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Nine Measures

Tehila Wenger

A man I know grows olive trees on the southern outskirts of Jerusalem. They grow on the red terraced hills that rise like fat necks around the edges of the city. People driving past barely see them, and they never remember the hills afterward. They only think to themselves, as the groves slide past their window, that Jerusalem might be beautiful after all. In her own way.

The man is old now, although he was only forty when I met him. That was ten years ago. Some people are not old until they are sixty or seventy. The strong ones, the grandparents who laugh too much and play backgammon with their neighbors, don't become really old until they reach eighty. But the olive grower was an old man at forty-eight.

That was the year they killed his son.

He has five sons, including the dead one. That's a lot of sons, you might think. If you told him that three or four years ago, he would have smiled a polite, disagreeing smile that made the skin at the corners of his eyes crinkle into arrows pointing inwards. He has dark eyes.

It doesn't seem like so many sons now. When you take one from five, you're left with not-so-much. Not four. Four is something, four is even a lot. But what they don't tell you in the early years of grade school as you struggle to add and subtract on your fingers is that the fingers you put down don't go away. So one from five is never four, it's just five minus one.

Let me tell you about olives.

An olive is a page. It doesn't mean anything, but it is interesting because of all of the ways in which it has not yet been used. Humans were planting olives before they knew how to write their thoughts on paper, and six generations later their offspring were carefully picking fruit off the same tree. They squeezed and crushed their crop to make its dark, liquid soul come out. This they rubbed into their chest muscles and poured over their king's hair and spread on their dead.

He cried a lot when his son died, people say. I never saw him cry, but that's what people say. They say that at the funeral, his voice was steady and he stood up straight the whole time with tears rolling down both cheeks like rain on a brown wall.

When you pick an olive off the tree, it is green or purple and so sour that you have to spit it out before your teeth can reach the pit. The olive grower used to pick them as he worked, wipe them on the corner of his shirt, and suck on them throughout the day. He said the sourness woke him up.

He would suck an olive as he walked from terrace to terrace on his hill, stopping every so often to greet one of the workers. They collected the olives in crates that a black-eyed and bearded man drove to the factory, one hand holding a cigarette against the steering wheel

and the other poised hungrily to honk at other drivers. The olives traveled the length of the country twice, first in crates and then again in sleek square bottles. They were golden green with white letters that curled in exaggerated whorls on the labels.

I did not go to the funeral. My girlfriend wasn't feeling well that day. My paper was being published that month. There was a problem with the car battery.

Also, I did not want to go.

The olive grower told me, when I first met him, that there is no tree in the world as interesting as the olive tree. I said yes, they are very beautiful. He smiled his polite and disagreeing smile. No, he said, they are very ugly. They are the ugliest and most interesting trees in the world.

I was on a tour when I met him, a six-day agricultural circuit of central and southern Israel. Each day, the group shrank a little more as members decided to skip the avocado grove or the banana plantation for a visit to the luxury spa at Ein Bokek. This irritated our tour guide; he reminded us frequently that the trip was the brainchild of some of the top agriculturalists in the country. The old women on the tour said that this was very nice, but the agricultural experts should have budgeted time for an afternoon by the Dead Sea. Of course we want to learn about cucumbers, said one grandmother, but we also want to wear them.

On our eyes, she explained to the octogenarian standing next to her. He snorted.

"Do you know," asked the olive tender, "That the olive tree grows better in bad soil than in good?"

Later I learned from a colleague in the Classics Department that this tenuous fact had been noted several centuries before by Pliny the Elder, a jumped-up polymath who wrote an entire book about the right way to throw a lance. He was a close friend of Vespasian, the Roman emperor who sent legionnaires to pick apart the stone walls of Jerusalem and whose son burned the Jewish temple.

I don't think the farmer had ever heard of Pliny or Vespasian. He probably knew about the temple, though. Everybody in Jerusalem knows about the temple. Only they know different things, different stories, and these stories are like knives that people use to cut into each other's backs and throats and arms. So everyone in Jerusalem walks around with their arms crossed over their chest or bent double, glancing over their shoulder and nursing wounds two thousand years old and seventy years old and sixteen years old.

Every night of the tour, the old men from our group sat in the black leather armchairs of hotel conference rooms and drank scotch. They argued in hoarse, angry voices about politics in the Middle East. They argued even though they had all voted for the same party in the last election and they all agreed that the Leviathan energy deal was national robbery and they all believed with the adamant religious fervor of confirmed atheists that the next generation was ruining the country. I was too young to join the debate, but they let me sit with them and drink.

One night, as they shouted furiously at one another about an MK who had bought his wife an expensive necklace, I left the hotel to go for a walk. Their voices followed me out the lobby like a harem of invisible bullfrogs warning each other about a danger that doesn't exist. I was out of patience. I was out of cigarettes. I wandered into one of the eternally open corner stores to pick up a pack.

The olive grower was there, hovering over the dairy shelves in the corner. He was buying milk, he told me, to drink with breakfast the next morning. He was embarrassed about this. He explained that his wife wasn't feeling well. Otherwise she would have come to town to buy milk. Otherwise there would have been enough milk in his house for two full weeks.

