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LAW AND HERMENEUTICS IN RABBINIC JURISPRUDENCE: A MAIMONIDEAN PERSPECTIVE

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SUMMARY:
... Jewish jurisprudence is the oldest evolving legal system in history. ... The idea of writing as creation reflects the rabbinic concept of exegesis. ... Whereas in Western legal tradition, the jurist supplements the written legislation by appealing to the "unwritten **law,**" in the rabbinic system, the rabbis supplemented the oral **law** by appealing to the Scripture. Indeed, this Article will show that even such basic concepts as "sovereignty" and "authority" are substantially different in rabbinic jurisprudence than in the Western legal tradition. ... "**Law**" in Jewish tradition is a radical concept with no parallel in legal thought. ... According to rabbinic tradition, the covenant contains six hundred and thirteen mivot or "articles" regulating all of Jewish life. ... Significantly, the American legal system has not yet developed an equivalent to the talmudic tractate Horayot, nor can it point to an American counterpart of a Jewish king responding to a summons of the Supreme Court. ... Indeed, Judaism owes its very existence to exegesis. ... Thus, rabbinic exegesis was instrumental in revolutionizing the concept of religion throughout much of the civilized world. ... The rabbinic doctrine of derashah is consistent with the principle "lo bashamayyim hi." ... Rabbinic exegesis is the creation of the rabbis, rather than the stipulation of the text. ...

TEXT:
[*1657]

Jewish jurisprudence is the oldest evolving legal system in history. It has existed since pre-biblical times, and continues in our own day both in the modern State of Israel and throughout the diaspora. Rabbinic tradition stands at the center of this system. This tradition perceives itself as the authoritative foundation and the historical bond linking the Jewish people from the dawn of time to the present. The rabbinic tradition functions as an apparatus that processes and catalogues data and opinions facilitating juridical interpretations and decisions. This Article examines that apparatus by exploring its underlying concepts of **law** and hermeneutics.

Contemporary notions of rabbinic jurisprudence have been affected by the general trend of hellenizing Jewish

literature and ideas. Rabbinic texts are ordinarily examined through hierarchical distinctions and categories peculiar to Western classical studies. The basic assumption underlying this methodology is that the rabbinic truth is essentially platonic. As such the purpose of rabbinic exegesis is to "uncover" the text and reveal its "true meaning." This method reflects the scholastic view that the "literal sense" of the Scripture is what the author intended. [1] Once the "intention" of the author has been determined, the text itself becomes insignificant - a "metaphor" marginal to its "true meaning." The object of interpretation thus becomes displacement of the text. This view is intrinsic to Western tradition, in general, and Christianity, in particular, where writing is displaced on behalf of logocentrism. The classic example of this type of hermeneutics is the Christian Scripture interpreting, and thereby displacing, the Hebrew Scripture. It is worth noting that John's logos [2] (word) is "unwritable," and therefore anti-book and anti-text. By way of contrast, the logos of Philo and the memra (word) of the [*1658] rabbis do not exclude writing; writing is creation itself. [3]

The idea of writing as creation reflects the rabbinic concept of exegesis. It generates rather than discovers, meaning. Commenting on the verse, "and I shall give you the tablets of stone, and the **law** and the commandment which I wrote to instruct them," [4] the rabbis taught as follows: " "the tablets of stone' - this is the Miqra (Scripture); "the **law**' - this is the Mishnah." [5] If the text is like stone, then exegesis is the "a blow of a hammer," giving forth various sparks. Like the stone, the text itself remains inviolable and absolute, whereas the explanations and commentaries flee like sparks. In explaining the polysemic character of the Scripture, the rabbis stated, "Just as each blow of a hammer strikes forth many sparks, a single verse unfolds into many senses." [6] Exegesis serves to reinforce and supplement the oral tradition; it can never be the explanation of a text. In contemporary terms, this means that the rabbis viewed the text as a semiological composition whose unit, the word, is a sign which is not subject to definition; it is either recognized or not. As Emile Benveniste shows, "in semiology there is no need to define what a sign signifies. For a sign to exist, it is necessary and sufficient that it should be received and that it should be related somehow to other signs." [7] At the semiological level, whether or not a sign signifies is a matter of recognition, not interpretation. "Does the entity in question signify?" [8] The answer must be an unequivocal yes or no. "If it is yes, everything was said, and it is registered; if it is no, it is rejected, and also everything was said." [9] Exegesis pertains to the semantic aspect of the word, where meaning is generated by establishing new connections. [10]

Out of this background information, two fundamental points follow. First, rabbinic exegesis is not platonic. From this perspective it would be faulty to apply to rabbinic ideas and institutions the theological notions associated with Christian hermeneutics. Second, there is no basis for the assumption that our hellenistic views are indeed universal. [*1659] In examining rabbinic jurisprudence it is unwarranted to assume that rabbinic ideas and institutions are identical to those found in Western tradition. Furthermore, without acknowledging the "differences," similarities between these separate systems are meaningless. Conceptually, a proper methodology for the study of rabbinics, in general, and the Jewish legal system, in particular, will require a radical revision of standard hellenistic assumptions.

There are historical reasons requiring such a radical revision. Due to the peculiar circumstances in which rabbinic jurisprudence developed, it is structurally unique. To understand the substance and procedures of rabbinic jurisprudence, one need not draw parallels with similar **laws** and institutions found in other legal systems, which ignore the specific character and function of the rabbinic method. For example, one might compare the rabbinic concept of an unwritten **law** with that of the ancient Greeks. The parallel, however, is trivial unless one also recognizes that, within each system, the unwritten **law** had a radically different design. Whereas in Western legal tradition, the jurist supplements the written legislation by appealing to the "unwritten **law,**" in the rabbinic system, the rabbis supplemented the oral **law** by appealing to the Scripture. [11] Indeed, this Article will show that even such basic concepts as "sovereignty" and "authority" are substantially different in rabbinic jurisprudence than in the Western legal tradition.

The major thrust of this Article is to examine the concepts of "**law**" and "hermeneutics" in rabbinic tradition.

This investigation has followed the legal tradition of Maimonides. [12] Rabbinic literature, in general, and the Talmud, in particular, have been interpreted by various authorities during medieval times. Yet this author chooses to base this study on Maimonidean tradition for three reasons. First, historically, Maimonides' understanding of rabbinic jurisprudence is closely associated with the intellectual tradition of the Geonim. [13] The academies of the Geonim were organically connected with the actual schools in which the original talmudic literature was compiled and taught. Second, structurally, Maimonides' Mishneh Torah is the only code ever produced comprising the entire rabbinic legal system. Therefore, through Maimonides' work, a particular legal theory can [*1660] be tested against all other elements of the system. Finally, conceptually, Maimonides' legal system affords a comprehensive view of the rabbinic legal system according to juridical rather than theological or metaphysical principles. This last point is essential in characterizing the legal mind of the rabbis in contemporary legal terms.

