Journal of Law and Religion 32, no. 1 (2017): 172–184 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2017.23

REVIEW ESSAY

DIVINITY, LAW, AND THE LEGAL TURN IN THE STUDY OF RELIGIONS

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BOOKS REVIEWED

The Divine Courtroom in Comparative Perspective. Edited by Ari Memelstein and Shalom E. Holtz. Biblical Interpretation Series 132. Leiden: Brill, 2014. Pp. 316. $152.00 (cloth). ISBN: 978-9004281639.

What's Divine about Divine Law? Early Perspectives. By Christine Hayes. Princeton: Princeton University Press, 2015. Pp. 432. $39.50 (cloth). ISBN: 978-0691165196.

KEYWORDS: divine law, comparative law, legal imagination, history of ideas, Jewish studies, natural law, Paul, Philo, talmudic law

While histories of ideas in premodern perspectives habitually understood history as divisions of fixed periods, modernists tend to narrate these histories in terms of flowing streams curving through timelines, intersections, and junctions. Crucial moments, accordingly, are turns and returns, shifts and orientations. I am not sure what it takes to diagnose and proclaim an intellectual turn or how to affirm or refute such a phenomenon, but I take the audacious risk and argue that the last couple of decades have seen a "legal turn" in the study of religions—a renewed focus on legal aspects of religion that includes legal concepts, theories, and practices.

This turn is certainly related to broader trends of revitalizing theoretical fields, formerly debarred from the disciplinary treatment of religious histories, texts, and contents. It reflects acknowledgment of the realm of conscious thought as a subject matter to be studied—something between systematic articulations, such as philosophical or theological reflections, and uninterrogated practice. It also reflects a reassessment of the Enlightenment's formulations of "religion" and "law"[1] and the mutual interplay between law and religion in various contexts through history.

The study of Jewish history and sources in that regard is no exception, as there has been a patent growth of literature and academic activities demonstrating serious interest in law in different areas of Jewish studies. The legal turn in Jewish studies includes much more than refreshed outlooks on the halakhic literature and praxis; it reflects an enhanced predisposition to view Judaism as a law-based religion and to imagine the rabbinic world as legal culture. As a result, this scholarship develops a higher degree of sensitivity to legal themes, tropes, and circumstances, and it borrows methodologies from the study of legal history and comparative law. Likewise, many scholars

1 See Robert Yelle, "Imagining the Hebrew Republic," in *Politics of Religious Freedom*, ed. Winnifred Fallers Sullivan et al., (Chicago: University of Chicago Press, 2015), 17–28.

find great interest in legal theories and hence utilize jurisprudential insights and conceptions to better comprehend their subjects of study. The introduction of jurisprudential impulses into the study of Jewish history and literature also reflects new emphases—a drifting towards the history of ideas rather than textual criticism or social history, and a focus on theological principles and systematic thought rather than particular praxis and positivist content.

The two volumes reviewed in this essay validate wonderfully the benefits of sensitive contemplation of the legal consciousness that is engrossed in ancient literatures. The depth and the richness of these two publications demonstrate the successful outcome of bringing the law and literature movement to studies of legal history and textual analysis. Moreover, these two publications propose a new focus on the author's legal imagination, its content and function.

LEGAL IMAGINATION RECONSIDERED

The "legal turn" in religious studies is certainly a post-Enlightenment conceptual reevaluation of law, religion, and secularization and the interconnections between them constructed and mediated through imagination. While the major approaches to religion in modern times—criticism and social functionalism—aspired to demystify religion by focusing on its factual effects, the interdependency of religious and political thought is considered crucial and undeniable by later thinkers. For post-positivist critics, earlier estimations that theology is divorceable from the political realm are found to be heavily charged with ideology, and thus the interplay between the human realm and the imagined divine should be reevaluated.

The legal turn is also a post-Enlightenment phenomenon with respect to the different approaches to the role of imagination in religious consciousness. For medieval philosophers and modern critics of religion, imagination was seen as basically an epistemological trap that seriously threatens accurate perceptions. For premodern theologians, imagining the deity in anthropomorphic terms was an undesirable bias of unfledged minds, curable by pure philosophical conceptualizations. And for modern secularist thinkers, religion and religious belief are essentially grounded in false perceptions resulting from unconscious projections of human weaknesses, needs, imperfections, resentments, fears, and the like.

Viewing imagination as a constitutive faculty of human self-understanding and of the divine was largely ignored by these critical attitudes that kept on seeing imagination as an epistemological apparatus. Nonetheless, contemporary revisionist approaches are more interested in the operative roles of the imagination in the construction of elementary preconceptions. In that regard, a special attention is being paid by historians, rather than theologians, to the analogies between human activity and the divine and their effect in social and intellectual histories.[2]

The Divine Courtroom in Comparative Perspective, edited by Ari Memelstein and Shalom E. Holtz, is a wonderful illustration of this refreshed trend that goes beyond problematizing imagination as a circular projection of the human and the divine. It reflects a reinvigorated attentiveness

2 Peter Brown's study on the medieval idea of the patron saint as a projection of late Roman legal practices is a pioneering example of how the mirroring analogies of human activity and the divine "enabled the Christian communities, by projecting a structure of clearly defined relationships on to the unseen world, to ask questions about the quality of relationships in their own society." Peter Brown, *The Cult of the Saints: Its Rise and Function in Latin Christianity* (Chicago: University of Chicago Press, 2014), 63.

