Introduction: Can We Even Speak of "Judaism *and* Law"?

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We begin with a caveat. The formulation "Judaism and Law" rests upon an assumption derived from and congenial to the western Christian tradition but somewhat alien to the Jewish tradition. The assumption, articulated in a parallel Cambridge University Press volume on Christianity and law, is that "law and religion are distinct spheres and sciences of human life . . . that exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other."[1] On this view, it is possible to explore how "legal and religious ideas and institutions, methods and mechanisms, beliefs and believers influence each other – for better and for worse, in the past, present and future."[2] And indeed, a guiding question for the volume *Christianity and Law* was the following: "what impact has Christianity had on law?" (law being understood here as western law in all its rich complexity, as an independent entity distinct from Christianity).

One might suppose that a volume on *Judaism and Law* could follow the same basic format – exploring Judaism's impact on law on the assumption that law and religion are distinct spheres that interact dialectically. However, the guiding assumption and questions that so fruitfully structure the volume on *Christianity and Law* raise immediate difficulties in the Jewish context. Christianity originated in a rejection of the Mosaic Law as antithetical to a life lived in the spirit. As is well known, this original alienation of the faith from law proved to be unsustainable, and in due course Christianity found it necessary to negotiate the bounds and claims of normativity. Nevertheless, even as Christianity made room for and in turn influenced the development

[1] Witte and Alexander (eds.), *Christianity and Law*, p. 3.
[2] *Ibid.*, p. 5.

of western legal traditions, law was never an *essential* or *constitutive* element of Christian religious expression. Law was a distinct sphere of human endeavor despite its many points of intersection with the new faith.

In contrast to the antinomian gesture at Christianity's inception, Judaism's origins are represented as thoroughly nomian. As David Novak writes: "While today many regard law and religion as separate spheres and sciences of life, Judaism has long regarded these phenomena as overlapping, if not virtually identical . . . [By the Middle Ages, a]ll law was assumed to be derived from the will of God, whether immediately experienced in revelation, or transmitted via continuous tradition, or discerned by public discursive reasoning. And religion, being the human relationship with God, was assumed to consist of accepting, understanding, applying, and obeying God's commandments."[3] Law was long viewed as an essential and constitutive element of Jewish religious expression. Thus, the assumption that religion and law are distinct spheres that interact dialectically is unwarranted in the Jewish context. In premodern Judaism we find not simply a system of religious law but an exhaustive *nomos* of comprehensive scope retrojected to the very moment of the tradition's origin (the covenant at Sinai) and believed to express the will of a single divine being – in short, a divine law.

The idea of divine law – the notion that the norms that guide human action lay some claim to divinity – is found in both classical (Greco-Roman) thought and in the Hebraic (biblical) tradition. However, to the extent that the two traditions conceive of the divine in radically different ways, their notions of divine law diverge. In Stoic thought, for example, the divine is not distinct from nature; therefore, divine law is a metaphor for natural law – an *unwritten* law (as opposed to written legislation) based on and perceived in the rational order of the universe. By contrast, biblical law is divine because it is believed to emanate from and reflect the will of a personal god who is the master of history. In the biblical tradition, divine law – for the first time in history – is actual *written* legislation; among other things it contains a mass of specific and detailed pronouncements, rules, prohibitions and teachings attributed to the direct authorship of a divine being.

The Hebrew Bible places law and justice within the context of a relationship between the ethnos Israel and a personal deity, YHWH. Because of the utter centrality of divine law to the biblical and premodern Jewish conception of the divine–human relationship, it is difficult to speak of "Judaism" and "law" as distinct entities such that their interaction can be

[3] Novak, "Law and Religion in Judaism," p. 33.

identified and traced. Arguably, at least in its classical rabbinic formulation extending through the premodern period, Judaism *was* law – though in a vastly expanded sense that is not fully captured by western definitions and theories of law (natural, positivist, or historical). For centuries, the foundational principles of Judaism might just as easily have been understood to be the foundational principles of Jewish law. That the one god, through his covenant, has placed normative demands upon his people in order that they might achieve justice and aspire to holiness is at one and the same time a religious principle and a legal principle. Insofar as law may be seen as constitutive of the Jewish conception of the divine–human relationship – a condition that obtained in the literary manifestations of the tradition in the premodern period – it is not possible to speak of law *and* Judaism since law *is* Judaism.