I. **Law** in Rabbinic Jurisprudence

A. The Nomocratic Society

"**Law**" in Jewish tradition is a radical concept with no parallel in legal thought. In contradistinction with other democratic systems, where the demos or "people," as an absolute empirical object, are the ultimate source of authority, the people of Israel recognized the absolute authority of the **law.** The people acted as the depository of that **law.** [14] Thus, Judaism may be properly described as a "nomocratic" system. The "**Law,**" referred to as torah in Hebrew, nomos in Greek, lex in Latin, and shari"a in Arabic, is the sole ground of authority. Again, whereas in other legal systems, **law** is the effect of authority, in Judaism authority is the effect of the **law.** [15] Therefore, all forms of [*1661] authority are limited by the **law.**

Jewish **law** is the result of a bilateral covenant contracted between God and the Jewish people at the foot of Mount Sinai. According to rabbinic tradition, the covenant contains six hundred and thirteen mivot or "articles" regulating all of Jewish life. [16] The covenant is both "divine" and "eternal." Since it is "divine," it requires no promulgation. It binds the contracting parties at all times and in all societies. This principle is known as torah min hashamayyim expressing the tenet that the "**Law** is divine." Rather than a theological doctrine, this is a fundamental legal principle postulating that the **law** requires no promulgation or earthly authority to sanction it. From this perspective, God is the consequence, not the cause, of the **law.** This radical idea is implied in a rabbinic doctrine, widely held throughout the Jewish world, whereby the first verse to be taught to a child is "Moses has commanded the **Law** to us, it is the legacy of the congregation of Jacob." [17] Only afterwards is the child to be taught "Hear O Israel, the Lord our God, the Lord is One." [18] As it were, belief in God is subsequent to, and a result of, belief in the Torah.

This radical idea was codified in Maimonides' Mishneh Torah. Belief in God is categorized as a mivah or article of the covenant. [19] Orobio de Castro [20] pointed out that since belief in God is a consequence of the **law,** disbelief in the **law** implies disbelief in God. [21] From this perspective, there is no distinction between rejecting the **law** and atheism. [22] Within this specific context, the ultimate grounds [*1662] for belief in God are legal, not theological or metaphysical. [23] Indeed, by codifying the belief in God as a mivah, [24] Maimonides was stipulating that that belief is a covenantal or a legal obligation, and not a theological doctrine. [25]

Since the ultimate recognition of God is the **law,** and not some metaphysical notion, were God to contravene any of the elements of the **law,** He would not be obeyed. Accordingly, the Talmud identifies the eternity of the **law** with the biblical principle "lo bashamayim hi" ("The **Law** is not in heaven") by explaining that the divine lawgiver may no longer promulgate new **laws** or reinterpret the **laws** of the covenant. [26] Indeed, the **law** cannot be abrogated even by a divine agency. Since the covenant was not imposed but negotiated by the two parties - God and Israel - neither may abrogate any of its terms.

The notion that God is subject to the **law,** and that He cannot abrogate it, leads to two of the most significant aspects of rabbinic jurisprudence: the exclusion of "violence" and, its ensuing consequence, equality before the **law.** Whereas the pagan mind conceives of legal relationships in hierarchical terms, determined by an initial act of "violence," the Jewish bilateral covenant implies the absolute horizontality of the contractual parties. Authority, whether political, ecclesiastical, or judicial, is the effect, not the source, of the **law.** Conceptually, there is no difference between the inauguration of a system by an original act of violence, or the abrogation of an existent order. Indeed, all revolutionary systems are inaugurated by a two-directional act of violence, simultaneously abrogating the old order and establishing the new order. Denial of the possibility of abrogating the **law** constitutes a formal rejection of the pagan idea that "violence" stands at the very basis of all "legitimate" political and judicial systems. [27] In the pagan mind, **law** and authority are, necessarily, the effect of "a monopoly of violence." [28]

We may now have a better understanding of the Jewish and Christian views about the abrogation of the **law.** The Christian claim that the **law** was abrogated by a "new," and hence more "powerful" [*1663] order, rests precisely on the belief that "**law**" is structurally connected with "violence," and is therefore antithetical to "love." [29] Ironically, by linking this "love" to an inaugurating act of abrogation, Christian love became formally and inextricably connected with "violence."

B. Individual Autonomy and the Jewish Constitution

Reflecting the pagan idea that "violence" stands as the basis of the legal and political systems of a nation, John Austin views "**law**" as a command expressing the will of the political superior, and thus the effect of authority. The magistrates and institutions issuing **laws** and legal decisions derive their authority from the sovereign. Since sovereignty cannot be limited, the sovereign is not subject to the **law.** Thus, the sovereign is the basis of **law,** not its effect. [30] Herbert Marcuse referred to this domination of the people by the ruling authorities, when he remarked:

The only authentic alternative and negation of dictatorship (with respect to this question) would be a society in which "the people" have become autonomous individuals, freed from the repressive requirements of a struggle for existence in the interest of domination, and as such human beings choosing their government and determining their life. Such a society does not yet exist anywhere. In the meantime, the question must be treated in abstracto - abstraction, not from the historical possibilities, but from the realities of the prevailing societies. [31]

Autonomy is a fundamental Jewish concept. It means self-government according to one's own **laws** and criteria. A society is autonomous when the ordering of human conduct and the adjustment of human relations are relative to its own criteria and interest. Thus, it presupposes a **law** independent of the political and religious bureaucracies and recognized by all as the sole source of authority. Unlike freedom (ofesh) which is a negative concept with negative connotations (for example, freedom from hunger or from oppression), autonomy (erut) is the affirmation of certain inalienable rights contracted with God. The function of the **law** is to guarantee both public and individual autonomy. Without the **law,** autonomy is not possible. As the rabbis taught, "no one is autonomous (ben orin) unless he is engaged in the study of the Torah." [32] Since the Jew is an autonomous [*1664] entity, he owes allegiance to the **law,** rather than to the sovereign or body politic. Every morning the Jew celebrates his autonomy by thanking the Lord both for not being born a "gentile" and for not being born a "slave." [33]

Jewish **law** defines the responsibilities and authority of its political, ecclesiastical, and judicial institutions. When any of these institutions fail to comply with it, they lose their legitimacy. Hellenistic Jewish writers