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press

to rhetoric and to the role of legal imagination in the shaping of the religious consciousness. Beyond the epistemological competence, legal imagination is sketched in this book as an efficient vehicle to describe divine justice and deeds, a platform for criticizing and defending god, a source of comfort and remedy, and a social strategy of strengthening personal responsibility and professional independence.

This volume is a collection of essays stimulated and inspired by the work of Meira Kensky in *Trying Man, Trying God: The Divine Courtroom in Early Jewish and Christian Literature*,[3] a study that describes the divine courtroom as a sophisticated rhetorical mechanism that affects its audiences in very special ways. Descriptions of divine courtrooms, accordingly, not only illustrate divine justice or divine intervention in human affairs but also design the imageries of judicial processes and courtroom scenarios as venues in which expectations and demands for justice are claimed alongside enunciations of human moral commitments.

Many of the articles in this book highlight the legal imagination around the dynamics of the divine courtroom as literary topos and perspective of ancient literature. In fact, they do much more than re-approach literary depictions; they develop an advanced hermeneutical perspective on ancient theological discourses about divinity and justice. Accordingly, imagery of divine courtrooms generates the possibility of an exceptional encounter of the human and the divine—the interface of human intuitive morality and heavenly constructed justice. Furthermore, as Kensky argues, common descriptions of divine courtroom scenes are far from being informative and pedagogic. They initiate role changes: the readers of these descriptions are pressed to activate their moral judgments and not to remain passive spectators. Thus legal imagination is not only crucial to understanding and interpreting legal discourses and it is much more than an unarticulated or unconscious epistemology imbedded in the legal language. Our deference to both domains, divinity and legal procedures, probably prevents us from judging divine courtroom scenes. Nonetheless, as Kensky suggests and is thereafter well illustrated through the entire book, the imageries of these scenes have a crucial illocutionary force.

The essays in this volume demonstrate a renewed interest in legal affairs in a broad extent of sources, as well as cultural and religious contexts. They demonstrate both the rich realm of legal imagination in ancient religious texts and the need to take more seriously the rhetorical means of these texts. As a group, the essays cover a wide range of historical and religious contexts, from ancient Greek and Mesopotamian literature, biblical texts, Second Temple and rabbinic literature, through early Christian writings and Islamic legal history to the fourteenth-century commentaries of the Catalonian rabbi Nissim of Gerona.

For example, focusing on the Second Temple apocalyptic visions of a divine courtroom in Daniel 7 and in the apocryphal Book of Giants, Joseph Angel's essay suggests viewing this literary topos as a touchstone for the reevaluation of the relationship between the Danielic and the early Enochic traditions. Several other essays in the volume are devoted to the projective aspects of the courtroom imagery, either as a projection of human adjudication upon the divine and vice versa. Tzvi Abusch, whose previous work revealed the Akkadian semantic origins of the term *halakhah*, as reflecting a projection of astral courses, here displays a reverse projection upon which Girra, the god of fire, is described as a judge and executor who is asked to render a verdict against the witches.

A trust in heavenly courts and judgments, as we learn from essays by Victor Bers and Adrian Lanni, was not an obvious matter. The judgment of the gods in the archaic and classical Greek literature was less trustworthy than human judgments. The skepticism and mistrust that Greeks had towards divine adjudications, Bers and Lanni argue, had to do with the acknowledgment of the

3 Miriam Kensky, *Trying Man, Trying God: The Divine Courtroom in Early Jewish and Christian Literature* (Tübingen: Mohr Siebeck, 2010).

inherent difficulty of judgment and also related to the special character of ancient Greek anthropomorphism, according to which, in opposition to biblical anthropomorphic theology, mortals, by virtue of their mortality, were much more serious about matters of judgment.

An inverse picture, and a more optimistic one, emerges from the study by Rachel Magdalene, who argues that divine courtrooms in biblical and Near East literatures function as supreme courts that intervene in cases of abusive power or authority by human royals and officials. Through extensive study of the biblical case of Naboth's Vineyard, she suggests viewing the imagery of the divine courtroom not as the mirror of human courtrooms, but rather as a complementary institution, a last resort for those who seek justice and an end to human abuse of authority.

The operative aspects of these metaphoric appearances and their theological toll is the focus of other essays in *The Divine Courtroom in Comparative Perspective*. Interpreting legal imagination, accordingly, raises hermeneutical dilemmas, or even fallacies: To what extent metaphoric analysis can account accurately on an imagination? Or put differently, to what extent can a metaphoric explanation describe an imagery in its own terms? These questions are addressed by the volume's contributors to in various ways.

Driven by heuristic concerns, Job Jindo warns against metaphoric reading of the biblical legal imageries, suggesting that they be read, instead as part of larger and holistic picture of the operations of the heavenly institutions. Reading these images as human projection, he insists, ignores the Bible's comprehensive view of the universe as a polity dominated through a royal system of god's kingship and his heavenly assembly. Conversely, Carol Newsom brilliantly surfaces the performative acts of the legal metaphors within the religious imagination. Through her analysis of the Book of Job and the invention of the idea of trialing god, she demonstrates the generative role of the legal metaphor as a proposition of "a radically different religious imagination" that organizes alternative relationship of the human and the divine (Newsom, *The Divine Courtroom in Comparative Perspective*, 247). Accordingly, the imagery of the divine courtroom forms the backdrop for a unique and dramatic rendezvous of the human and the divine.