In the modern period, the idea that law is constitutive of the divine–human relationship was challenged by intellectual and political changes that swept Europe, and Judaism came to be seen by some as a "religion" in terms that enable a consideration of its relationship to law as a distinct entity. The characterization of Judaism as a "religion" parallel to Christianity was not universally endorsed, however, and countertrends developed in European and American Jewish thought. In the twentieth century, the tension between competing visions of Judaism and Jewish identity (variously emphasizing moral, halakhic, ethnic, or cultural elements) and the relation of Judaism to law – both Jewish and western – found expression in debates over the role of church and state in modern-day Israel.

REFORMULATING THE QUESTION

In light of the foregoing, this volume on Judaism and law addresses the following topics. First, on the assumption that for much of its history, Judaism has been identified with law, the volume will explore ways in which the tradition has conceived and theorized its divine law. How did Jewish writers, rabbis, philosophers, and thinkers understand (1) the nature, scope, character, and purpose of the normative demands that Israel's god has placed upon the community; (2) the roles of the divine lawgiver and the divine law's human mediators; (3) the possibility of continuing revelation; (4) the possibility of and mechanisms for legal growth and development; (5) the relationship of Written Torah and Oral Torah, of biblical law and rabbinic law (or *halakhah*)? The volume also investigates the extent to which Judaism has, throughout its history,

spawned *antinomian* challenges to the idea of law as the primary medium of the divine–human relationship. Thus, the volume gives some attention to the major sites of *resistance* to the nomian character of Jewish religious experience (for example, Pauline Christianity, mysticism, Sabbateanism, Ḥasidism, Reform Judaism) and the effect such movements have had on the development and character of the tradition.

Second, the volume explores Judaism's conception of and interaction with secular systems of law. The vision of divine law at the heart of biblical Israel and later Judaism does not include a system of secular law for YHWH's people. Nevertheless, deprived of political sovereignty since late antiquity, Jews have historically found themselves subjected to a variety of "foreign" legal systems. How have Jews – governed by divinely authored norms – negotiated the claims of the "secular" or non-native legal systems in which they have found themselves? How have they theorized the existence of those legal systems and how have they justified submission to them?

Third, the volume revisits the *status quaestionis* in the wake of the European Enlightenment on the one hand and political emancipation on the other. Doctrines of the separation of church and state and definitions of "religious traditions" as systems of belief began to penetrate Jewish life already in the seventeenth century. By the eighteenth century, some Jewish thinkers adopted the increasingly popular characterization of Judaism as a "religious faith," restricting or de-emphasizing its normative element. This approach facilitated the process of emancipation and the acquisition of citizenship in European nation-states even as it opened the door to an internal critique of Jewish law. For many, it was now possible to conceive of Judaism as a "religion" distinct from law – whether Jewish or non-Jewish. Jewish voices were added to the larger European discussion of the competing and coinciding claims of religion and law, the role of religion in the state and public sphere, and the state's interest in controlling religion. At the same time, traditional views of law as central to if not constitutive of Jewish religious expression persisted in some circles, challenging Enlightenment conceptions of religion, law, and the relationship of the one to the other.

Fourth, the volume addresses the special case of Israel. The legal system of the secular Jewish state established in Palestine in 1948 drew primarily from mandatory law, Ottoman law, English common law and equity – and to only a limited extent, Jewish law. Ironically, the legal system of the Jewish state came to be counted among those "secular" legal systems with which Jews still governed by the provisions of the divine law must negotiate. This volume asks: How is the authority of the Israeli legal system theorized and justified by

those who espouse a primary allegiance to the *halakhah*? How are familiar problems of church and state negotiated in modern Israel? What can be learned from the confrontation and interpenetration of the Jewish religious tradition and *halakhah* on the one hand and the legal system and institutions of secular Israeli society on the other?

The volume proceeds on two methodological fronts – conceptual and historical. Conceptual analyses deal with the Jewish notion of divine law – its nature, reach, guiding principles, authority, mechanisms for growth and change, relationship to other legal systems, and so on – with special attention to conceptual shifts that occurred over the course of time. However, the status and position of Jews for much of their history as a subject people or a people with limited autonomy had a decisive influence not only on the Jewish conception of law but on the extent to which the normative ideals of the literary and religious elite were realized in the quotidian life of Jewish society. Thus, conceptual analysis is combined with a historical approach that weighs the impact of political, social, and cultural circumstances on the Jewish understanding and implementation of its divine law. Particular attention is paid to Judaism's relationship with the legal systems of other peoples – whether divine or secular – including the secular legal system of the Jewish state of Israel.