referred to the Torah as the "constitution" of the Jewish people. Indeed, Philo viewed the Pentateuch as "the ideal Constitution." [34] In this respect, the Pentateuch is the basis of all authority: political, ecclesiastical, and juridical. As opposed to the role of the sovereign presented in the works of Hobbes and Spinoza, [35] Judaism records the sovereign as subject to the **law.** Quoting a Greek proverb, "That for the king the **law** is not written," a rabbi in the Talmud commented as follows: "Ordinarily, when a human king issues a decree, if he chooses, he obeys it, otherwise only others obey it; but when the Holy One, blessed be He, issues a decree, He is the first to obey it." [36] The rabbinic position on this matter coincides with separation of kingship and divinity in ancient Israel. Addressing this fundamental point, a distinguished historian remarked: "In the light of Egyptian, and even Mesopotamian, kingship, that of the Hebrews lacks sanctity. The relation between the Hebrew monarch and his people was as nearly secular as is possible in a society wherein religion is a living force." [37] The king's secular role in ancient Israel led to what may be properly described as the "separation of powers." Unlike pagan society where the monarch is the head of the Church, the Hebrew king was not the head of the sanctuary or directly involved with the temple rituals. Professor Abraham Joshua Heschel notes: "In Israel, the king was not a priest. He was sanctified by his anointing, appointed by God; in his person centered the hopes of the people, yet sacerdotal functions were regarded as the heritage of the tribe of [*1665] Levi." [38] When, occasionally, some kings wanted to arrogate for themselves such prerogatives, they were strongly resisted. For example, Heschel continues, "When Uzziah entered the Temple to burn incense on the altar ... he was told by the high priest, "it is not for you, Uzziah, to burn incense to the Lord, but for the priests, the sons of Aaron, who are consecrated to burn incense. Go out of the sanctuary ....' " [39] Biblical prophecy is a direct consequence of the idea that the monarch and other dignitaries are not the source of authority. When the biblical prophet, an individual without an office, admonished the king, the priest, and the judge in the name of the **law,** he was affirming the principle that these authorities are subject to a **law** transcending their specific institutions and authority. Heschel makes this point succinctly:

Of paramount importance in the history of Israel was the freedom and independence enjoyed by the prophets, their ability to upbraid the kings and princes for their sins. From the beginning of the monarchy, the king was at any moment in peril of rebuke, even of rejection, by the prophets, who reminded him that the king's sovereignty was not unlimited, that over the king's mishpat stood the mishpat of the Lord - an idea that frequently clashed with the exigencies of government. [40]

Unprecedented in history, Jewish prophets frequently denounced corrupt kings and political officers. When confronting the authorities in the name of the **Law,** the biblical prophet "was not a primus inter pares, first among his peers. By his very claim, his was the voice of supreme authority. His statements not only rivaled the decisions of the king and the counsel of the priest, he defied and even condemned their words and deeds." [41]

In this connection it is important to note that the Pentateuch stipulates that the kohen mashia (the High Priest) representing the ecclesiastical authority, [42] 'ene haqahal (the judiciary) representing the people, [43] and the nasi (ruler), representing the political establishment, [44] are subject to judicial error and must bring an expiatory sacrifice. [45] The principle that the highest authorities entrusted with the [*1666] interpretation and implementation of the **law** are capable of judicial error presupposes a totally objective **law** independent of governmental bureaucracies. An entire talmudic tractate, Horayot, deals with the niceties of this principle. [46]

C. The Autonomy of the **Law**

Belief in the autonomous status of the **law** underlies much of biblical and post-biblical Jewish history. Throughout the ages, the political, ecclesiastical, and judicial authorities were challenged by the people in the name of the **law.**

In the Bible, the episode of Ahab and Naboth illustrates how even tyrants were expected to recognize the absolute authority of the **law** in ancient Israel. When Naboth refused to sell his vineyard, Ahab felt despair,

not knowing what to do. His pagan queen, Jezebel, the daughter of a Syrian King, suggested trumped up charges against Naboth. Yet even during that notorious incident, judicial procedure was meticulously observed. More importantly, the episode was denounced for generations as a most heinous crime. [47] Talmudic sources also underscore that the monarch may not transgress the **law.** The rabbis reported a confrontation between Simeon ben Shetah [48] and a Jewish king, who was summoned to appear in court and hear charges, just like any other person. [49] The rabbinic doctrine of malkhut shamayyim (kingdom of heaven), [50] usually understood in theological terms, is really a political concept meaning that the sovereignty (the kingdom) of the **law** (of heaven) is supreme. From this doctrine, two legal principles emerge. First, there is the concept of "en shalia lidvar 'averah" ("there cannot be a fiduciary relation in matters involving a transgression"). Second, there is the maxim of "divre harav vedivre talmid divre mi shom'im" ("the orders of a superior authority and the orders of an inferior authority, whose orders shall we obey?"). [51] The first statement asserts that an individual is responsible [*1667] for his own actions, and cannot claim that he was acting as an agent for someone else. The second statement conveys the principle that there can be no legal duty to act on behalf of another person in illegal matters. Neither the king nor any other authority may be obeyed in matters involving the breaking of the **law.** [52]

These standards apply to the ecclesiastical authorities as well. They, too, are under the absolute mandate of the **law.** When acting outside the confines of the **law,** the priesthood has no authority. In the Bible, the conflict between Amos and the high priest Amaziah, illustrates this principle. [53] The story depicts how Amos, a common man who held no religious office, challenged the authority of the high priest in the royal sanctuary. Even though the priesthood enjoyed an eminent status, nontheless it was subject to the **law,** and had to be be measured by it. [54] The Talmud describes a similar incident during the Second Temple period in Jerusalem. The rabbis reported a clash between the king, who was also a high priest, but who had deviated from prescribed ritual, and the people. [55] Josephus described this incident as follows:

As for Alexander, his own people revolted against him - for the nation was aroused against him - at the celebration of the festival, and as he stood beside the altar and was about to sacrifice, they pelted him with citrons, it being a custom among the Jews that at the festival of Tabernacles everyone holds wands made of palm branches and citrons - these we have described elsewhere; and they added insult to injury by saying that he was descended from captives and was unfit to hold office and to sacrifice; and being enraged at this, he killed some six thousand of them, and also placed a wooden barrier about the altar and the temple as far as the coping (of the court) which the priests alone were permitted to enter, and by this means blocked the people's way to him. He also maintained foreign troops of Pisidians and Cilicians, for he could not use Syrians, being at war with them. [56]

Judicial authority as well must follow the **law.** If the Supreme Court of Israel, or a lower court, issues a decision contrary to the **law,** [*1668] it is not to be obeyed. [57] Maimonides codified the rule that if the proper Jewish authorities had appointed an unqualified person as a judge, that appointment would be worthless. [58] As to individuals who were appointed as judges because of money, the rabbis taught:

Rabbi Mane would deprecate those who were appointed because of money. Rabbi Amme applied to them the verse "Gods of silver and gods of gold do not make for yourselves." Rabbi Joshia said, his talli (mantle) is to be regarded as the backstrap of a donkey. Rabbi Ashyan said: Whoever is appointed because of money, one cannot stand up in reverence before him, and one cannot call him "Rabbi," and his mantle is to be regarded as the backstrap of a donkey. Rabbi Ze'ira and a rabbi were seated. One of those who was appointed because of money passed before them. Said that seated rabbi to Rabbi Ze'ira: Let us pretend that we are studying, so that we would not need to stand up before him. [59]

In the matter of incompetent judges duly appointed by the Exilarch, Hai Gaon [60] issued the following decision:

Concerning your query about judges that impound the beds of the poor and other objects not in accordance to the **law** of the Torah, and consequently the creditors come and rob their houses and loot their beds and utensils which cannot be legally impounded, and you have no power to constrain them. Let the spirit of those judges be accursed! They are the judges of Sodom. Robbers and Thieves! Concerning them it is written: "You have looted the vineyard, the loot from the poor is in their houses." Therefore, you must disseminate the word among all your neighbors and nearby places, and disgrace them and remove them from office, since they do not care about the Torah and the words of our Rabbis, of blessed memory. And you, who know the **law** of the Torah and Rabbinic statutes, organize, take council, deliberate, and bring forth from among you God-fearing men and scholars who care for the honor of the Torah, and appoint them over you. You should have no second thoughts about this matter. [61]