Yet, despite the opportunity to encounter the deity through legal processes, divine courtroom scenarios are very complex and as such invite the questioning of divine justice. In her essay on pure procedural justice in Sifre Deuteronomy, Chaya Halberstam shows that the midrashic wrestling with the impediments of the metaphor of divine trial is swaying between different ideas of procedural justice; shifting from "perfect" to "pure" procedural justice, and then a modification of "pure procedural justice" to an "imperfect" one. In his essay on lawsuits against god in rabbinic literature, Dov Weiss spots the ambivalent theological aspects of this imagery. On the one hand, courtroom scenes prima facie legitimize a critique of divine morality. On the other hand, these scenes also provide the opportunities to justify god and his deeds.

Further reflections on legal metaphors in ancient texts invite further contemplations on the constitutive role of the imagery of divine trials beyond the biblical and the rabbinical traditions. The imagery of divine trial is a most fundamental component in the eschatology of the "last judgment" that plays a pivotal role also within Christian theology and Islamic legal history. In that respect, the imagery of the divine courtroom in early Christian writings marks two cardinal events of the Christological epoch—the historical trial of the son of god, and the eschatological episode of the last judgment. These two scenarios likely correspond, but they also situate god in opposing roles—as defendant and as judge—and illustrate different theo-political settings: persecuting polity versus retributive justice. Andrew Lincoln provides a luminous analysis of the dialectical correspondence between the depiction of Jesus's trial in the Gospel of John, as a reworking of themes in Deutero-Isaiah, and the last judgment. This integrative reading of the two scenarios suggests that the multiple and interchangeable roles ascribed to the divine figure in these descriptions—accused

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defendant, embodied testimony, and supreme judge—represent a variety of messages about the tensions, complementarity, and possibility for enhancement between god and the world.

In a different manner, Mathieu Tillier's essay shows how the imagery of a divine courtroom, comprising the Quranic vision of the "day of judgment" (يوم الدين) together with the transcendental image of god, affected sociopolitical matters. Imageries of divine courtroom within Islamic legal history, therefore, emphasized the asymmetry between earthly and heavenly adjudications, and hence initiated rhetorical strategies that empowered simultaneously the judges' sense of personal responsibility and their professional independence with regard to political power and rulings.

The Divine Courtroom in Comparative Perspective is important for the extensive readings and analyses of primary sources offered across religious texts and contexts. Several essays vividly illustrate Kensky's insight that "when man is tried, it is truly god who is on trial" (Memelstein and Holtz, *The Divine Courtroom in Perspective*, 2)[4] and the rhetorical nature and impact of the literary constructions of courtroom scenes. Accordingly, beyond the theological value of courtroom scenes there is the emotive value that activates the reader's moral judgments by moving her from being a passive listener or spectator into a judicial position.

Editing a collection of articles by a variety of authors, from different fields and expertise, that addresses without exception an innovative topic is not an easy task even when the essays themselves are well-organized and intricate discussions. Memelstein and Holtz have successfully generated a remarkable and coherent contribution that elevates the discussion about legal imagination in ancient literature to new heights. Scholars and students of religious studies, ancient intellectual history, and legal history will find great interest in this volume that leaves no doubt about the prominence of the legal imagination of the religious consciousness.

There is some disproportionality with regard to the lengths of the articles (ranging from seven to seventy-seven pages), but this does not compromise the effect of the multidimensional, focused discussion. Thematically, theosophical discourses related to ancient Jewish literature predominate among these essays. In that respect, one would certainly be interested to learn more about the legal imagination and its roles and effects in other bodies of literature and of other religious traditions. Similarly, one might expect to learn more about the practical, sociopolitical implementations of the imagery of divine court, as is provided in the Islamic case.

DIVINE LAW

A focus on rhetoric and scriptural authors' legal imagination is also a central axis in Christine Hayes's *What's Divine about Divine Law?* which aims to reconstruct an important chapter in the intellectual and theological history of ancient Judaism. Hayes's main thesis here is that wrestling with the question of what is divine about divine law was indeed a crucial and highly constitutive element in the development of late-ancient Judaism. Accordingly, this question is taken as an organizing device for mapping late-ancient Jewish stances, trends, and attitudes. Surely, at the backdrop of this approach is the modern conviction, famously articulated by Leo Strauss, that both biblical and Greco-Roman traditions struggled with, celebrated, and agreed on the idea of divine law.[5]

4 Quoting Kensky, *Trying Man, Trying God*, 5.

5 This observation is pivotal to Strauss's paramount essay, "Progress or Return": "This notion, the divine law, it seems to me is the common ground between the Bible and Greek philosophy. And here I use a term which is certainly easily translatable into Greek as well as into biblical Hebrew. But I must be more precise. The common ground between the Bible and Greek philosophy is the problem of divine law. They solve that problem in a

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Hayes challenges this conviction through a two-layer argument. First, she argues that the two traditions had "radically different" (Hayes, 2), and in fact irreconcilable conceptions of "divine law." Then, she argues that the differences between the two conceptions were a key challenge to late-ancient Jews and essential to the formation of the Jewish theological milieus.

