. And [the Talmud adds with a wink] the walls remain off-kilter to this very day!

Rabbi Eliezer returned to his argumentation, "If the law is according to my opinion, let it be proven from heaven." Whereupon a [Heavenly] Voice came forth and proclaimed, "What do you have against Rabbi Eliezer? The law is always according to his opinion."

Rabbi Joshua stood up on his feet and quoted, "It is not in Heaven!" (Deuteronomy 30:12)

[The Talmud now asks a question of commentary on the verse,] What is the meaning of "it is not in heaven"? Rabbi Jeremiah explained, The Torah was already given at Sinai, so we do not attend to heavenly voices. For You have already written in the Torah at Mt. Sinai, "follow the majority."³¹ (Exodus 23:2)

Before this delicious Talmudic narrative is drawn to a close, some commentary is in order. The lobbyist Rabbi Eliezer offered every legal argument, but could not sway his colleagues. Because neither the law nor the facts seemed to be with him, Rabbi Eliezer turned to divine assistance. Rabbi Joshua was one of the senior jurists of his generation.³² His authority was sufficient, as we see, to prevent the very walls of the court from collapsing. It should be noted that the walls themselves were experts on the law. Because they had been listening to arguments for generations, the walls knew which way to lean. But Rabbi Joshua would have none of it. His position was that in the court, the walls were there to hold up the ceiling and not to be involved in any form of religious display. He asked the walls quite pointedly, "What's it your business?" This is, I believe, what American jurists mean when they speak of "the wall of separation."

Referring back to our story, Rabbi Joshua, in his zeal, quotes Scripture to God and consciously mangles the meaning of the text. He tells God that the Torah is not in Heaven. But in its context in Deuteronomy, that verse is an exhortation to the Israelites: "Surely the Torah, which I command you today, is not too difficult nor beyond your

31. BABYLONIAN TALMUD, *Bava Metzia* 59b. See my treatment of the theological implications of this passage in *READING THE BOOK: MAKING THE BIBLE A TIMELESS TEXT* 51-6 (1991).

32. See STRACK & STEMBERGER, *supra* note 30, at 77-8.

reach. It is not in heaven that you should say, 'who can go up to the heavens and get it for us' . . . no, the thing is very close to you." Rabbi Joshua takes what is offered as a feeble human excuse *not* to do Torah as his permission to interpret with a vengeance. Rabbi Joshua argues, "The Torah is not in Heaven. God, mind Your own business. We rabbis are now the arbiters of divine law. We do not listen to voices from Heaven."

To exacerbate this *chutzpah* and wholly shatter any notion of the strict construction of original intent, Rabbi Jeremiah invokes, as it were, the rabbinic Rules of Civil Procedure by quoting the Torah right back to God yet again. In this anything but civil exchange, the good rabbi reminds God that rabbis vote by majority rule, not by divine intervention. Yet here, the verse of Scripture is bent to its breaking point. Exodus 23:2, within its context, means something quite different than what the Talmud has pretended it to say. In context, the biblical verse reads as follows: "You shall NOT follow the majority to do evil."³³ I submit that it is reading somewhat out of context to simply drop the word "not" out of a divine enactment in order to infer a rabbinic ruling.

Of course, the narrative I have recounted above is rabbinic myth. Indeed, it qualifies as fantasy. I suspect that this fantasy might also find a home within the legal world. Imagine arguing before the United States Supreme Court, being harangued by justices interrupting with hard, aggressive questions, when a voice comes from heaven to ask, *What do you have against learned counsel? Is not the law always according to his (or her) interpretation?* As I said, sheer fantasy.

The Talmudic story actually has an ending, even two. The first ending is the happy ending. The second ending is more difficult to categorize. The Talmud text picks up where the above myth left off, immediately after Rabbi Jeremiah invokes his truncated citation of Exodus, "Follow the majority."

Rabbi Nathan once had the opportunity to consult with [the angelic prophet] Elijah,³⁴ he asked him, "What did The Blessed Holy One do at that moment?" To which Elijah responded, "Why God chuckled and said, 'My children have out-argued Me, My children have out-argued Me!'"³⁵

33. *Exodus* 23:2 (emphasis added).

34. Elijah is reported in the Bible as having ascended to heaven in a fiery chariot. *2 Kings* 2:1-2:12. He is presumed in rabbinic lore to have translated into an angelic being who makes the rounds of human affairs, helping out here and there, answering difficult rabbinic queries, attending Passover seders, circumcision ceremonies, and the like.

35. BABYLONIAN TALMUD, *supra* note 31.

Here, too, we are in the realm of legal fantasy. The rabbis have defeated the very source of law and God is pleased at how clever the rabbis are. God approves. Does this not mean that the rabbis are the absolute arbiters of divine law? God no longer has a voice because what the rabbis say goes. Only the rabbis can determine the intent of divine law, even if it is by rules that consciously break it.