Political rulings are also not to be obeyed if they violate the **law.** The same principle was applied to the political authorities. In a decision of the Geonim it was concluded:

A king, governor, or tax-collector who sends agents to the community to excommunicate for his own private needs and endeavors, [*1669] either to punish or to seize Jewish money - and it is impossible not to excommunicate because of his coercion. All excommunications that are issued by him are worthless, and no one should pay any attention to them. In the same fashion, if an Israelite who had deposited money with a friend, and he was denounced, and the king ordered that he who received the deposit should be excommunicated, and the confidant does not want to disclose the whereabouts of the money except to the heirs as required by the **law** in order to pay that is, the debts incurred by the deceased, then blessing shall descend on him, and the baseless curse will not come! No one should heed to that ban and excommunication. And we must acknowledge him the confidant for the good that he did, and bless him because he persisted in his faithfulness, and he is compassionate with the heirs. Concerning this man it is written, "My eyes are on the faithful of the earth." [62]

In short, throughout its history, Judaism has fastened to the principle that all forms of authority must be grounded in the **law.** The undesirability of assimilating with other political, religious, or legal systems is a corollary of having rejected the notion that authority is the effect of power, that is, "violence."

D. Exile: Sovereignty Without Territory

In its barest form, the Exile (galut) is a political theory stemming from the Jewish concept of **law.** It means that the Jewish nation was not dissolved with the territorial loss of the land of Israel. This claim rests on the principle that Jewish sovereignty is not predicated on the control of a particular geographical area, but on the **law** establishing the internal legal, religious, and cultural institutions governing the Jewish people. Contrary to pagan thinking, whereby the right of the sword, the merum imperium, or absolute power - the "monopoly of violence," in the language of Derrida - underlies the right for civil and criminal administration of justice, the **law** is the only basis of authority in Judaism. Therefore, although vanquished in war, the Jewish nation was not dissolved.

With the destruction of the Temple in 70 C.E. and the subsequent exile, the Jewish people politically

redefined their national sovereignty. Henceforth, Jews identified themselves and were recognized by the host country as members of "the Jewish nation in Exile." [63] Accordingly, the admission of Jews into a new country was not merely a matter of freedom of religion, but rather, of reorganizing a [*1670] juridically autonomous entity. For example, when the first group of Jews sought permission to settle in New Amsterdam in January 1665, the petition was made in the name of the "Jewish nation." [64] Whatever Governor Peter Stuyvesant's personal feelings concerning Jews and Judaism may have been, his refusal to grant them permission was not simply a question of religious freedom. The situation of the Jews, believing themselves to be a legal entity autonomous from the state, raised highly complex issues. A Christian sect might claim to be a separate religious group, but not a separate national entity. So while the government may have been willing to grant religious freedom to its subjects, recognizing Judaism's political and judicial rights as a nation involved not only respect for legal pluralism and non-state legal orders, but a redefinition of "national sovereignty." Accepting the Jews would have been an implicit acknowledgment of political entities existing within the state that are not subsidiary organs of the national polity. [65] The same problem reemerged within the American legal system when it came to defining the legal status of native Americans. It is a remarkable fact that the United States authorities awarded to the American Indians an analogous status to that of the early Jewish settlers, and recognized them as separate "nations." [66]

E. The Jewish "Constitution" versus the United States Constitution

In concluding the discussion on the place of **law** in rabbinic jurisprudence, this author wishes to highlight the differences between Jewish **law** as a constitution and the United States Constituion. First, Jewish **law** does not require promulgation or the sanction of authority. The **law** is valid even when the Jewish people no longer enjoy national territory. Accordingly, there could be a Jewish nation without territory or any political and judicial institutions essential for the government of a people. The Jewish status of galut, as a nation in "Exile," is the historical embodiment of the aforementioned principle. Although bereft of all political and national institutions, the Jewish people recognize the "**Law,**" and not the host country, as their supreme authority. As a correlative principle, the messianic ideal asserts that eventually a perfect Jewish state will be established in full accordance with the **Law.** Therefore, by definition, all political allegiance to other states or systems are "temporary." The Jewish claim [*1671] to the Holy Land is based, precisely, on the premise that because of the **law,** the Jewish nation was not dissolved. [67]

Second, the Supreme Court of Israel is subject to judicial error, for which it must bring an expiatory offering. The Supreme Court of the United States, although occasionally "erroneous," in the words of Lincoln, can never be subject to judicial error. [68] Even in the rare instance where a Supreme Court decision is overruled, it is always the Supreme Court which makes the revision. As Chief Justice Marshall declared, it "is emphatically the province and duty of the judicial department to say what the **law** is." [69] Similar to Jewish **law,** there are, of course, learned analyses regarding the precise authority of the Supreme Court's exposition of constitutional **law.** Some, such as the former Attorney General of the United States, Edwin Meese III, distinguish "between the Constitution and constitutional **law.**" [70] There is also disagreement about the exclusive authority of the Court's interpretation of the Constitution, particularly in regard to the other branches of government. [71] At any rate, only when examining the Supreme Court's adjudications from a non-judicial perspective (political, public morality, etc.) could they be classified as "judicial mistakes." There can be no "mistakes" when these decisions are examined from a strict judicial perspective. [72] Despite the rhetoric and background noise surrounding some Supreme Court constitutional decisions, for all legal and practical purposes, the Constitution is what the Supreme Court declares it to be.

Third, in Judaism, the **law** is binding on all forms of authority. In the United States Constitution, there is separation of church and state. [73] Therefore no parallel can be drawn between the American legal system and the Jewish principle that the highest ecclesiastical authorities are subject to judicial error. The area where proper comparison may be made is in the status of the civil sovereign. [74] Significantly, the American legal

system has not yet developed an equivalent [*1672] to the talmudic tractate Horayot, nor can it point to an American counterpart of a Jewish king responding to a summons of the Supreme Court.

II. **Hermeneutics in Rabbinic Jurisprudence**

A. The Place of Hermeneutics Within Rabbinic Jurisprudence

Rabbinic institutions have three bases of authority: (1) the transmission of authentic traditions stemming from Sinai; (2) the promulgation of new statutes and legislation designed to serve as "a fence around the **law**"; and (3) the right to interpret Scripture. [75] The authority for the first two is a consequence of the third. Scriptural grounds for the transmission of the oral **law** and the enactment of legislation are based on canonical exegesis (midrash, derashah).