I offered him a cigarette and we stood in the doorway of the store, smoking. I told him about the old men at the hotel. Talk, talk, talk, I said disgustedly. They don't change anything. No-one in this country changes anything.

He spread his hands, palms up, and raised his shoulders to his ears. People have to talk, he said. What can you do? You want them to stop talking?

I want them to do things, I said. It's not enough to drink scotch and feel sorry for the world.

No, he said. But they also go on tours.

Then he laughed and clapped me on the shoulder. His hand felt like a brick. Don't blame the old people for being old, he told me.

He gave me his number and told me that I could come to his house whenever I wanted. Whenever I was sick of the city and the old people and the country, too.

I went. A year later, for two weeks in September during the olive harvest. He asked me to help gather the crop and I was glad to do it, glad to forget my reading glasses on the nightstand every day. I met his youngest sons, the wild unmarried boys who still lived in the house and hated school. Three years later, he invited me back for a weekend. I met his older sons visiting with their pregnant wives. They were short like their father and full of thick muscles in their arms and necks.

Four years later, I drank coffee on my friend's front porch. I was passing through. We spoke about his new grandson, my new girlfriend, and the weather.

Not enough rain, he complained.

I agreed. But I work at the university. It was hard to care about a drought with your colleague trying to hijack your research on ethnic divisions under Almoravid rule in eleventh-century Morocco. I tried to explain my work to the olive grower. Jews. Muslims. Law and violence. *Plus ça change*, I said.

Yes, he said. But he was not interested.

You'll come again soon, he said, holding my hand in his calloused square one.

Of course, I said.

Then I forgot about the olive grower, except when my girlfriend told our dinner guests that I was a farmer at heart or at the supermarket, when I saw his gold label on the shelves.

I was boiling hot water for morning coffee when I read the article about his son. It was on the lower half of the front page, two hundred words with another paragraph buried in the middle of the paper. There were many deaths that month, so it was a short article. There was not much to say. A confrontation had occurred in the West Bank. A clash. Words. Stones. Guns. He was dead. The police were investigating. His father was quoted at the end of the piece (page ten) saying that death was bad. Violence was bad. We hope for peace, he said, but not very hard.

I told my girlfriend over breakfast that the olive grower's son was dead, and she cried. How many more Arabs will die, she asked, before we recognize Jewish terrorism for what it is?

I was surprised. I said, I never told you that he was an Arab.

I told my mother over lunch that my friend's son was killed. She cursed the Palestinians. How many more young Jews have to die, she asked, before the world speaks out?

This did not surprise me, although I had not told her that he was a Jew.

I called the olive grower, but a jerky, mechanical voice told me that the number I dialed was no longer in service.

The funeral, I heard, was very nice. Many people came. I heard this from the bald man who sells cigarettes at the corner store where I had met my friend, too long ago, buying milk. The young man was twenty months dead, but the storeowner remembered the funeral well. He had many friends, the two-year dead boy who had two boys of his own, all right, but nobody's manhood survives a death like that. Twenty-eight-year-olds who die like that become boys again. It is easier to cry for them that way.

You knew him? he asked.

I met him. I know his father.

He nodded and told me that the second pack was free.

No, I said. I want to pay.

It's fine, he said. It's fine.

I stopped by the house. The olive grower's wife opened the door.

You don't remember me, I said.

Of course I remember you, she said.

My friend was old. He looked like Noah after the flood. He walked as if his feet hurt and held his broad shoulders clenched close to his neck. He clasped my hand and put his other arm over my shoulder. It felt light, like a hollowed-out branch.

We talked about nothing for two hours. His wife served biscuits and black tea. I stood to leave. With relief. With regret. The house was empty.

You'll come again soon, he said.

Of course, I said. Knowing that I would never come again. You couldn't forget the country here. You could fill the house five times over with grandchildren and the olive grower would still stare at you like he was Job. And you were God.

It is good to see you, he said.

Yes, I said. Then I thanked his wife and left. I was afraid that if I didn't, I would see the old man cry.

An olive tree lives for four hundred, five hundred years. Some people say that the oldest ones are a thousand years old. That is enough time for a dynasty to rise and fall. Time for a country to grow great and break into shivering slivers of what was once a people, like a wave smashing its face against the shore. Or against another wave.

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Divinity Redefined-
Review of Christine Hayes,

Daniel Reifman

In his essay "Art, as Device,"[1] the Russian literary theorist Viktor Shklovsky introduced the concept of defamiliarization or estrangement as a central aspect of artistic expression:

> The purpose of art is to impart the sensation of things as they are perceived and not as they are known. The technique of art is to make objects 'unfamiliar', to make forms difficult, to increase the difficulty and length of perception because the process of perception is an aesthetic end in itself and must be prolonged (p. 162).

Shklovsky goes on to analyze the way that great writers make the reader confront conventional phenomena in unconventional ways, not for the sake of being different but because difference serves the goal of "deautomatizing perception" (p. 171) — framing a new way to see what we thought we already knew.