Hayes develops the first part of this argument in part one (chapters 1 and 2) through her careful reading of primary sources and sharp conceptual analysis in which she expounds on the different principles and tropes of each tradition, and she explore the different notions of "divine law" accordingly. As it appears, Greco-Roman discourse emphasizes the "divinity" of the laws, whereas biblical literature emphasizes the "laws" of the divine, their stipulations, behavioral implementation, and consequences. In chapter 1 Hayes shows the manner by which biblical constructions of the idea of "divine law" are raised within the framework of obligatory covenantal relations. In chapter 2 she demonstrates the Greco-Roman struggle with the meaning of the "divinity" attributed to a kind of law. Hence *divinity* as a modifier of *law* includes references to nature, eternity, rationality, universality, and permanency.

In her account Hayes avoids monothetic cataloging of competing conceptions, and instead she lays out a rich map of discourses and conceptual formulations within each tradition. With great clarity she deploys a polythetic classificatory analysis without reducing the rich, multidimensional discourses.[6] Each discussion is introduced and summarized thoroughly—a very important assistance for the readers of this comprehensive and complex treatment. In part two (chapters 3 and 4), Hayes exposes two different patterns to reconcile the gap between the two conceptions, and in part three she elaborates on the rabbinic reaction to this gap (chapters 5, 6, and 7) and the possible identification of the idea of natural law within the rabbinic literature (chapter 8).

Overall, Hayes argues that the two traditions provide competing conceptions of divine law that generated the "cognitive dissonance that the West has been grappling with ever since … [and which] gave rise to new and complicated synergies and spawned conceptual categories that continue to inform both the way we think and talk about law and the way we read Scripture to the present day" (3). The reference to psychological mechanisms such as the "dissonance hypotheses" for explaining late-ancient legal-theologies is certainly interesting, as is the constitutive value that is ascribed to this dissonance.[7] Hayes sketches a multidimensional picture of Jewish reactions to this dissonance, and she suggests that it is crucial to the understanding of the principled and divergent approaches taken in the ancient hybrid Jewish society. She argues that we should understand the theological map of late-ancient Judaism as more responsive to past ideas and conceptualizations, rather than reacting to contemporary challenges or future challenges and dares.

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diametrically opposed manner." Leo Strauss, "Progress or Return? The Contemporary Crisis in Western Civilization," *Modern Judaism* 1 (1981): 17–45, at 35. The reduction of historical Judaism to a law-based religion is a central pillar in the Lutheran theology, but also in the Mendelsohnian aim to define Judaism as capable of adjusting to modernity and general philosophy. It also served the romantic equation of Judaism and paganism as expressed by Friedrich W. Schelling, *Philosophie der Offenbarung* (Stuttgart: Wissenschaftliche Buchgesellschaft, 1857), 57.

6 A *monothetic class* is defined in terms of the necessary and sufficient characteristics of its members, so its members are identical (also termed Aristotelian classification). A *polythetic class* is defined in terms of a broad set of criteria that are neither necessary nor sufficient. Thus each member of the polythetic class possesses a certain minimal number of defining characteristics, not necessarily to be found in each member of the category (associated with Ludwig Wittgenstein's concept of family resemblances). See Kenneth D. Bailey, "Constructing Typologies through Cluster Analysis," *Bulletin of Sociological Methodology* 25, no. 1 (1989):17–28.

7 Robert Cover's pioneering and inspiring work of American legal history, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), used the "dissonance hypotheses" to explain the gap between personal conviction and officials' duties, between formalism and moralism, on the eve of the American

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Hayes's core argument is that the "incongruity between the biblical and the Greco-Roman conceptions of divine law was obvious and troubling to ancient Jews to different degrees and prompted three general categories of response" (4). In support of this argument, Hayes outlines, three major responses: (1) an accommodative-apologetic response (most expressively represented by Philo of Alexandria) that claimed to bridge this gap by approximating or identifying the seemingly different conceptions of the divine law; (2) a response that ratified the conceptual gap while adjusting its application with different principles and different audiences (Paul the Apostle); and (3) a response that scandalously constructed alternate conceptions of divine law "in *conscious defiance* of the Greco-Roman" (168) conception and with mockery to the latter.

For Hayes, the three responses are not equivalent. While the first two represent adaptation of post-biblical Jewish self-understandings through Greco-Roman conceptual categories, either natural law (Philo) or human law (Paul), the rabbis apparently rejected the very attempt to keep to these conceptions. Supported by linguistic and conceptual appearances, Philo and Paul did not obscure their propinquity with the Greco-Roman mindset, while the rabbis consciously distanced themselves from the Greco-Roman frame of mind. The three responses also differ with regard to their addressees, their mode of expression and the style of thought. Thus, Hayes shows, these three also demonstrate distinct attitudes towards the very fundamental premises of the Greco-Roman pretentious values associated with the idea of divine law.

Natural law discourses are, indeed, multidimensional and produce elusive concepts. The diverse meanings of natural law are not only a matter of different emphasis; they also denote completely different things. The lack of designated term for natural law in different bodies of literature and traditions makes the comparative task even more difficult because of the risk of reductionism, anachronism and confusing ambiguous meanings. However, Hayes establishes her argument that the rabbis did converse and react to the Greco-Roman conceptions of natural law through her careful analysis of rabbis' approaches to the traits that are associated with the natural law discourse.[8]

Hayes reads the rabbinic legal discourses as theoretical interlocutions with Hellenic legal perceptions and suggests a refreshed outlook on the halakhic discussions within rabbinic literature. This analysis joins recent trends that overlook the Jewish-Christian separatist imageries and identities and view the first century's theological and intellectual discourse as Jewish internal discourse that accelerated fundamental ideas, tropes, and vocabularies that eventually fashioned later theological drifts. Hayes covers a wide range of topics that integrate into a comprehensive picture grounded on historical sources, and her study is important in several respects.