Indeed, Judaism owes its very existence to exegesis. Through exegesis, Judaism was able to grow and develop in the most adverse and diverse circumstances, without having to lose its connection with Scripture. Intimately connected with exegesis are the dinim mufla'im (undefined **laws** or casus omissus). There is purposeful ambiguity in the **Law** designed to allow for adaptability and development. Judaism recognizes that there are terms in the Scripture which were not defined by oral tradition, and thus these terms can be defined exclusively by the judiciary. Concerning the right of the judiciary to define these terms, the rabbis taught that the decision of the Supreme Court cannot be challenged "even when they tell you that your left is your right and your right is your left." [76]

Most talmudic debates regarding biblical exegesis revolve around the dinim mufla'im. [77] By applying exegesis to the undefined terms of a **law,** the judiciary was able to accommodate the **law** to the new developments and circumstances. A glaring example is the definition of "ayin taat ayin" ("an eye in place of an eye"), [78] where taat is interpreted to mean "monetary compensation." [79] Occasionally, **laws** that were no longer compatible with public morality were restricted by exegesis, making their literal application impossible. One such **law** concerns the right of parents to have a rebellious son put to death by [*1673] the court. Another example of exegesis redefining the **law** is the requirement that no criminal punishment can be imposed unless the criminal has been formally forewarned by the witness and has acknowledged their warning. [80]

Hermeneutics became more important with the loss of national autonomy and institutions after the destruction of the Temple in 70 C.E. Without exegesis, Judaism would have had to either break with the Scripture, or reduce its growth to the sociopolitical and religious institutions of biblical Israel. In either case, it would have meant the end of the Jewish people as a distinct biblical religion. [81] The issue of serving God through sacrifices accentuates the role exegesis and hermeneutics played in post-Temple Judaism. After the destruction of the Temple and the dispersion of the Jews throughout the diaspora, sacramental sacrifices were abolished. Without exegesis, the alternatives would have been fatal for Judaism. One alternative would be to institute minor temples outside Zion - as was done by the Elephantine community and some Alexandrian Jews - thus breaking with the biblical ideal of a centralized temple in Jerusalem. The other approach would be to eliminate the religious services altogether - just as the **laws** of purity and the agricultural tithes outside the land of Israel were rescinded after the destruction of the Temple. In either case, there would have been an end to both the Jewish people and the Jewish religion.

The quandary was resolved through hermeneutics. The rabbis interpreted the expression "ul'ovdo bekhol levavkhem" ("and to serve Him with all your heart") [82] to mean that in addition to offering sacrifices, another way to worship God is through the service of the heart - that is, prayers. [83] In Scripture, "avodah, or "service," to God always involves sacramental sacrifices. By focusing on the "service-heart" connection, the Rabbis were able to sanction a new form of worship, whereby the prayers would replace (not displace!) the sacramental sacrifices. This fundamental tenet resulted in the Rabbinic principle of "tefillot keneged temidim

tiqqenum" ("the prayers were instituted as parallels to the daily-sacrifices"). [84] The substitution of the Temple by the synagogue and the priest by the pious sage were a further consequence of this exegetical formulation. This effect totally revolutionized the history of religion. Again, it should be emphasized [*1674] that the transformation was effected not by the rabbis breaking away with the Scripture but by basing the new method on Scriptural exegesis. It is interesting to note that both the church and the mosque subsequently evolved from the synagogue and not the Temple. Thus, rabbinic exegesis was instrumental in revolutionizing the concept of religion throughout much of the civilized world.

B. Reading as Writing: Derashah and the Collusion Reader-Text

There are two types of exegesis. One is platonic, while the other is stoic. [85] Platonic exegesis assumes a theory, postulating a priori knowledge of the "ideal Forms." As Julia Kristeva explains, "it seems that one does not interpret something outside theory but rather that theory harbors its objects within its own logic." [86] This methodology is consistent with the principle that authority both antecede, and be independent of, the text. The ultimate grounds of interpretation is the theory, not the text. Early Christian exegesis is Platonic. In Pauline terminology, "the spirit" supercedes and displaces the "letter" of the Scripture. It is because the interpreters incarnate the theory that they have authority to expound the text. As with the Greek a-letheia, interpretation "uncovers" the "ideal Forms" in the text. The agenda of the interpreter is to "uncover" the text and "discover" the ideal forms; more precisely, his agenda is to project those forms onto the text. In this way, interpretation displaces the text. Accordingly, in Christian tradition the New Testament displaces the Hebrew Scripture precisely by being its "true" interpretation.

For the rabbis, akin to the Stoics, interpretation involves "making connections" in the text as with the connection "service-heart" mentioned above. [87] The interpretation, however, can never displace the pesha (the manifest tenor) of the text. Thus, the rabbinic principle provides "en miqra yoe midai peshuo" ("a verse which was the object of exegesis does not lose its manifest tenor"). [88] Accordingly, the interpretation is surveyed in light of the text and not the other way around. This methodology is consistent with the premise that interpreters have authority because they authentically interpreted the [*1675] text; an interpretation is not "authoritative" simply because it was issued by people with "authority."

The rabbis of the Talmud and the Midrash did not set up rules to decide between different hermeneutical options, or to distinguish between legitimate and illegitimate exegesis. Rabbinic sources view all forms of hermeneutics as legitimate. Even the thirteen rules of hermeneutics (shelosh "esreh middot shehatorah nidreshet) are sufficiently broad to allow for all types of interpretations and associations. Since the rabbis regarded the entire Scripture as a collection of semiotic symbols, every aspect of the text could be "connected" through derashah with one another. In rabbinic literature, even those elements void of lexical meaning, like defective and full spellings, particles, prepositions, calligraphic ornamentation, and even the shape of letters, may be "connected" and acquire "significance" through canonical exegesis. [89] According to the rabbis, Moses discovered God "tying up" - in the sense of making connections - "the calligraphic ornamentations" of the Torah. [90] By means of derashah the reader does not discover, but generates meaning.

One of the most important aspects of the derashah is that the text is interpreted independently of the author's intention. Notions of "original intention" are Platonic. According to the "originalist" perception, the judiciary "discovers" the "true" or "real Form" lying somewhere in the mind of the legislator. The rabbinic doctrine of derashah is consistent with the principle "lo bashamayyim hi." [91] What was ratified at the covenant on Sinai was not the "intention" of the lawgiver, but the actual **law,** as understood by those who received it. [92] It follows that the task of the judiciary is not to recapture the "original intent" of the legislator, but to apply the text of the **law** to the situation at hand, by making innovative connections, generating, thereby, fresh meaning and understanding of the **law.** [93]

The rabbis approached the text as if it were a semantic composition. Exegesis borders into the aesthetic. Like in music and painting, there is a complete collusion between the exegete/artist and the elements that were incorporated into the derashah/artistic composition. [*1676] The elements used in creating the artistic composition lose their original value in isolation (that is, before they were "connected"), acquiring a fresh significance in the "composition" of the derashah. The total significance of the derashah-unit is not the sum of the individual significance of the parts. For instance, in the above mentioned derashah, the isolated meaning of the term "avodah and the term lev do not add up to tefillah (prayer). It is through the construction of the derashah-unit "prayer" that the semiological lexical meaning of the terms is transformed into a semantic composition. Accordingly, whereas at the peshat level (sense), S = (A)+(B), at the derashah level, S = (A)+(B) + n.