What is true of good art is no less true of good scholarship. The techniques of the scholar may be different than those of the artist, but ultimately her goal, too, must be to revitalize our perception of the familiar by making it strange again. The challenge, of course, is not to mistake strangeness for an end in-and-of itself: a new vantage point constitutes progress only when it allows us to perceive the object of study with greater clarity. The hallmark of truly groundbreaking scholarship is a radical, even unsettling new perspective that in hindsight makes you wonder how you ever saw things otherwise.

This is the ambitious standard that Christine Hayes reaches for in her most recent book, *What's Divine About Divine Law?: Early Perspectives* (Princeton University Press, 2015). The book's title immediately throws the reader off balance: what is *not* divine about divine law? Divinity is so integral to the concept of Torah law that its significance seems self-evident. In his book, *Law of God: The Philosophical History of an Idea* (University of Chicago Press, 2007), Rémi Brague firmly rejected this assumption, and outlined the very different ways in which Greco-Roman culture and the Abrahamic faiths conceived of what it means for law to be divine. Hayes builds on Brague's work by offering an in-depth account of how those figures who struggled with the nature of Jewish law in the millennium before the rise of Islam — Hellenistic Jews, early Christians and the rabbis of the tannaitic and amoraic periods — may be understood as responding in different ways to issues raised by Greco-Roman legal thinkers.

Hayes thus 'estranges' ancient Jewish legal discourse on two levels. She locates a profound cognitive dissonance within ancient Jewish texts themselves, as their writers struggled to

[1] "Iskusstvo, kak priem," in *Poetika: Sborniki po teorii poėticheskogo iazyka*, ed. Viktor Shklovsky, (Petrograd: 18-*aya gosudarstvennaya tipografiya*, 1919), 101-14. English translation by Alexandra Berlina, *Poetics Today* 36:3 (2015): 151-174.

assess Mosaic Law through the prism of non-Jewish intellectual culture. And she proposes a reorientation of modern scholarship on these texts, claiming that some of our own deeply ingrained notions about Mosaic Law are products of a culture-specific clash of discourses.

Comparative work in rabbinic and contemporaneous non-Jewish law is obviously not new. Since the late nineteenth century, scholars have productively analyzed rabbinic laws in light of parallel phenomena in Hellenistic and Roman law,[2] and more recently Sasanian law.[3] But these comparative studies have tended to be point-to-point comparisons of specific legal topics or institutions. Hayes invites the reader to consider parallels between Jewish and non-Jewish perspectives on legal discourse as a whole: What is the relationship between law and truth? What function is law intended to serve, both for the individual and for human society in general? How does law respond to changing social needs? In this sense, *Divine Law* is part of a growing body of scholarship that considers rabbinic law from the perspective of general philosophy of law.[4] But whereas most of this scholarship draws on concepts and analytical tools from modern legal theory whose relevance to ancient texts is sometimes questionable, *Divine Law* focuses squarely on ancient philosophies of law. Thus, apart from the specific thesis that Hayes sets out to defend, she makes an important contribution to the field simply in the way she defines her area of inquiry. Precisely because *Divine Law* is so focused on rabbinic law in its contemporaneous ancient context, Hayes' analysis is frequently sharper than that of comparable studies in philosophy of Halakhah which address the full chronological span of halakhic discourse.

What is the difference between biblical and Greco-Roman conceptions of law that ancient scholars found so unsettling? Brague puts it succinctly: "Greek divine law is divine because it expresses the profound structures of a permanent natural order; Jewish Law is divine because it emanates from a god who is master of history" (p. 18). While Brague examines how these conceptions developed over time, Hayes offers a non-chronological perspective, outlining the various "discourses" of law that exist in the biblical and Greco-Roman traditions, respectively. The discourses she describes are diverse, even contradictory at times: it's clear that Hayes has resisted the temptation to oversimplify things. For example, even as she lists the dominant features of biblical law — that it is an expression of the divine will, coercive and non-rational, particular to Israel, etc… — she also notes that one can highlight less prominent biblical passages that point to a more universal, rational model of divine law. The same is

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[2] For a review of this literature, see the introduction to *Rabbinic Law in Its Roman and Near Eastern Context*, ed. Catherine Hezser (Mohr Siebeck, 2003).

[3] Yaakov Elman and his students have been the leading proponents of comparative Sasanian analysis. For example, see Shai Secunda, *The Iranian Talmud: Reading the Bavli in Its Sasanian Context* (University of Pennsylvania Press, 2013).