Above History and Dogma

The first way in which Hayes's study is significant is that it marks a new phase in the methodology of the study of Jewish law. Twentieth-century scholarship of Jewish law was established upon the distinction between history and dogma[9] that consequently defined two legitimate methods and perspectives—historical and dogmatic. Indeed, for many years, historicism and dogmatisms

8 A parallel example of arguing for the existence of "natural law" within Islamic thought, which lacks such a term, can be found in Anver Emon's study of Islamic natural law. However, Emon acknowledges the semantic distance between the Hellenic concept and its narrowed meaning within the Islamic context that is simply "naturalistic reasoning." See Anver Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010).

9 Maurice Blondel, *Histoire et Dogme: Les lacunes philosophiques de l'exégèse moderne* (Paris: Presses Universitaire de France, 1956). Translated to English by Alexander Dru and Illtyd Trethoman as *The Letter on Apologetics, and History and Dogma* (New York: Holt, Rinehart and Winston, 1964).

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predominated the study of Jewish law and excluded other possible methods. Accordingly, the study of Jewish law by lawyers mainly followed the dogmatic method, considering the halakhah as a legal system composed of peculiar propositions about norms, principles and polices, while other academic studies of the halakhah were committed to historical perspective.

The dogmatic choice enhanced the reduction of the halakhah into a legal system and was deeply attached to the modern pretention to construct a legal science of rules and principles and encouraged the comparison of the halakhah, qua-legal system, with other legal systems, modern and premodern alike. The dogmatic-reductionist approach to the halakhah also fit the cultural Zionist enterprise to revive the halakhah and to become a national state law. Nevertheless, against these academic and ideological benefits, the toll of the dogmatic-reductionist method was high. Due to this methodological exclusiveness various significant aspects of the halakhah were generally neglected. Hayes and other contemporary scholars represent a refreshed approach to the Jewish law transcending the dogma-history distinction, attentive to reductive fallacies, and enriching the study of the halakhah by spotting many other aspects. Accordingly, she emphasizes the rhetoric and the dialogical aspects of the rabbinic legal discourses by which the rabbis offered an "alternity," to use George Steiner's term, to the Hellenic theoretical foundation of "divine law."

Without a doubt, Hayes's outstanding book is a landmark in the study of rabbinical legal theory that will open further discussions. Apparently, the rabbis not only reacted to Greco-Roman conceptions but also acknowledged the extent to which their scholastic ideas about divine law diverge from the biblical legal conceptions that are based on revelation and covenantal relations. If, indeed, the "dissonance hypothesis" explains the developing attitudes towards the idea of divine law, further elaboration on the rabbinic interlocution with the biblical conceptions of divine law is expected to attend the studies of the reaction towards the Greco-Roman part.

Paul's Inclusive Dualism

A second significant feature of Hayes's discussion is her argument that Paul utilized the dichotomy of natural law and positive law to comprise a dualistic message to distinct audiences—divine-natural-universal law to the Gentiles and human-conventional-particular law, that is the Torah, to the genealogical seed of the Patriarchs. Accordingly, the dichotomy of natural law versus positive law was for him "a golden opportunity to market his intrinsically unpalatable message" (Hayes, 162) to distinct audiences—biblically defined Jews and Hellenized Gentiles. Thus, Paul resolved the ambivalent stances of genealogical exclusivism and universal inclusivism. More than a theoretical response, Paul's legal-theology is depicted as the creation of a conceptual platform for managing a bivalent economy of religious identities. Paul, accordingly, did not problematize nor criticize the law itself, arguing "the Law per se is not the problem" (Hayes, 155), but rather facilitated a resolution of the particular-universal tension by the Hellenic typology of laws that allowed Paul to accommodate opposing principles of religious belonging. His legal-theology is therefore a rather subservient project to the higher goal of shaping a new map of religious identities.

Integrative readings of Paul's legal phenomenology and the identity of his addressees is indeed a leitmotif of the emerging school[10] that reads anew Paul's sayings detached from Protestant

10 See David F. Farnell, "The New Perspective on Paul: Its Basic Tenets, History, and Presuppositions," *Master's Seminary Journal* 16, no. 2 (2005): 189–243.

influence and with less antagonism toward Jewish "covenantal nomism."[11] Hayes refines this perspective by emphasizing Paul's "inclusive dualism" that encompasses the biblical-Greek dissonance, distinct congregations, and the natural-positive legal dichotomy.

Yet it is not clear how such a reading can escape the Pauline critique of the law and avoid its moral and psychological aspects that equally apply to natural laws and human laws. Hayes reads Paul's monologue about the law in Romans 7 as another case in which the Mosaic Law is branded as contrary to nature; thus, Paul leads his "readers to conclude that the Mosaic Law is not natural but conventional—a temporary and particular positive law that coerces obedience, rather than rational instruction that cultivates virtue" (153). Indeed, Paul's illustration refers to the tenth commandment of the Decalogue, the prohibition of coveting (οὐκ ἐπιθυμήσεις). Nevertheless, the text lacks any evidence that for Paul this prohibition samples, or fairly represents, the entire Mosaic Law as a defined body of decrees.