Because a derashah is a semantic composition not reducible to its constitutive elements, it is accepted or rejected by the same process that one accepts or rejects any artistic composition. At the level of derashah, there is no "objective" text; the meaning of a unit is not reduced to the sum of its elements in isolation. Consequently, the rabbis taught, "One cannot raise an objection against a homily." [94] At the level of derashah, there is a complete collusion between the reader and the text. The "connections" made in the text are the creative composition of the reader functioning as an author. [95] To underscore this point, the Geonim and Maimonides postulated the principle that everything stemming from rabbinic exegesis is not a scriptural (deorayta) but a rabbinic (derabbanan) obligation. Rabbinic exegesis is the creation of the rabbis, rather than the stipulation of the text. [96] This position parallels the distinction made by contemporary jurists "between the Constitution and constitutional **law.**" [97]

There are however, definite limits to the reader-text collusion. Certain types of exegeses are regarded as illegitimate and offensive. Among those who have forfeited the World-to-Come and fellowship with the people of Israel are those engaging in "derashot shel dofi" ("exposition of faltering interpretations"). [98] This category includes [*1677] all the Gnostic, Christological, and antinomial exegeses.

Our focus now is to examine the perimeters of readerly collusion. Specifically, by which criterion did the rabbis distinguish between a legitimate derashah that may be accepted, and a Christological or antinomial derashah, that must be rejected as offensive and illegitimate?

C. Subverting the Text: The Limits of Readerly Collusion

The perimeters and limits of derashah and reader-text collusion are those of all judicial interpretation. In Judaism, the Torah is principally the **Law** of Israel. Indeed, the rabbinic institution of derashah is modeled on the judicial principle whereby a court of justice is authorized to determine the sense of and interpret all contracts, statutes, and written documents under its jurisdiction. Now, since the Torah was given to the Jewish people, it follows that they have the right to interpret it and determine its meaning in the same fashion as does a judicial court. [99] The most basic principle governing judicial interpretations is that exegesis cannot be used as an instrument designed to deauthorize the text and render it void. Accordingly, when there is ambiguity in a contract, statute, or constitution, it cannot be interpreted in a way that would void the document. Both "strict" and "liberal" methods of interpretation are limited by this overwhelming principle. An excellent example of this principle may be found in a responsum by the famous medieval jurist, Rabbi Asher. [100] A promissory note on Passover was brought to his Court for execution. Somehow the scribe had omitted the pronoun "this," which would have indicated that the first Passover from the time of the drafting was intended as the due date for the note. A strict interpretation of the contract would imply, as the promisor argued, that the note was due in a future, indeterminate Passover. A liberal interpretation, as the promisee argued, warranted an immediate execution of the contract, since it was clear that "this Passover" was intended. Although usually a strict interpreter of the text, Rabbi Asher decided in favor of the promisee, that is, the liberal interpretation. After a careful analysis of talmudic sources, he pointed out that an interpretation rendering an ambiguous contract

invalid must be avoided. Now, he said, since the strict interpretation would render the note null and void, as the promisor could always argue that a later, indefinite Passover was meant, the liberal interpretation was correct: [*1678]

Only when it can be explained in two ways, one favoring the promisor and another favoring the promisee, then we explain it against the promisee, as the burden of proof is on him. This is possible only when the contract would not be rendered ineffectual. However, in our case, if we would interpret it to mean an indefinite Passover, there would have been no reason for the contract to have been drafted in the first place. Therefore, we must surely assume that this immediate Passover was intended, and that the scribe erred and forgot to write the date. [101]

The exclusion of subversive exegesis by the rabbis is quite clear in light of the preceding. The Gnostic, Christological, and antinomial interpretations of the Hebrew Scripture are designed to impugn the **law** ("derashot shel dofi"), rendering the text void and ineffectual. Therefore, they must be rejected for the same reason that such interpretations would be rejected by any court of justice. In the American legal system, both "strict" and "liberal" interpreters would concur that any interpretation whose ultimate consequences are the abolition of the Constitution, and the subversion of national authority and institutions, must be rejected. This is all the more true in Judaism where the authority to interpret stems from the text, rather than from an outside institution. As to the latter, if an argument concerning the validity of the **law** were correct, then an interpreter would have no authority to issue any interpretation.

III. Conclusion

Judaism admitted both "strict" and "liberal" interpretations of the text, and acknowledged, better than any one else, the collusion reader-text. This was always with the provision that the interpretation does not void the **law.** Thus, subversive exegeses were rejected as offensive and illegitimate. A peculiar technique of the subversive derashot is to tear a term or expression out of its general context, and give to it a meaning designed to subvert the **law** or a national institution. Addressing themselves to this concern, the rabbis formulated the principle that "kol midrash umidrash ke'inyano" ("every interpretation and interpretation must be context-bound"). [102] This means that the text must be interpreted in the light of the original context. The same principle is held in other legal systems, including the American legal system. Jurists warn against reading the **law,** "without regard for the surrounding jurisprudence - including its constitutional [*1679] configurations - into which the statute must fit." [103] Concerning lawyers who take words and terms out of their context, disregarding their specific background and circumstances, a great legal scholar of our times wrote with indignation: "One of the most important contexts is that of the whole Act, and there is no more vicious method of argument than tearing words from a statute as some counsel do, without relating them to the whole purport of the enactment." [104]

Judaism felt the same about the **Law.** Since ambiguity is intrinsic to the nature of language, one cannot interpret an obscure or laconic term in such a way as to render a **law,** or the entire Constitution, null and void. The perimeters of text-reader collusion in Judaism parallel the standard methodology applied in American courts of justice for the interpretation of contracts and legal texts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewContracts LawTypes of ContractsCovenants

FOOTNOTES:

n1. See Umberto Eco, The Limits of Interpretation 14-15 (1990).

n2. John 1:14.

n3. See Jose Faur, God as a Writer, Religion & Intell. Life, Spring/Summer 1989, at 31, 32-35

n4. Exodus 24:12 (translated by author).

n5. Midrash Hagadol 556 (Mordecai Marguiles ed., 1967) (commenting on Exodus 24:12) (translated by author). The text in Babylonian Talmud, Berakhot 5a is corrupt. See Jose Faur, Studies in the Mishne Tora 18 (1978).

n6. Babylonian Talmud, Sanhedrin 34a (translated by author). See Jose Faur, Golden Doves with Silver Dots: Semiotics and Textuality in Rabbinic Tradition at xiii-xiv (1986).

n7. 2 Emile Benveniste, Problems de linguistique generale 222 (1974) (translated by author).

n8. Id. (translated by author).

n9. Id. (translated by author).

n10. See Faur, supra note 6, at 76-79, 118-23.

n11. See Jose Faur, **Law** and Justice in Rabbinic Jurisprudence, in Samuel K. Mirsky Memorial Volume 13, 20 (Gersion Appel et al. eds., 1970); cf. Erwin R. Goodenough, The Politics of Philo Judaeus 79 (1938).

n12. Rabbi Moses ben Maimon, widely known as Maimonides, was one of the major medieval rabbinic authorities and philosophers. He lived from 1135 to 1204 c.e.

n13. The Geonim were heads of the Talmudic Academies in Babylonia between the seventh and tenth centuries.

n14. The state of ancient Israel may be described as democratic.