This volume differs from classic introductions to Jewish law.[4] It does not provide a history of Jewish law or an exposition of its sources and principles. Rather, this volume examines the very concept of law as a central religious concept expressive of the divine–human relationship as well as challenges to that idea. These challenges arise from within Judaism and from social and historical realities that include Jewish interaction with and/or subjugation to other legal systems that are, from a Jewish perspective, non-divine. The volume considers how political and socio-historical reality shaped Jewish conceptions of its own "divine" law and Jewish perceptions of the "non-divine" law of others and, in the case of Israel, of a secular Jewish state.

The fourteen chapters, written by distinguished scholars with specific expertise in the subject, are divided into three parts arranged in historical sequence, as described below.

PART I: LAW AS CONSTITUTIVE OF BIBLICAL AND PREMODERN JEWISH RELIGIOUS EXPRESSION

The chapters in Part I focus on (a) the emergence and development of the idea of law as an essential and constitutive element of the divine–human

[4] See, for example, Hecht *et al.* (eds.), *An Introduction*, or M. Elon's magisterial *Jewish Law*.

relationship in biblical Israel and classical Judaism through the medieval period; (b) the extent to which law was, *in historical terms*, an essential and constitutive element of Jewish religious expression in this period; (c) alternative conceptions of the divine–human relationship and responses to these alternatives, and (d) approaches to both the idea of, and actual encounter with, secular law. These chapters combine conceptual analysis with a consideration of the socio-economic, political, and cultural factors that shaped notions of divine law from biblical to medieval times and influenced its implementation. The conceptual analyses and historical investigations in these chapters produce results that coincide with, contradict, or simply complicate one another. Where possible, an explanation for the slippage between rhetoric and reality will be attempted.

In Chapter 1, "Law in Biblical Israel," Chaya Halberstam explores law in ancient Israel as both a historical juridical practice and a literary discursive practice. She considers Israel's *historical* "law in practice" as it related to other social spheres (the familial and political) and argues that law in ancient Israel was not an autonomous and professionalized field but a cultural mode that imbued all facets of life, reflecting distinctive elements of ancient Israelite society, its conception of the divine and of divine justice. She then turns to an in-depth examination of law as *literary* practice in ancient Israel, highlighting the profound interconnections between law and a wide range of other discursive practices. She shows that in the Hebrew Bible, legal writing is not easily isolated from the literary genres of narrative, covenantal history, prophetic oracle, and wisdom which together comprise the *torah* ("teachings") of the God of Israel. Halberstam concludes that law "suffuses the language of the Hebrew Bible, and mediates the relationship between Israel and their God."

The distinction between literary sources and the documentary evidence for law-in-practice informs Seth Schwartz's discussion of "Law in Jewish Society in the Second Temple Period" (Chapter 2). Schwartz argues that literary sources (such as Sirach, the Dead Sea Scrolls) reveal the attitudes of an elite (a "high clerisy") that fetishized the Torah but had little interest in applying its laws beyond the Temple or, in the case of the Dead Sea Scrolls, to a sectarian community. Despite extensive rumination on the character and nature of divine law, Philo provides little detail about a legal system (civil law, laws of marriage, divorce, inheritance, and so on), and Josephus only hints at Jewish law as a lived system outside the Temple and areas of priestly concern. There appears to have been no formal and rationalized approach to deriving prescriptive details from Scripture as a schematic written code in this period. By contrast, Schwartz argues, papyri and documents allow some insight into

the quotidian legal reality of non-elites and some tentative reconstruction of the workings of Jewish law. While the documentary evidence is ambiguous and spare, it seems reasonable to suppose a body of practice in Jewish society of Judea in the latter part of the Second Temple period. But as Schwartz notes, it is likely not until the first century CE that the law of the land in Judea was Jewish in the strong sense of being self-consciously relatable to the law of the normative code (Scripture). Paradoxically, some documents evince an awareness of a biblical law only to then circumvent or ignore it, and in general Jews didn't hesitate to use non-Jewish legal documents and courts. Schwartz describes the development of strongly localized versions of general Hellenistic Near Eastern legal norms and instruments, a Judaized civil law that after the destruction in 70 CE would be appropriated by rabbis as Torah binding on all Jews.