It seems to require more to convince the readers that Paul was indeed troubled with the origins of the prohibition to covet and not with its effects on the inner world of the obedient. By contrast, Paul's emphasis on the mental world of the obedient *qua* potential sinner seems to support the moral-psychological reading according to which the choice of this prohibition is not incidental: the very prohibition "thou shalt not covet" is a perfect illustration of the paradoxical dynamic through which the law triggers the desires that the law itself is designed to prevent.[12]

In Romans 7, Paul seems to be troubled by the phenomenon of moral law regardless of its origin and jurisdiction. The very existence of a decree such as "thou shalt not covet" is depicted by Paul as a psychological trap that revives and stimulates inner passions, otherwise remaining latent, and the possibility of transgressing the law. The law is described as essentially heteronomous, alien, impenetrable to the mental world and threatening the peaceful and uninformed "inner self" (ἔσω ἄνθρωπον; *interiorem hominem*).[13] Thus, Paul's aversive attitude seems to relate to the risk of activating immoral mental attitudes, knowledge, and passions.[14]

Paul's sayings in Romans 7 seem to assimilate the Stoic conception of "inner divine spark" with the prophetic vision of a New Covenant that internalizes the law: "I will put my law (*torati*) in their inward parts, and write it in their hearts."[15] In other words, law is ceasing to incite inner immorality once a spiritual transformation takes place through the internalization of the law: "For I am delighted with the law of God, according to the inward man."[16] This way, the biblical and

11 E. P. Sanders, *Paul and Palestinian Judaism: A Comparison of Patterns of Religion* (Philadelphia: Fortress Press, 1977), 75. For further discussions on Paul's reaction to Jewish legalism, see Kent L. Yinger, "The Continuing Quest for Jewish Legalism," *Bulletin for Biblical Research* 19, no. 3 (2009), 375–91.

12 "I had not known sin, but by the law: for I had not known lust, except the law had said, 'thou shalt not covet.' … For without the law sin was dead … when the commandment came, sin revived, and I died" (Romans 7:7–10).

13 Romans 7:22.

14 Perhaps evidence for viewing the prohibition to covet as paradigmatic to the predicament of laws that oppose natural desires can be learned from parallel discussions of the first century. The prohibition "thou shalt not covet" was discussed among the Gnostics as an example of the voidness of any code of behavior that is in opposition to natural impulses. Thus, the legendary gnostic author Epiphanes is quoted arguing that any law (*lex*) or custom (*mos*), let alone divine law, cannot oppose the natural sexual desire given by god and which is in effect god's decree (*dei decretum*). Hence, he concludes, "the words of the lawgiver 'Thou shalt not covet' must be understood as ridiculous (*ridiculum dixerit*), and yet more ridiculous is it to say 'thy neighbor's goods.' For he himself who gave the desire to sustain the race commends that it is to be suppressed, (*ipse enim, qui dedit cupiditatem, ut quae contineret generationem, jubet eam auferre*), though he takes it away from no animal" (Quoted by Clement of Alexandria, *Stromata*, 3.2.8–9) (author's translation).

15 Jeremiah 31:33.

16 Romans 7:22.

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press

the Stoic conceptions are amalgamated through the prophetic vision of the New Covenant independent of the Pauline dualist evangelic project.

Distinctions and Dichotomies

Distinctions and dichotomies are at the core of *What's Divine about Divine Law?* and the ways Hayes utilizes them is a great methodological lesson that also invites further contemplation as a third significant feature of her study. Since ancient times, distinctions and dichotomies have been common epistemological means for philosophers, theoreticians, lawyers, and also historians. Yet, distinctions and dichotomies are not identical notions. For some reasons, we incline to blur the differences between distinction and dichotomy and treat them as synonymous. We also tend to forget that distinctions and dichotomies are pragmatic tools by which we organize our knowledge and ascribe meanings to our perceptions. As such, distinctions and dichotomies are context dependent and interest dependent as they allow us to classify phenomena upon our interests and to describe meaningful relations between them.[17]

Hayes's book is remarkable also for its intense integrations of jurisprudential insights and deep analysis of ancient sources. Theoretical analysis of ancient texts, that is, the study of the conceptual backdrops and presuppositions as part of broader theories was for many years a neglected method in the mainstream scholarship of ancient Judaism. Nevertheless, theoretical analysis still risks projection, or translation, of unfitting concepts and theories.

Perhaps, the "travel well test"[18] that is used in contemporary studies of comparative law and general jurisprudence, can also be a useful measure for theoretical analysis of ancient Jewish sources. Indeed, asking whether the examined legal concepts and models "travel well" from one theoretical context to a different one is not a perfect test, but it is a heuristic principle that should balance the predisposition to translate, reduce, generalize, or apply theories embodied in one context to another.

Unfortunately, a majority of legal or jurisprudential analyses of rabbinic literature are not attentive enough to this standard and fairly accused of being too reductive. Hayes's discussion of the realism-nominalism problem (195–245) is a model of how to elegantly "travel well" a conceptual inquiry, based on categories that originated in medieval metaphysics, to talmudic discourses. She does not drift or take for granted the nominalism-realism distinction as a division of fixed defined conceptions that was embraced consistently by the rabbis. Instead, she isolates the essential constituents that are applicable to the rabbinical legal thought (mind-dependent versus mind-independent reality) and uses them to describe general orientations and tendencies (Hayes, 199).