The biblical concept of state can be described as "democratic" with at least as much justice as the Mesopotamian form of government. It is the "people" (i.e. demos) of Israel who have a decisive say as to how and by whom they are to be ruled; it is they who set up their kings time and again.

E. A. Speiser, The Biblical Idea of History in Its Common Near Eastern Setting, in The Jewish Expression 1, 9 (Judah Goldin ed., 1976). The Jewish demos, however, was intrinsically different from that of the pagan world, because it perceived itself as bound to a higher **Law,** divine and immutable, according to which all human affairs, including those of the state and society, must accommodate.

n15. The term "theocracy" was first coined by Flavius Josephus to describe the political system of Israel. See 2 Josephus, Against Apion 165 (H. St. J. Thackeray trans., 1961). In other writings, this author has submitted that Josephus did not mean that God - as a pure theological concept - is directly and imminently the ruler of Israel. This would obviously lead into total chaos and anarchy. Rather, this term is meant to convey

"the **Law** of God." Thus, the **Law,** given by God Himself, and representing His eternal and unchangeable will, is the constitution, and therefore the source of all authority in Israel. A more appropriate term to designate the Jewish constitution would have been nomocracy or "authority of the **Law.**" The reason that Josephus preferred "theocracy" was to emphasize that in Judaism the **Law** stems from God, rather than from the will of the political sovereign and that through the **Law,** God Himself is governing. Josephus writes:

For us, with our conviction that the original institution of the **Law** was in accordance with the will of God, it would be rank impiety not to observe it. What could one alter in it? What more beautiful one could have been discovered? What improvement imported from elsewhere? Would you change the entire character of the constitution? Could there be a finer or more equitable polity than one which sets God at the head of the universe, which assigns the administration of its highest affairs to the whole body of priests, and entrusts to the supreme high-priest the direction of the other priests? ... But this charge further embraced a strict superintendence of the **Law** and of the pursuits of everyday life; for the appointed duties of the priests included general supervision, the trial of cases of litigation, and the punishment of condemned persons.

Id. at 184-88. Josephus summarized the principal elements of the **Law.** Since "theocracy" came to be known as a government of God by the ecclesiastical authorities, this author now prefers the term "nomocracy." Actually, "theo-nomocracy" would be a more accurate description.

n16. For a close analysis of this fundamental concept, see Jose Faur, Understanding the Covenant, Tradition, Spring 1968, at 33; Jose Faur, Texte et Societe: histoire du texte revele, in 1 La Societe Juive a Travers l'Histoire 49-52 (Shmuel Trigano ed., 1992) hereinafter Faur, Texte et Societe.

n17. Deuteronomy 33:4 (translated by author).

n18. Deuteronomy 6:4. See Babylonian Talmud, Sukkah 42a; Maimonides, Mishneh Torah, Sefer Hamada, Hilkhot Talmud Torah 1:16; Shulan "Arukh, Yoreh De"ah 245:5.

n19. See Faur, supra note 5, at 152-60.

n20. Orobio de Castro was a philosopher and physician born in Brazaga, Portugal (1620-1687). See 12 Encyclopaedia Judaica 1475 (1972).

n21. See Orobio de Castro, Epistola Invectiva, in I.S. Revah, Spinoza et le Dr Juan de Prado 88, 119-23 (1959).

n22. See Jose Faur, In the Shadow of History: Jews and Conversos at the Dawn of Modernity 147 (1992).

n23. See Maimonides, Mishneh Torah, Sefer Hamada, Hilkhot Yesodei Hatorah 8:2 (stating that belief in God is explicitly connected with the giving of the **Law** at Sinai).

n24. Maimonides, Mishneh Torah, Minyan Hamivot, Mivat Ase 1.

n25. Accordingly, "heretic" is defined not as one who disbelieves in God, but as one "who declares" ("ha'omer") that there is no God. Maimonides, Mishneh Torah, Sefer Hamada, Hilkhot Yesodei Hatorah 3:7, 8.

n26. See Babylonian Talmud, Baba Meia 59a; Faur, supra note 6, at 13-14. See also Maimonides, Mishneh Torah, Sefer Hamada, Hilkhot Yesodei Hatorah 9:1.

n27. On the pagan concept of "violence," see Jacques Derrida, Force of **Law:** The "Mystical Foundation of Authority", 11 Cardozo L. Rev. 921 (1990).

n28. Id. at 985-87.

n29. Cf. id. at 991.

n30. See H.F. Jolowicz, Lectures on Jurisprudence 15-27 (J.A. Jolowicz ed., 1963) (explaining the theories of John Austin).

n31. Herbert Marcuse, Repressive Tolerance, in A Critique of Pure Tolerance 81, 105 (1969).

n32. Mishnah Avot 6:2 (translated by author).

n33. For further discussion on this subject, see Faur, Texte et Societe, supra note 16, at 70-74.

n34. See Harry A. Wolfson, 2 Philo 374-95 (1947). For a more modern perspective of this issue, see Jacob Neusner, The Constitution of Judaism in Ancient Times: The Pentateuch and the Mishnah, J. Reform Judaism, Spring 1989, at 55; see generally 3 Jacob Neusner, The Two Constitutions of Judaism in Ancient Times, Understanding Seeking Faith 145 (1988).

n35. See Faur, supra note 22, at 184.

n36. Jerusalem Talmud, Rosh Hashanah 1:3 (translated by author). The correct text is found in Seride Hayerushalmi 145 (Louis Ginzberg ed., 1968) (Fragments of the Genizah). For the correct interpretation of this passage, see Saul Lieberman, How Much Greek in Jewish Palestine?, in Biblical and Other Studies 128 (Alexander Altman ed., 1963).

n37. Henri Frankfort, Kingship and the Gods 341 (1948).

n38. Abraham J. Heschel, The Prophets 478 (1962) (citing Deuteronomy 33:8).

n39. Id. (quoting 2 Chronicles 26:16).

n40. Id. at 478-79.

n41. Id. at 480.

n42. Leviticus 4:3-12.

n43. Id. at 13-21; cf. Numbers 15:22.

n44. Leviticus 4:22-26.

n45. The sequence - ecclesiastical, judicial, and political - is particularly significant. By mentioning the ecclesiastical authority first, it is implied that unless the authority of the **Law** is recognized, the priesthood cannot serve as agent of an expiatory offering. The stipulation that a sin by the high priest is "to the culpability of the people" ("le'ashmat ha'am"), Leviticus 4:3, emphasizes that the onus is on the people. Judaism does not accept the view that a people is not responsible for the crimes of its leaders. See Maimonides, Mishneh Torah, Sefer Shoftim, Hilkhot Melakhim 9:14. The conduct and demeanor of the

sovereign rest on the proper functioning of the ecclesiastical and judicial authorities, not the other way around.

n46. See Babylonian Talmud, Horayot; Jerusalem Talmud, Horayot.

n47. See 1 Kings 21:1-29.

n48. Simeon ben Shetah was the head of the Jewish Sanhedrin (High Court) during the first century B.C.E.

n49. Babylonian Talmud, Sanhedrin 19a-b. See also Midrash Tanuma, Exodus: Ki Tissa; Josephus, Jewish Antiquities 14:169 (Ralph Marcus trans., 1961).