[4] Some of the influential works to apply elements of modern legal theory to rabbinics are Yoḥanan Silman, "Halakhic Determinations of a Nominalistic and Realistic Nature: Legal and Philosophical Considerations" (Hebrew), *Diné Israel* 12 (1984-5): 249-66; Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law* (Harwood Academic Press, 1991); Moshe Halbertal, *Interpretive Revolutions in the Making* (Hebrew; Magnes Press, 1997); and Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Mohr Siebeck, 2002). We should add that rabbinics scholars were preceded in their use of legal theory by scholars in the fields of *mishpat ivri*, philosophy of Halakhah, and biblical law. For example, see Moshe Silberg, *Principia Talmudica* (Hebrew; Mif'al Hashikhpul, 1961); Eliezer Goldman, *Expositions and Inquiries* (Hebrew), eds. D. Statman & A. Sagi (Magnes, 1996); Bernard Jackson, *Studies in the Semiotics of Biblical Law* (Sheffield Academic Press, 2000).

true with the Greco-Roman legal discourses. By and large, Greek and Roman scholars regard divine law as rational, unwritten, universal, and unchanging, while human law is characterized as written, context-specific, and subject to revision. Yet Hayes observes that different Greco-Roman legal discourses offer important variations on this typology, even as the basic dichotomy between divine law and human law remains a given. One might quibble with some of Hayes' generalizations, and some readers may find themselves struggling to recall later in the book what is meant by runic notations like "biblical discourse 3(ii)" or "G-R 6". But on the whole, she strikes an admirable balance between clarity and complexity.

Given that the dominant biblical and Hellenistic conceptions of divine law are rooted in two fundamentally different understandings of what divinity *means* in this context — is it the source of the law or an inherent characteristic of it? — it might seem that they need not be in conflict at all. Nonetheless, it is clear that many ancient writers did consider these two senses of divinity to be incompatible, so that the difference between the biblical and Greco-Roman models of divine law became the source of much cultural tension. The central thesis of Hayes' book is that those groups which expounded on the nature of Jewish law in antiquity — Hellenistic Jews of the late Second Temple period, the founders of Christianity, and the rabbis of the Mishnah and the Talmuds — may all be seen as *conscious* of the tension between the biblical and Greco-Roman conceptions of divine law and *actively constructing* a model of Jewish law in response to that tension.

This is an exceedingly ambitious thesis to defend, requiring not only control of classical Greco-Roman, Christian, and Jewish sources, but also a clear grasp of their views on an array of complex and amorphous ideas, views that these ancient writers do not always readily divulge. There is no question that Hayes has the rare expertise needed to undertake such a project. Nonetheless, as I read through the book, I found myself frequently unconvinced of her central argument. To put it differently, if *Divine Law* consisted only of sources that directly supported this tightly formulated thesis — that ancient scholars constructed their model of Jewish law consciously in response to Greco-Roman legal discourses — it would be a considerably shorter and less interesting book.

That would be a shame, because whatever its weaknesses, *Divine Law* is an enormously rewarding read. Hayes is a wonderfully astute reader of rabbinic texts. I regularly recommend her first book, *Between the Babylonian and Palestinian Talmuds* (Oxford University Press, 1997), to my students as a model of thoughtful and lucid text-critical Talmud scholarship. One of the great pleasures of reading *Divine Law* is to watch Hayes analyze a well-studied talmudic or midrashic passage and deftly turn the standard scholarly interpretation on its head, or tease out an illuminating new insight. In this way, she manages to forward the scholarly agenda on at least half a dozen significant issues in rabbinic law. These make *Divine Law* an important work, even though many of Hayes' topic-specific arguments do not support her central thesis as clearly as she suggests.

Moreover, despite its focus on antiquity, *Divine Law* manages to feel remarkably contemporary. It should come as no surprise that the challenges which the Greco-Roman intellectual milieu posed for Halakhah overlap a great deal with the challenges posed by modern liberalism (which are significantly different than those posed by Christianity in Medieval Europe), some of which Hayes relates to in her afterword. To read the way ancient Jewish scholars wrote about Jewish law with a mixture of confusion and defensiveness,

embarrassment and triumphalism, is to hold a mirror up to our own time. For every issue raised by these ancient texts that strikes us as quaintly archaic, there is another that seems even more urgent in a contemporary religious context. To anyone who cares about making Halakhah meaningful and relevant to modern life, Hayes offers plenty of food for thought.

What she does not offer are easy answers, and the complexities and ambiguities that she exposes are as instructive as her conclusions. Both in her extensive analysis of the rabbinic corpus and in her brief consideration of post-rabbinic halakhic discourse, Hayes emphasizes that there is no monolithic position regarding the motifs and distinctions found in Greco-Roman legal discourse. This has important implications for the way that we understand the development of halakhic discourse during and following the rabbinic period: even as notions such as rationality and universality gradually penetrate discourses about Jewish law, they are not always accepted to the same extent or understood the same way. Hayes shows how we often find within a single rabbinic passage several different approaches to these issues expressed one after the other, without any sense that they are mutually exclusive.

Yet there is a further layer of complexity that is largely absent from Hayes' study. In analyzing her material in relation to external forces — the way that Jewish legal scholars incorporate or reject Greco-Roman notions about divine law, Hayes overlooks the formal, internal elements that mold rabbinic legal discourse, including factors that are endemic to the growing complexity of any legal system. I will suggest that many of the phenomena in rabbinic law that Hayes documents and analyzes are better attributed to tensions intrinsic to legal discourse in general, rather than to a culture-specific conflict between different conceptions of divine law, as Hayes proposes.[5] This, too, is a vital point for anyone concerned about how Halakhah will address the challenges of 21st-century society: in order to know what Halakhah as a system can accomplish, one must understand which of the factors that constrain halakhic adjudication are also essential to Halakhah's functioning as a coherent legal discourse.