The first seven centuries of the Common Era were a period of intensive legal creativity in the wake of the destruction of the Temple in 70 CE. In Chapter 3, "Law in Classical Rabbinic Judaism," Christine Hayes traces the expansion of Jewish law by the rabbis of the talmudic period (first to seventh centuries CE) – a period in which normativity, central to the biblical understanding of the divine–human relationship, becomes constitutive of that relationship. The chapter explores the ideology of Torah that lies at the heart of classical rabbinic Judaism, beginning with the role of law as both tool and telos in the rabbinic reconstruction of Judaism after 70 CE, and the shift in the perception of Scripture from a collection of descriptive legal teachings to a prescriptive legal code and source of law. This shift threatened to dissolve the vital link between law and narrative described in Chapter 1, as rabbinic readers sought to extract and organize the legal teachings from the biblical text. Hayes considers the conceptual categories and textual practices that emerged as a result of the prescriptive understanding of the nature of Scripture, including the designation of and differentiation between law and narrative (*halakhah* and *aggadah*) and the development of various strategies for renarrativizing the law: the introduction in rabbinic legal literature of anecdotes and exempla, the presentation of normative materials in a dialogical format, the creation of ritual narratives, and the ethical interpretation of defunct laws. Hayes explores the tension between pluralism and normativity, between attribution and anonymity, and considers the implications of this tension for the rabbinic conception of divine law. In a final section, Hayes examines rabbinic divine law discourse set against competing divine law discourses in late antiquity and argues that the rabbis distinguished themselves from other Jewish

groups in antiquity by constructing a conception of divine law that defied the main contours of Greco-Roman divine law thinking.

The eclecticism and adaptation that characterized both ancient Jewish law-in-practice (as described in Chapter 2) and rabbinic law (as described in Chapter 3) stand in stark contrast to a rhetoric of legal distinctiveness, if not isolationism, that appears in biblical, Second Temple and rabbinic sources. In Chapter 4, "Approaches to Foreign Law in Biblical Israel and Classical Judaism through the Medieval Period," Beth Berkowitz describes the process by which the biblical injunction against adopting the abominable practices of the Amorites (Lev 18:3, "You shall not walk in their ways") became a general prohibition against following or even imitating the laws of other peoples. Tracing the principle from its biblical origins through its Second Temple, rabbinic, and medieval elaborations and modifications, Berkowitz shows how the principle enabled Jews to theorize the existence, status, and authority of non-Jewish and/or non-divine legal systems. Because it was used to classify a wide range of practices, laws, and customs as either divinely sanctioned or prohibited, as either Jewish or non-Jewish, the principle reinforced the extent to which Jewish law would be seen as an integral part of Jewish identity. The centrality of Jewish law to Jewish identity was taken up in medieval Jewish thought and in the modern period would pose unique challenges, as some Jews sought to forge Jewish identities divorced from adherence to traditional conceptions of Jewish law.

In the medieval period, Jewish communities in Islamic lands and Christian lands were exposed to new intellectual stimuli and interfaith polemics which gave rise to new conceptions of the nature, purpose, and authority of divine law. With the revival of classical learning in the Islamic world, Sephardic scholars and philosophers, such as Maimonides, Albo, and Abrabanel, constructed political theories that engaged and reformulated Judaic conceptions of the Law of Moses. The development of a scholastic legal tradition in both Sephardic and Ashkenazic centers resulted in the production of independent legal works – commentaries, responsa, and codes – that were not devoid of theoretical treatments of the Law. In addition, the medieval period saw the development of other modes of religious expression, such as philosophy, mysticism, and pietism, offering alternative visions of the value of law as a medium of divine revelation and of the nature and purpose of God's normative demands for Israel.