There is a second, more ambiguous ending to the Oven-of-Ochnai narrative. The Talmud reports that Rabbi Eliezer may have been outvoted, but still believed himself to be correct—did not God support his argument? The sages responded to Eliezer's persistence in ignoring the authority of their court by burning all of the items he had declared ritually fit and by excommunicating him from their community.³⁶ The head of that court, Rabban Gamaliel,³⁷ prayed to God regarding his court's severe reaction to Eliezer's apparent contempt: "Master of the Universe, it is revealed and known to You that I did not do this to protect my own honor, nor for my family's honor, but for Your honor—that dissent and division not increase among the Jews."³⁸

It seems that the rabbis not only arrogate the power of interpretation but also draw in their umbrella somewhat. Dissent and division cannot persist in the face of a majority ruling. One may be allowed to hold divergent minority opinions, but when those opinions—particularly in the generation after the destruction—threaten the rule of law and the very court system, then the rabbis will excommunicate even one of their most prominent brethren. Yes, the rabbis have authority and yes, the authority will be much more diffuse than it had been, but there are limits. The very myth of divine law requires sanctions for those who threaten its dissipation and assimilation under the iron grip of Roman secular rule.

III.

As I suggested above, the rabbis based the claim for their authority upon their own peculiar interpretation of the events at Mt. Sinai. They presumed that God gave oral interpretation along with the written canon of the Torah. This would be a little like saying that because we are "one nation under God," every part of our American jurisprudence was revealed to the Founding Fathers in their drafting of the Constitution—not just the Constitution and the Bill of Rights, but

36. *Id.*

37. See STRACK & STEMBERGER, *supra* note 30, at 76-8.

38. See BABYLONIAN TALMUD, *supra* note 31.

every subsequent amendment, every legislated statute, and every court's decision were revealed to the Founding Fathers in 1789.³⁹

The implications of this bizarre scenario are not only clear to us now but were clear to the rabbis who perpetuated the myth themselves. In another Talmudic narrative, they imagine Moses ascending Sinai to receive the Law:

Rav Yehudah quoted Rav, When Moses ascended on High [to receive the Torah] he found God sitting and calligraphing crownlets upon the letters.⁴⁰

Moses said to God, "Master of the Universe, who is staying Your hand [from giving us the Torah unadorned]?"

God replied, "There will be a man many generations in the future whose name is Aqiba ben Joseph,⁴¹ who will exegetically infer mountains of laws from each and every jot and tittle."⁴²

Moses said, "Master of the Universe, will You show him to me?"

God said, "Turn around."

Moses [did so and found himself in Rabbi Aqiba's court. He] went and sat in the eighth row,⁴³ but could not understand what it was they were talking about. He grew weak with incomprehension. But then they reached a certain matter and Rabbi Aqiba's disciples pressed him, "But Rabbi, where is your authority for this ruling?"

Aqiba said to them, "This is the law given to Moses at Sinai!"

39. I should note that the rabbis did not share our system of government. In their courts in particular, the judges cross-examined witnesses. There were no lawyers, *per se*. Further, it appears that there were circumstances where a Sanhedrin ruled, but they acted as a great court (of 70 plus members) rather than as a legislature. In short, most rabbinic law (as opposed to law determined to be of biblical origin) was case law. Despite the clear distinction between rabbinic law and biblical law, the rabbis considered both the former and latter as having divine authority.

40. Torah scrolls have such calligraphic adornments on certain letters to this very day.

41. One of the great late-first, early-second century rabbinic legalists. A contemporary of Rabbi Eliezer.

42. Aqiba was known for his methodology of reading law, perhaps into the text, based upon his assumption that the Torah was a divine code which required a radical hermeneutic not otherwise applicable to human literature. See BURTON L. VISOTZKY, *Jots and Tittles: On Scriptural Interpretation in Rabbinic and Patristic Literatures*, in *FATHERS OF THE WORLD: ESSAYS IN RABBINIC AND PATRISTIC LITERATURES* 28-40 (1995).

43. Students traditionally sat from brightest to dimmest. Thus, Moses is both literally and figuratively at the back of the class.

Moses felt better. But when he came back before the Blessed Holy One he asked, "Master of the Universe, You have a man such as he, and yet You give the Torah to the likes of me?"

God replied, "Silence, this is My plan."⁴⁴

The implications of this story for rabbinic interpretation of divine law are most instructive. This narrative seems to imply that by the first or second generation after the destruction of the Temple, rabbinic reading of divine law had become sufficiently complex that even Moses could not follow its intricacies. Moses sits in the rear of the classroom, intellectually too weak or unprepared to appreciate the rabbinic dialectic. When Aqiba's students press him on a point of law, Aqiba resorts to that age-old response, which is the equivalent of saying to a recalcitrant child, "because I'm the dad, that's why!" By saying the ruling is what was given to Moses at Sinai, Aqiba is saying there can be no dispute. The divine law has been handed down as a *fait accompli*, there is no room for either argument or refutation. It is divine law literally—what God spoke to Moses at Sinai.