Influence of Greco-Roman legal discourses in non-rabbinic Jewish texts

Appreciating the successes and failures of Hayes' book requires a careful sifting of the wide-ranging evidence that she marshals. Her most straightforward analysis is of Hellenistic Jewish works, most prominently the extensive writings of Philo of Alexandria, but also texts as varied as 4 Maccabees, Sirach, and the Letter of Aristeas. In their explanations of various elements of Mosaic Law, these texts typically emphasize rationalism, universalism, and consonance with the natural order, indicating that these authors were consciously engaged with Greco-Roman legal discourses and attempted to bridge the gap between the biblical model of a written divine law with the Greco-Roman notion of unwritten one. Hayes also persuasively demonstrates the use of Greco-Roman tropes in the Christian Bible, especially in the Letters of Paul. But whereas these other Hellenistic Jewish writers associate Mosaic

[5] Those familiar with Hayes' *Between the Talmuds* will recall that she herself negotiates a distinction between internal and external factors in the Talmuds' interpretation of *Mishnah Avodah Zarah*. However, it seems to me that her analysis there is unrelated to her thesis in *Divine Law*. *Between the Talmuds* relates to the issue of hermeneutics — whether one's interpretive choices of a specific text are driven by ambiguities or gaps within the text or by cultural forces outside of it. The issues Hayes addresses in *Divine Law* relate to the overall conception of law as a system.

Law with the Greco-Roman model of divine law, Paul distinguishes sharply between Mosaic Law and the universal law written on the heart, and attributes to Mosaic Law some of the characteristics of *human* law in the Greco-Roman typology.

Hayes' analysis of the Hellenistic Jewish and early Christian material is nuanced and incisive, though not especially innovative. Her most significant contribution in this section of the book is her proposal regarding Paul's famously conflicting statements about Mosaic Law. Traditionally, scholars have understood Paul's attitude toward Mosaic Law to be entirely negative, but Hayes follows a recent trend in New Testament scholarship to offer a more nuanced interpretation of Paul's views. Hayes argues that Paul intended to preserve the distinction between Jews and Gentiles, since he considered Jewish identity to be exclusively genealogical. This required him to craft different messages for his Jewish and Gentile audiences, and Hayes proposes that this accounts for his mixed rhetoric about the Law. She suggests that Paul disparages Mosaic Law only when addressing Gentiles lest they aspire to observe it, which he regarded as out of the question. For Jews, however, Paul did not consider faith in Christ to obviate the Law, but rather to lead to a state in which they would observe it effortlessly. I am sure that this theory will stimulate much discussion among New Testament scholars; however, it does not directly impact on Hayes' broader thesis regarding the influence of Greco-Roman discourses in shaping the discourses of Jewish law in antiquity.

Detecting Greco-Roman influence in rabbinic texts

These chapters on non-rabbinic perspectives serve mainly to set the stage for the primary focus of Hayes' study, namely the rabbinic view of divine law, which occupies the latter half of the book. If this section is Hayes' most important contribution, it is also where her thesis becomes trickiest to defend. Unlike the Hellenistic Jewish or early Christian writers, the rabbis were not predisposed to outside perspectives on their enterprise. While the influence of Greco-Roman discourses about law is fairly self-evident in Hellenistic Jewish and early Christian sources, in rabbinic literature, Hayes (and the scholars whose work she cites) must discern this influence primarily between the lines. And whereas non-rabbinic writers clearly accept the fundamental Greco-Roman dichotomy between human and divine law, Hayes argues "that the rabbis' unique construction of divine law is taken in *conscious defiance* of" this dichotomy (p. 168).

These challenges lead Hayes to adopt a multipronged approach in her analysis of the rabbinic legal corpus. One tactic is to look for parallels between rabbinic and Greco-Roman legal techniques that indicate something about the rabbis' general conception of law. For example, in considering the question whether the law evolves in response to human needs, Hayes demonstrates that one type of formal legislative change in rabbinic law, the *taqqanah*, bears significant resemblance to the Praetorian Edict, a mechanism that facilitated corrections to Roman civil law: both the Edict and *taqqanot* functioned as legal remedies due to considerations of equity and good faith, and were ostensibly *ad hoc* measures that could *post facto* become a permanent part of the law.

Hayes finds even more substantial parallels in aggadic passages that describe the divine courtroom teeming with advocates who endeavor — often successfully — to sway God's judgment in the direction of mercy, suggesting that the rabbis did not associate law with a

procedural standard of truth (strict justice as opposed to compromise or clemency). Richard Hidary demonstrates that these depictions evoke practices in Roman courtrooms where unscrupulous lawyers used whatever means necessary to secure victory, practices that were actually eschewed by the rabbis in the administration of human judgment.[6] Since many of the arguments that these advocates use to influence God involve moral challenges (a phenomenon analyzed extensively by Dov Weiss[7]), Hayes also analyzes this literature in light of the Greco-Roman notion of using *phronesis* or practical wisdom to correct injustice that results from a rigid application of the law. Yet Hayes observes that these parallels conceal a crucial difference: whereas in Greco-Roman discourse these techniques are applied exclusively to human law, the rabbis apply them specifically to the heavenly court. Inasmuch as we may assume that the rabbis would have been familiar with these Greco-Roman courtroom practices, we may say that this reversal constitutes a conscious rejection of the Greco-Roman model of divine law.