17 I follow here some of Marcelo Dascal's ideas about the pragmatics of dichotomies. Accordingly, when we dichotomize we radicalize a polarity, emphasize the incompatibility of the poles, and ignore the inexistence of intermediate alternatives. See Marcelo Dascal, "Dichotomies and Types of Debate," in *Controversy and Confrontation: Relating Controversy Analysis with Argumentation Theory*, ed. Frans H. van Eemeren and Bart Garssen (Amsterdam: John Benjamins Publishing Company, 2008), 27–49.

18 "'Travelling well' is a metaphor associated with wine. Here it is used broadly to refer to the transferability of concepts and terms across different contexts. The contexts are many and the term is deliberately vague. The concern relates both to legal concepts, such as duty, person, contract, used in the formulation of laws (law talk) and analytic concepts used in describing, analyzing, explaining and evaluating legal institutions and phenomena (talk about law). 'Travel' can take place across legal cultures, languages, jurisdictions, levels, and fields of law." William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 44.

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press

In a different way Hayes utilizes the dichotomy of natural law versus positive law, which she aims to problematize by foregrounding the rabbinical criticism and alternative.[19] Indeed the conceptions of natural law and positive law are central to modern jurisprudential and philosophical discourses and they certainly mark a vital lineage to the Greco-Roman world. In the wake of the increasing scientific positivism through the nineteenth and twentieth centuries these two conceptions were dichotomized and intensified to become systematic and rival accounts on the very gist of the law—natural law theory versus legal positivism. As a result, this process gave rise to the image of two contested long-lasting systematic traditions or schools of thought. Yet, claiming that "the Greco-Roman dichotomy of natural law and positive law became controlling paradigms in the conception of divine law in the West" (Hayes, 7) seems to follow uncritically the modern inclination to dichotomize the two conceptions as comprehensive perspectives on the nature of law.

Truly, for Hayes, the conceptions of natural law and positive law do not stand alone; they cluster around a series of associated distinctions and dichotomies—universal-particular, reason-will, written-unwritten, eternal-temporary, fixed-changeable, and the like—to establish a firm antithetical distinction between "divine natural law" and "human positive law" (92). Although she treats these clusters as original, coherent, and systematic packages, she acknowledges that these settings are not fixed and their components are not intrinsically interconnected. But the dichotomization of natural law and positive law seems to be even more fragile when reflecting on the manner by which natural law and positive law were taken before their modern theorizations.

Clearly, the conceptions of natural law and positive law prior to modern jurisprudence marked types of law and not comprehensive perspectives or theories. More importantly, only rarely in premodern jurisprudential thought was the distinction between natural law and positive law regarded as an antithetical dichotomy. For similar reasons, claiming that the two conceptions "were embraced by the three biblical religions" (Hayes, 7) also seems to be affected by modern perspectives. In medieval thought, for example, the two categories are not antithetical binaries but rather complementing conceptions. Thus, the closest conception of natural law as divine law in both Islamic and Jewish medieval Mu'tazili thought—"rational law" acquired by universal reason (Arabic *'aqliyyāt*; Hebrew *sikhliyot*)—does not stand in dichotomous opposition to its alternative – the "revelational law" (Arabic *sam'iyyāt*; Hebrew *shimi'yot*).

Furthermore, a comparative gaze on medieval thought can teach us another lesson about the distinction between natural and positive law. Commonly, medieval jurisprudential discourses did not approach the two divergent legal conceptions as competing properties (quasi-horizontal confrontation), but rather as variations of laws along a sequential measure (quasi-vertical placements). More precisely, medieval jurisprudential accounts regularly organized legal conceptions, among which were also conceptions of divine law and human law, through hierarchical or chronological measures, rather than articulating them as contesting notions.

Chronological placements of different laws are certainly rooted in eschatological prophetic visions, Apostolic literature, and Patristic literature. But they are not alien to rabbinical thought

19 "The Greco-Roman dichotomy of natural law and positive law became controlling paradigms in the conception of divine law in the West, and its attendant discourses were embraced by the three biblical religions, though in different ways and to a widely varying degrees. But the rabbinic conception was far from extinguished. It is the goal of this book to bring its claims and contours into sharper focus in order to trouble the too-comfortable dichotomies that continue to share the western conversation about law, about the divine, and about what it means for a law to be divine" (Hayes, 7–8).

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press

in the Talmudic literature and beyond.[20] The medieval theologian and jurist Yosef Elbo (1380–1444), for instance, embraces the hierarchical and the chronological sequences of the different kinds of laws and accordingly outlines a historical progress of the civilization initiated with a primitive society that survived by *natural law* (דת טבעית), through a cultivated society that flourished by *conventional law* (דת נימוסית), and a highly developed society being guided by *divine law* (דת אלהית).[21]

Even Thomas Aquinas (1225–1274), who is generally regarded as the West's preeminent theorist of the natural law, did not dichotomize the conceptions of natural law and positive law. Inspired by Platonism, Aristotelianism, and Stoicism, Aquinas's legal theory contains four kinds of laws (*leges*) structured on hierarchical sequence: At the pinnacle is the eternal law (*lex aeterna*), god's law as understood in god's mind. Below that is the divine law (*lex divina*), law given through revelation, and the natural law (*lex naturalis*), defined as natural reasoning that "participates" in the eternal law. Evidently these three laws are superior to the fourth, human law (*lex humana*), but clearly under this construction the different laws are not competing; rather, they are representing a hierarchy of three divine traits: eternity, epiphany, and reason.[22]