Of course the rabbis knew only too well that their own discourse was no such thing. They were clearly aware of the radical nature of Aqiba's exegesis. His inferences of law from calligraphic adornments could hardly be construed as strict construction; indeed, his colleagues wondered if his constructions were within the pale of permissible hermeneutics. Their claim against him was that "the law must be interpreted according to the rules of human discourse."⁴⁵ Fundamentalist interpretation, or interpretation by fiat, was not necessarily a correct reading of divine law. By saying, "It is the law given to Moses at Sinai,"⁴⁶ Aqiba is asserting a prerogative that he really does not have. He cannot know what happened on Sinai. His assertion really means, "My opinion trumps everything."

This is not the normative mode of discourse for rabbinic dialectic. Indeed, Moses' own weakness, his dizzy incomprehension of what is going on in Aqiba's academy, may be our narrator's way of expressing his disapproval at such a presumptuous invocation of divine law. It is as though the rabbis say, "Let us not confuse the myth of our authority with the reality of our legal process. We claim divine authority, for otherwise we have very little recourse within this secular society. But we employ hellenistic hermeneutics and legal principles alongside our

44. BABYLONIAN TALMUD, *Menahot* 29b. See READING THE BOOK, *supra* note 31, at 49-51. See also, VISOTZKY, *supra* note 42, at 28-40.

45. SIFRE NUMBERS #112, 121. See also, VISOTZKY, *supra* note 42, at 32, 40.

46. See *supra* notes 42 and accompanying text.

inherited Jewish semitic principles to determine what we call divine will.” The narrative may set the myth for the nomos, but it is not the law itself. The law must be determined by a much more practiced human give and take.

Yet even as this Talmudic narrative critiques Aqiba’s judicial activism, it recognizes two issues. First, whether by Aqiban method or by other methods, the law in fact has changed since Sinai. There is historical development within the legal system. Society changes, and so divine law must evolve. The very critique of Aqiba’s presumption seems to be a critique of overly-conservative fundamentalist reading. There cannot be strict construction because true Authorial intent is unknowable. Further, the rabbis reject divine interference with their own attempts to apply the law in each generation. Even if it were knowable, they would prefer not to have any version of divine law but the one that they themselves determine.

The second issue is more ironic: a bitter recognition of the necessity for myth and narrative to allow the rule of law to persist within a community. For even as the story criticizes Aqiban excess, it upholds the myth of divine authority for rabbinic rulings. Moses witnesses the happenings in Aqiba’s court at the very moment that he ascends on High to receive the Torah. Within the narrative world of the story, what happens in Aqiba’s court—the argument and Aqiba’s trumping of his students by trumpeting that “this is the law given to Moses at Sinai,”—is indeed “the law given to Moses at Sinai.” Because Moses is on Sinai when the dialogue takes place, Aqiba’s assertions are, by definition, the law given to Moses at Sinai.

So, Aqiba can be criticized for radical hermeneutic, for pushing his constructions too far beyond the pale of accepted legal methodology. Yet at the same time, the Talmudic narrator (perhaps Rav Yehudah or his teacher Rav⁴⁷) ironically maintains the myth that the rabbis speak with the authority of divine law. If this were not paradox enough, this story serves to underscore a broader paradox about the diffusion of rabbinic authority: the story of Moses on Sinai viewing Aqiba’s pronouncement of authority implies a type of apostolicity⁴⁸ (i.e., a direct and unbroken chain of tradition from Moses to Aqiba). Indeed, an

47. Yehudah is Babylonian, flourished around 300 C.E. Rav was a Palestinian who moved to Babylonia there to found a system of study and interpretation based on the Palestinian rabbinic compendia. Rav flourished around 225 C.E.

48. I use this term from church doctrine, for it is applicable and convenient here. See, JOHN NORMAN DAVIDSON KELLY, *EARLY CHRISTIAN DOCTRINES* 35-47 (1958). Such monolithic authority was invoked in the rabbinic community as late as the end of the Tenth Century by Rav Sherira Gaon who wrote an authoritative Epistle from Baghdad to Kairawan, North Africa, invoking the apostolicity of rabbinic tradition against the Karaitic threat.

explicit chain of tradition exists in rabbinic literature, not in regard to Aqiba but rather his contemporary Rabban Yohanan ben Zakkai.⁴⁹

As mentioned above, Aqiba's position was well respected, but not unchallenged.⁵⁰ There were many rabbinic opinions in addition to Aqiba's. Some followed Aqiba, and some followed his primary interlocutor, Rabbi Ishmael.⁵¹ Despite the invocation of divine authority, the reality of both Roman *Realpolitik*, as well as rabbinic legal theory, yielded a broad diversity of rabbinic opinions. There was no central authority in the rabbinic community. Rather the subsidiary myth was that "this opinion and that opinion are the words of the living God."⁵² The diffusion of authority among many different rabbis made an effective check and balance to authoritarianism, even as it ran the risk of centrifugal force devolving into chaos and assimilation.