However, since these specific parallels are limited in scope, Hayes must take a more active role in organizing the rabbinic material in order to correlate it with themes in the Greco-Roman discourses. She posits three questions of the rabbinic legal corpus, each of which occupies a separate chapter: Do the rabbis associate law with "truth"? Do they assume that law is rational? And do they consider the law to be flexible or static and unchanging? These questions provide a productive framework for analyzing a number of important issues in rabbinic legal discourse, and Hayes makes the most of the opportunity. For example, in considering whether the rabbis subscribe to a *formal* standard of truth in law, she offers a comprehensive analysis of the way term *din* — in the sense of logical or formal correctness — features in rabbinic legal reasoning and exegesis. She concludes that *din* refers to a factor — typically a textual inference or logical proposition — that the operative ruling of the law is assessed *in relation to* (as in the talmudic phrase *be-din hu*, which introduces an initial premise that is subsequently rejected) rather than that which determines what the law will actually be. Later in the same chapter, she considers whether the rabbis subscribe to an *ontological* standard of truth in law, i.e. whether the law conforms to a mind-independent reality, and she makes a significant contribution to the scholarly debate on whether rabbinic law should be regarded as realist or nominalist (more on this below).

No less valuable is the way that Hayes corrects earlier scholarship on some of these issues, including the work of two venerable scholars — Isaac Heinemann and Ephraim Urbach — on the rabbis' approach to rationales for biblical commandments. Hayes demonstrates that a number of Heinemann's and Urbach's methodological assumptions, such as the sharp distinction between heteronomous and autonomous rationalization of the law, are not reflected in rabbinic literature, and that overall the rabbis display minimal interest in rationales for specific biblical laws (at least in the sense manifest in the *ta'amei ha-mitzvot* literature of the medieval period). Similarly, she spends much of the final chapter of the book ably picking apart the common scholarly assumption that the Noahide Laws constitute a Jewish equivalent of classical natural law.

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[6] *Rabbis and Classical Rhetoric: Sophistic Education and Oratory in the Talmud and Midrash* (Cambridge University Press, 2018).

[7] *Pious Irreverence: Confronting God in Rabbinic Judaism* (University of Pennsylvania Press, 2016).

Are the rabbis *consciously* addressing Greco-Roman assumptions about law?

Given all this material, one way for Hayes to have formulated her thesis would have been to say that ideas expounded in Greco-Roman legal discourses help us illuminate important aspects of rabbinic law, without positing that the rabbis themselves were consciously responding to these discourses. Yet Hayes sets the bar significantly higher, arguing that the rabbis understood these ideas to be of foreign origin and *knowingly engaged with them as such* in their own "scandalous" construction of divine law. This is the bar that she does not consistently manage to clear.

Hayes' strongest evidence relates to the rabbis' analysis of the rationality of Torah law: she cites numerous midrashic and talmudic passages that address this issue in terms that echo Greco-Roman philosophers, Hellenistic Jewish writers, and even New Testament sources, suggesting that the rabbis are knowingly engaged in intercultural discourse. These passages relate to specific Torah laws or to the law in general as either non-rational (lacking or not in need for a particular reason) or irrational (defying logic or a natural order), indicating that the rabbis did, indeed, consciously reject the Greco-Roman value of rationality in law. In some passages, the non- or irrationality of the law is even transvalued: rather than constituting a flaw, it makes God's law superior, indeed functioning as a sign of its divinity. Modern scholars have often taken these ideas to be innate to rabbinic legal thought, yet Hayes makes a compelling case that they were formulated in response to a specific kind of cultural pressure, one that reshaped ancient readers' collective sense of the type of rationale divine laws should be expected to have.

However, the clear correspondence between the terms of rabbinic and non-rabbinic discourse on the issue of the law's rationality is not found in other areas of rabbinic legal discourse. In order to demonstrate that the rabbis were mindful of Greco-Roman discourses regarding other issues, Hayes focuses on what she calls rhetorics of disclosure or concealment,[8] passages that stand out within the rabbinic legal corpus as evidence of the rabbis' self-awareness about their work. A prominent type of rhetoric of disclosure is the narrative genre in which a rabbinic figure debates a heretical or non-Jewish figure and/or addresses a challenge from skeptical students: although such stories are not overtly subversive (the rabbis invariably prevail), their very presence in rabbinic literature signals a need to acknowledge a particular problem even as it is deflected. Rhetorics of concealment are legal moves whose transparent artificiality indicates the rabbis' discomfort with certain elements of Halakhah. For example, passages in which the rabbis describe natural phenomena in a way that makes them fit with the parameters of the law indicate that they were concerned about discrepancies (real or perceived) between halakhic rulings and observable natural phenomena.