Furthermore, the dichotomization of natural law and positive law is not only inconsistent with premodern takes on these categories; it seems to be confused with a different dichotomy that plays a crucial role within the western legal thought, that is the *nomos/physis* distinction. Indeed, the opposition between *nomos* and *physis*, originated in Greek thought, is viewed at times as "the central topos and antithesis of Western thought."[23] But it is neither a hallmark of the realm of law or of the ways historical religions struggled with ideas of divine law. The *nomos/physis* opposition stood for some fundamental aspects of reality and so dominated also, and not less importantly, discourses about the nature of languages and arts. Yet, even among the Greco-Roman legal culture this opposition did not epitomize a dichotomy of natural law and positive law. In fact, modern dichotomization of the natural law and positive law blurs the constructive role that the *nomos/physis* opposition played within the function of the law.

CONCLUDING MEDITATION: BEYOND RECONCILING LAW AND RELIGION

Despite the alleged resemblance, one should not identify the rapidly growing study of law and religion with what I earlier termed the "legal turn in religious studies." Indeed, both trends reflect

20 For example, the *midrash* introduces distinct scholastic conceptions of divine law—law that originated in divine revelation but was taught and studied only very little, and law that is taught by god himself and therefore more likely to remain permanent and stable: "[T]hough I gave you the Torah to study in this world, all too few labor in it. In the world-to-come, however, I Myself shall be teaching it to all Israel, and they will study it and not forget it." *Psikta deRav Kahanh*, 12, 107a; *Tanhuma Buber*, Yitro, 13, 76.

21 "There are three kinds of law, natural, positive and divine. Natural law is the same among all peoples, at all times, and in all places. Conventional law is a law ordered by a wise man or men to suit the place and the time and the nature of the persons who are to be controlled by it . . . . Divine law is one that is ordered by god through a prophet . . . . The purpose of natural law is to repress wrong, to promote right, in order that men may keep away from theft, robbery and murder, that society may be able to exist among men and everyone be safe from wrongdoers and oppressor . . . . The purpose of the positive law is to suppress what is unbecoming and to promote what is becoming . . . . [It] controls human conduct and arranges their affairs with a view to the improvement of human society . . . . The purpose of divine law is to guide men to obtain true happiness, which is spiritual happiness and immortality." Joseph Albo [Yosef Elbo], *Sefer Ha-'Ikkarim: Book of Principles*, trans. Isaac Husik (Philadelphia: Jewish Publication Society of America, 1930), 1:7, 78–79.

22 *Summa Theologica*, 2.91.1–5.

23 Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1990).

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press

revisionist impulses against convictions that are intrinsic to ideas of Enlightenment and Reformation, yet these two intellectual projects significantly differ.

The academic study of law and religion encompasses two orientations: regulatory concerns about religious liberties, behaviors, and communal life and theoretical interest in the dialectical interconnections, interplays, and interdependencies between law and religion as normative systems that promise order and justice. In its essence, the study of law and religion exhausts a protest against the separateness of law and religion by emphasizing the shared elements of law and religion,[24] the religious background of the law,[25] and the legal dimensions of religion.[26] Nevertheless, the expressive slogan of the study of law and religion—"law in religion and religion in law"—beyond being a popularized catchphrase enfolds a historiosophic perspective and ideological agenda of re-situating, or re-approximating, law and religion.[27]

While sharing the denial of secularized and rationalized constructions of "law" and "religion," the two books discussed above represent a different academic goal and endeavor, which goes further than rearticulating the proximity of law and religion. In a very serious respect, they both demonstrate a critical expansion of modern jurisprudential discourse by stretching insights and theoretical conceptions apart from their modern contexts. As representors of the "legal turn in religious studies" they both exhibit the benefits of reading anew historical sources and religious phenomena detached from modern conceptions, categories, conditions, and agendas. The deep demonstrative analysis of the courtroom imagery and its role in constituting religious consciousness reveals neglected aspects of the religious imagination in the shaping of theology, morality, and practical affairs. Likewise, Hayes's brilliant accounts reveal the important role that theoretical reflection has played in the shaping of religious identities and theologies in ancient Jewish circles.

24 For example, ritual, tradition, authority and sovereignty, symbols, senses of sanctity, hermeneutics, loyalty, discipline.

25 Either the view of religions as the historical predecessors and origins of legal systems and values, or as the view of modern statist polities and legalities as metamorphosis of premodern religious patterns.

26 With strong reference to the "economy of religious differences" that distinguishes between faith and law, law-based and love-based religions, and the like.

27 One of the most predominant founding fathers of the study of law and religion, Harold J. Berman (1918–2007), explicitly articulated the presumptions of this field in relation to views about the "integrity crisis" of the Western culture that would be cured by reuniting "law" and "religion"—"a recognition of the dialectical interdependence of law and religion leads us … in the direction of fundamental social, economic and political change." Harold J. Berman, *The Interaction of Law and Religion* (New York: Abingdon Press, 1974), 40. In the contexts of Jewish and Islamic traditions, the reconciliation of law and religion also manifests a revival of a presumed primal unity reflected by the same token—the Hebrew דת (*dat*) and the Quranic Arabic دين (*din*)—that denotes concurrently both law and religion.

https://doi.org/10.1017/jlr.2017.23 Published online by Cambridge University Press