IV.

These two abstract poles are effectively reified in the greater paradox of the rabbinic myth of divine law. Throughout their literature, the rabbis insist that God gave the Torah at Sinai⁵³—and that the authority to pronounce divine law devolves inexorably to the rabbis. The primary manifestation of the myth is One God gives one law to one authority who hands it down undiluted. Yet the historic reality was that although the One spoke at Sinai, many interpret divine law with many differing interpretations.

The myth of unified, even unique authority becomes, in reality, a diffusion of authority across various loci within the rabbinic community. As long as there can be no centralized authority in the rabbinic world due to their real existence within a secular society, there can be no single unchallenged interpretation of divine law. Therefore, the myth of divine law in secular society carries with it the limitation of authoritative rendering of divine law. This pluralism of competing authorities and competing Jewish communities' participation in revelation persists to this very day. While few of the American Jewish communities continue to actively invoke the myth of divine law today,

49. This "chain of tradition" was in keeping with hellenistic works of the period establishing new scholars over the various philosophical schools. See Elie Bickermann, *La Chaine de la Tradition Pharisaïenne*, 59 *REVUE BIBLIQUE* 23 (1952).

50. See VISOTZKY, *supra* note 42, at 32-40.

51. Who had suggested that interpretation of the Torah must follow the rules of human discourse. See *supra* note 46 and accompanying text.

52. See *supra* note 22.

53. The Torah may concur, but it may also be that the rabbinic (indeed, also the Church's) reading of the Bible, for millennia, forces this reading into the text.

all assert some form of divine authority⁵⁴ for the authenticity of their communal apprehension of divine will.

Thus far, I have spoken to my expertise, rabbinic literature. I hope that these remarks have been of interest, but I am aware that they may have been more directed at the theologians in the audience than to the lawyers. Therefore, I turn to the implications it may have for Church/State issues. While the rabbis suffered certain impotence within secular society, they did have some controlling legal authority within their own communities. Rome, for its part, was quite content to allow the rabbis authority as long as it did not interfere with the orderly collection of taxes and did not presume to encroach on those areas that were perceived to be exclusively the sovereignty of the Imperium.

What about our own government? We are a nation of laws, and we celebrate the rule of law. We, too, invoke divine authority, even as we eschew any specific divinity. Our polytheism mirrors that of pagan Rome. We even share their distaste for atheism, although of late, our courts have professed some protection for that minority as well. I think all of this is good, but what is not good is this: if the rabbis can arrogate power under the cover of divine law, how much more so (*a fortiori*) can those religious leaders who are not a powerless minority do so in our own age?

I believe that we cannot afford to bring any more divine authority into our court system nor into any other area of our government. To do so would be a dual encroachment. First, it would encroach upon our Constitution—the same First Amendment invoked at the outset of this essay, but beyond the first five words. Bringing more religion into our ostensibly secular government, whether it is Christianity or any other religion undermines the rule of law. Second, it would be an encroachment upon the freedom of the varied religions that make up our great secular society. The result of a marriage of “divine law” with our “secular society” would be a form of “tyranny of the majority,” even if it is only a historic majority that no longer holds sway demographically, but nevertheless wields a dangerously large political influence.

I wish to close by reflecting on the paradox I noted about the myth of divine law. For the rabbis, the myth was a monolithic law handed down in apostolic fashion. The reality, ironically, was a pluralistic community with diffuse centers of local authority. The American mythos is similarly paradoxical, although quite the opposite of the

54. One example is God acting through history.

rabbinic myth of divine law. America is founded on the myth of democracy. Many differing sources give our government its authority. Whether the myth that we are a nation of hundreds of millions of enfranchised citizens or the myth that we are fifty United States banded together into one federal government is true, the flow of authority is inverse from that of divine authority. Divine authority is top down, while American democracy is bottom up. Divine law results in diffuse and pluralistic interpretations. Again, paradoxically, secular democratic society results in one high court that proclaims one law for this diverse, diffuse, and pluralistic society.

The inverse relationship of these two myths—divine law and secular society—should serve as a warning that Church and State must go their separate ways. The tolerance of the State for the various manifestations of the Church—which includes synagogues and mosques, as well as the other temples of the rainbow of religions in America—must also be matched by the tolerance of those Churches for the secular society upon which our State is founded.