n50. See Mishnah Berakhot 2:2.

n51. Babylonian Talmud, Qiddushin 42b (translated by author).

n52. See Maimonides, Mishneh Torah, Sefer Shoftim, Hilkhot Melakhim 3:9. For a summary of the main legal points included in these formulas, see Jacob Algazi, Qehilat Yaaqov 1c-4d (Lemberg, 1862).

n53. See Amos 7:7-17.

n54. See Shalom Spiegel, Amos vs. Amaziah, in The Jewish Expression 38-65 (Judah Goldin ed., 1976); cf. Malakhi 2:5-7.

n55. See Mishnah Sukkah 4:9.

n56. Josephus, supra note 49, at 13:372-74. The story in Babylonian Talmud, Yoma 71b illustrates the feeling of disgust that the people had for this type of high priest, in contrast to the reverence that they had for the teachers of the **law.**

n57. See Faur, supra note 5, at 20-24.

n58. Maimonides, Mishneh Torah, Sefer Shofetim, Hilkhot Sanhedrin 4:15.

n59. Jerusalem Talmud, Bikkurim 3:3 (citing Exodus 23:20) (translated by author).

n60. The most prominent figure of his time, Hai ben Sherira (939-1038) led the Pumbedita academy from 998 to 1038 C.E. 7 Encyclopaedia Judaica 1130 (1972).

n61. Hai Gaon, Sha'are Teshuva No. 86 (citing Isaiah 3:14) (translated by author).

n62. Halakhot Pesuqot No. 195 (Yoel Hakohen Miller ed.) (citing Psalms 101:6) (translated by author).

n63. See Faur, Texte et Societe, supra note 16, at 74-82.

n64. See Irving J. Sloan, Selected Documents, in The Jews in America 1621-1970, at 51, 53 (1971).

n65. See Jose Faur, Early Zionist Ideals Among Sephardim in the Nineteenth Century, 25 Judaism 54, 54-55 (1976).

n66. On the legal status of the Indian nations in American **law,** see Perry Dane, The Maps of Sovereignty: A Mediation, 12 Cardozo L. Rev. 959 (1991).

n67. See Faur, supra note 65, at 54-56, 60-62.

n68. See Harry H. Wellington, Interpreting the Constitution 133 (1990) (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861)).

n69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

n70. See Wellington, supra note 68, at 131 (quoting Edwin Meese III, Speech at Tulane University (Fall 1986)).

n71. See Marbury, 5 U.S. (1 Cranch) at 174-76; see also Carlos Santiago Nino, Philosophical Reconstruction of Judicial Review, 14 Cardozo L. Rev. 799 (1993).

n72. Wellington overlooked this point in his otherwise illuminating chapter on "Judicial Mistake," in Wellington, supra note 68, ch. 2.

n73. See U.S. Const. amend. I.

n74. Although personally relieved when Nixon resigned, this author was intellectually disappointed. Contrary to what many legal theorists argue, this author is not convinced that a sovereign could be tried in an American court. The very fact that a president could "pardon" someone indicates that the contrary may be the case. This is consistent with the above mentioned theory whereby "violence" stands at the basis of authority.

n75. See Maimonides, Mishneh Torah, Sefer Shofetim, Hilkhot Mamrim 1:1-3.

n76. Id. (translated by author).

n77. See Faur, supra note 5, at 19-32; Jose Faur, The Fundamental Principles of Jewish Jurisprudence, 12 N.Y.U. J. Int'l L. & Pol. 229-32 (1979) hereinafter Faur, Fundamental Principles.

n78. Leviticus 24:20 (translated by author).

n79. Babylonian Talmud, Baba Qamma 84a.

n80. See Faur, Fundamental Principles, supra note 77, at 231-32.

n81. It is highly doubtful that even the Samaritans would have been able to survive on their own, without the Jewish people.

n82. Deuteronomy 11:13 (translated by author).

n83. Maimonides, Mishneh Torah, Sefer Ahavah, Hilkhot Tefilah 1:1.

n84. Tosefta, Berakhot 3:1.

n85. On these two types of exegeses, see Julia Kristeva, Psychoanalysis and the Polis, in The Politics of Interpretation 85 (W.J.T. Mitchell ed., 1983).

n86. Id.

n87. On the two basic types of "connections" in rabbinic exegesis, see Faur, supra note 6, at xviii-xix.

n88. Babylonian Talmud, Shabbat 63a (translated by author). For a detailed analysis of this principle as well as of the concept of peshat, see Jose Faur, Basic Concepts in Rabbinic Hermeneutics, in 2 Studies in Jewish Philosophy (forthcoming). In short the peshat in rabbinic jurisprudence is analogous to Vico's sensus communis.

n89. See Faur, supra note 6, at 84-85.

n90. See Babylonian Talmud, Menaot 29b (translated by author).

n91. See supra text accompanying note 26.

n92. This point was analyzed and further elaborated in Faur, Texte et Societe, supra note 16, at 60-66.

n93. Benjamin Cardozo drew parallels between the understanding of Maimonides and the Geonim of judicial derashah with concepts in American jurisprudence. See generally Benjamin N. Cardozo, The Nature of the Judicial Process (Yale Univ. Press 1960) (1921); Benjamin N. Cardozo, The Growth of the **Law** (Greenwood Press 1973) (1924). Cf. Wellington, supra note 68, at 43-60.

n94. See 3 Oar Hageonim, Pesaim 71 & n.3.

n95. See Faur, supra note 6, at 122.

n96. See Faur, supra note 5, at 25-32.

n97. See Wellington, supra note 68, at 131.

n98. See Babylonian Talmud, Sanhedrin 99b; Faur, supra note 6, at xxi. There are two different versions of megalle panim. Concerning Mishnah Avot 3:14, Maimonides used the version megalle panim batorah. See 4 Maimonides, Pirush ha-Mishnayot 433 (Joseph Qafi ed., 1963). Accordingly, Maimonides explained the term to mean "one who transgresses the **Law** in open defiance." Megalle panim is referred to in this precise sense of "open defiance" in Babylonian Talmud, Erubin 69a. This is also how Maimonides codified it in Maimonides, Mishneh Torah, Sefer Hamada, Hilkhot Teshuva 3:11. This is probably the version that he had in Babylonian Talmud, Sanhedrin 99b. The more popular version, in both Mishnah Avot and Babylonian Talmud, Sanhedrin, is "megalle panim batorah shelo kahalakhah" ("unveiling in the Torah directions contrary to the **law**") - that is, subversive homilies designed to void a particular **law.**

n99. See Faur, supra note 6, at 123-24.

n100. Also known as the Rosh, Rabbi Asher ben Jehiel lived from 1250 to 1321 C.E.

n101. Asher ben Jehiel (Rosh), Teshuvot Harosh, Responsum no. 14 (translated by author).

n102. Jerusalem Talmud, Yoma 3:5 (translated by author).

n103. See Wellington, supra note 68, at 31.

n104. Carleton K. Allen, **Law** in the Making 506-07 (1964).