These passages are certainly evidence of the rabbis' self-awareness, but Hayes is too quick to assume what they are self-aware *about*. For instance, in her chapter on legal flexibility, Hayes cites numerous instances where rabbinic legal innovations — some of which override biblical law — are either openly acknowledged or concealed in some way (retrojected onto biblical

[8] She borrows these concepts from Bernard Levinson, *Deuteronomy and the Hermeneutics of Legal Innovation* (Oxford University Press, 1997); and Aaron Panken, *The Rhetoric of Innovation: Self-Conscious Legal Change in Rabbinic Literature* (University Press of America, 2005).

characters or earlier rabbinic authorities, ascribed to biblical exegesis, etc…). These examples of rhetoric of disclosure and concealment suggest an ongoing tension regarding the extent of the rabbis' authority to institute halakhic changes, and Hayes attributes this tension to differing attitudes toward the Greco-Roman notion that divine law is static and unchanging. Yet apart from the aforementioned parallels between rabbinic *taqqanot* and the Praetorian Edict, Hayes does not find any clear evidence that the rabbis were conscious of this aspect of Greco-Roman legal discourse when they were discussing the possibility of halakhic change. And while these parallels are intriguing, they are not substantial enough on their own to support the idea that intra-rabbinic tension over halakhic change stemmed from the rabbis' exposure to Greco-Roman legal culture. On the contrary: a dialectic of flexibility and rigidity is intrinsic to the very nature of law, so that there is every reason to assume that such tension would arise quite naturally on its own, especially given the growth in the complexity of Halakhah as a legal system during the rabbinic period.

The truth is that, in this particular case, Hayes' methodological assumption — that the rabbis' attitudes toward the flexibility of Torah law reflect their awareness of Greco-Roman notions of divine law — does not much affect her textual analysis of the rabbinic material; she introduces this point almost as an afterthought, in appropriately circumspect language.[9] Yet If we are to find a more useful methodological frame for this issue, I would suggest that the concept of divine law is something of a red herring. Hayes assumes that the rabbis' designation of a particular law as biblical (*de-oraita*) indicates that they thought of it as a direct reflection of God's will; it follows that rabbinic measures that override or modify biblical laws reflect the rabbis' understanding that divine law is not static. This association between the category of *de-oraita* and divine will is well grounded for laws that are expressed explicitly within the Bible, such as the cancellation of debts in the sabbatical year (Deut. 15:1-2), which the rabbis circumvent through the institution of *prozbul*. Yet this is not the case for most laws that are classified as *de-oraita* within rabbinic literature, whose 'biblical' status is established through the highly technical process of midrashic exegesis, or sometimes simply taken for granted. In such cases, the designation of a particular law as *de-oraita* or *de-rabbanan* (lit., "of the rabbis") seems formal rather than substantive, a matter of how stringent or rigid the law in question is considered to be rather than whether it reflects divine or human will. Moreover, unlike divine and human law in Greco-Roman discourses, which are conceived of as distinct legal systems, the halakhic categories of *de-oraita* and *de-rabbanan* are thoroughly integrated as part of a single legal system, to the point where the status of many laws is subject to debate or never clarified at all.

Instead of framing the *de-oraita*/*de-rabbanan* distinction in terms of the origin of the law, we may propose that its primary significance is as the most basic element in the internal hierarchy of rabbinic law, akin to the hierarchical distinctions that are a necessary component of any developed legal system (e.g., statutory vs. regulatory law). These hierarchies of different types of laws are vital not only for determining the consequences of legal violations, but also for determining precedence when different laws come into conflict, and for deciding the extent to which (and methods by which) laws can be modified, suspended, or repealed. These three issues are governed by what H.L.A. Hart refers to as

[9] "It is *possible* that the emergence of new strategies of concealment… alongside the rhetoric of disclosure… reflects an increased sensitivity to Greco-Roman conceptions of divine law as immutable. Even if we allow for such a possibility, the effect of this discourse was likely complex" (p. 308, emphasis added; see also p. 306).

"rules of change," a set of secondary rules that is a necessary part of any legal system governing how the primary laws of that system (the commands that directly govern behavior) may be changed over time.[10] One of the distinctive features of Halakhah as a legal system — both during the rabbinic period and since — is that these rules of change are not formalized in any systematic way. (This lack of formalization may be attributed to the absence of any centralized legal or political authority). This simple fact has the potential to explain many of the phenomena that Hayes documents in this chapter, such as the fact that, functionally, the rabbis do amend biblical law but often use "rhetorics of concealment" to disguise the innovative nature of this activity. In the absence of a stable set of rules restricting *or* facilitating legal change, the rabbis potentially had more leeway than jurists in other legal traditions to modify existing laws, but they might also be more anxious to conceal what they were doing.