In Chapter 5, "Law in Medieval Judaism," Zev Harvey reviews medieval Jewish reflections on law in general and the Law of Moses in particular, beginning with the tenth-century rabbi and philosopher Saadia Gaon and

concluding with the fifteenth-century philosopher-statesman Don Isaac Abrabanel. As Harvey demonstrates, some medieval Jewish thinkers drew on classical natural law traditions to configure the law of Moses as an order conducive to virtue and happiness, some drew on classical political theory to configure the law as the constitution of the Jewish nation despite the nation's lack of political autonomy, while still others combined natural law and positive law traditions in original ways. Some were informed by mystical tenets and emphasized the inner secrets and deeper mystical meaning of the commandments, some pointed to defects in the Law relative to aspects of foreign law, while others worked to bring coherence to the reality of the Jews' subjection to foreign legal systems through elaborations of the principle of *dina de-malkhuta dina* (the law of the land is law).

PART II: ENLIGHTENMENT, EMANCIPATION, AND THE INVENTION OF JEWISH "RELIGION"

Enlightenment political thought understood the basic political bond to exist between the state and the individual rather than the state and collective entities – a view that made possible the political emancipation of non-Christians. But the acquisition of rights as citizens in modern European states had far-reaching social and religious consequences for European Jews. As Jews were assimilated into secular European society and availed themselves of civil law, fewer matters were brought to traditional rabbinic courts. However, as Verena Kasper-Marienberg shows in Chapter 6, "From Enlightenment to Emancipation," the authority of the religious courts was already in flux on the eve of emancipation. The nature and extent of the dissolution of jurisdictional boundaries – which accelerated in the nineteenth century as subjugation to religious authority became a matter of choice – was a function of the legal framework that Jews encountered in their various places of residence. Focusing on the experience of the Jewish community of Frankfurt am Main with reference to more general trends in neighbouring regions, Kasper-Marienberg demonstrates that the engagement of Jews with non-Jewish law and jurisdiction (not always to override but sometimes to ratify or even coerce communal norms) was deeply connected to the amount of autonomy secured by the community in the premodern period. In general, the dissolution of jurisdictional boundaries, coupled with Jewish recourse to non-Jewish civil and customary law, provides a fascinating counterpoint to the tradition's preoccupation with the biblical prohibition against "walking in their ways" (see Chapter 5).

The acquisition of individual citizenship rights took place against the backdrop of an enlightenment differentiation between the political and the religious. In line with recent work on the invention of religion,[5] the remaining chapters in Part II consider the ramifications of the invention of Judaism as a "religion" in the Lockean sense of speculative faith of a personal and non-political nature. Locke and other European intellectuals confined religion to the private sphere in order to create a public sphere characterized by civil discourse, reason, tolerance, and harmony. Confining religion to the disembodied and speculative realm of faith was a critical step in the differentiation of church and government in western political thought and in the political emancipation of non-Christians. However, the differentiation of the religious and the political raised critical questions in connection with Judaism that reverberate to the present: insofar as Law is a central and defining element of traditional Judaism, is Jewish identity primarily political rather than religious or even ethnic? If so, does observance of the Mosaic Law constitute for Jews a political allegiance that is competitive, or even incompatible, with allegiance to the secular state? And if religion is defined as speculative faith, or a universal and rational morality, are the bodily religious practices of Judaism purely "ceremonial" behaviors devoid of spiritual meaning and acceptable only to the extent that they do not impinge upon civic life?

In 1670, Baruch Spinoza published his *Theological-Political Treatise*, in which he argued that the Hebrew Bible contained social, political, and moral legislation of human origin, aimed at the political stability of the ancient Israelite state. In Chapter 7, "Enlightenment Conceptions of Judaism and Law," Eliyahu Stern explores the response of philosopher Moses Mendelssohn to Spinoza's political reinterpretation of the Mosaic Law and to Enlightenment conceptions of religion that minimized or dismissed law as a conduit of the divine. Hoping to facilitate Jewish entrance into civil society, the Enlightenment thinker Mendelssohn accepted the differentiation of religion and politics, church and state, but unlike Spinoza, he championed Judaism rather than Christianity as the religion of reason par excellence, a move that conceded the designation of particularistic Jewish laws and observances as ceremonial obligations only.

As a reaction to both oppressive conditions and to the legalism of rabbinic Judaism, and spurred on by the ideals of the European Enlightenment and the desire for emancipation, various forms and degrees of Jewish

[5] See, for example, Peterson and Walhof (eds.), *The Invention of Religion*.