Realist and nominalist modes of legal reasoning

Another part of the book that would have benefitted from a consideration of the formal, internal dynamics of rabbinic law is Hayes' analysis of the question whether rabbinic law should be considered realist or nominalist, an issue that she addresses in the context of the relationship between rabbinic law and truth. This topic invites special scrutiny because it the subject of a current scholarly debate,[11] and because Hayes herself devotes considerable attention to it (close to fifty pages). I submit that Hayes makes a significant contribution to the conversation, but that her conclusions are marred by folding too many issues into the realism/nominalism distinction. A more nuanced appreciation of her material reveals important insights into the internal logic of rabbinic law, but marginalizes the evidence she cites for the influence of Greco-Roman legal discourse on this issue.

The scholarly debate in question originated with Yohanan Silman's influential 1985 paper,[12] in which he identified two distinct modes of halakhic reasoning: "realism" — the view that halakhic rulings ('prohibited', 'exempt') and statuses (impurity, ownership) reflect ontological properties of the objects to which they are appended, and "nominalism" — the view that halakhic rulings and statuses are not ontological but rather behavioral, such that they are manifest only in the prescriptive injunctions that they entail. Silman's categories have gained widespread use in rabbinics and philosophy of Halakhah, notably in the analysis of the differences between rabbinic and Qumranic law and of ritual purity laws. Yair Lorberbaum has offered a comprehensive critique of this scholarship,[13] arguing that Silman's distinction is overly reductionist and questioning whether it is possible to characterize a given legal system as either realist or nominalist. Notwithstanding, Hayes boldly wades into this controversy

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[10] *The Concept of Law* (Oxford University Press, 1961), 93-96.

[11] Prominent articles on realist vs. nominalist models of law in the rabbinic period include Daniel Schwartz, "Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law," in *The Dead Sea Scrolls: Forty Years of Research*, eds. D. Dimant and U. Rappaport (Leiden: Brill, 1992), 229–40; Jeffrey L. Rubenstein, "Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment," *Dead Sea Discoveries* 6:2 (July 1999): 157–83; Vered Noam, "Ritual Impurity in Tannaitic Literature: Two Opposing Perspectives," *Journal of Ancient Judaism* 1 (2010): 65-103. See also *Diné Israel* 30 (2015).

[12] Silman, *op. cit.*

[13] "Halakhic Realism," *Diné Israel* 30 (2015): 9*-77*.

and proposes that Silman's categories offer a useful framework for analyzing whether rabbinic law should be characterized as reflecting ontological truth.

In light of Lorberbaum's critique, Hayes' argument can be properly appreciated only by distinguishing between emic (internal) and etic (external) perspectives to the law. Even accepting Lorberbaum's conclusion that, objectively speaking, realism and nominalism are not useful categories for characterizing legal systems *in toto*, we may still speak of participants within a given legal system as conceiving of that system in either realist or nominalist terms. (This distinction is not terribly clear within the book itself, but Hayes articulated it in a symposium dedicated to the book and in personal communication.) Effectively Hayes is arguing that the rabbis themselves did not think of Halakhah in strictly realist terms, and hence that their conception of Halakhah does not match the Greco-Roman association of divine law with truth. Moreover, Hayes offers a definition of the realism/nominalism distinction that is both more concise and more precise than Silman's: realism "tends to assume the *mind-independent* reality of legal categories, determinations and judgments," while nominalism "tends to assume the *mind-dependent* reality of the same" (p. 197). With this definition, Hayes deliberately steers clear of the largely inconclusive discussions of rabbinic metaphysics (e.g., whether they regarded impurity as a "real" entity), but she also — somewhat inadvertently — makes her argument less dependent on speculative assumptions about legal essentialism (e.g., whether the rabbis considered pork to be inherently impure). Instead, she ends up focusing on the degree of *correlation* between legal categories and mind-independent phenomena. Hayes makes a compelling case that the rabbis self-consciously diverged in their legal rulings from such correlation, whether the phenomenon is astrological (the sanctification of the new month vs. the observable movement of the moon), biological (a woman's *niddah* status vs. her actual point in the menstrual cycle), genealogical (a convert's Jewish status vs. his non-Jewish parentage), or simply factual (the status of a widow's second marriage when the presumed death of her first husband is disproven). As Hayes frames this realism/nominalism distinction, it should be of vital significance for modern halakhic adjudication in cases where science challenges established halakhic rulings or has the potential to influence new ones.

Yet, in appreciating her argument, it is also important to understand that these examples represent a limited portion of the halakhic corpus, and when Hayes pushes her analysis of the realism/nominalism distinction into a broader analysis of the character of rabbinic law, her argument falters. For instance, she devotes almost ten pages to the way rabbinic law uses mind-states as the basis for a wide range of halakhic rulings, such as determining the status of a utensil with regard to its susceptibility to ritual impurity, and proposes that this, too, reflects a nominalist approach to Halakhah. Yet it is hard to conceive of an advanced legal system that does *not* consider states of mind to be significant: intent to effect a transaction, *mens rea* in a criminal act, etc… If Halakhah seems to invoke states of mind more broadly than in other legal systems, this may be ascribed to the fact that Halakhah formalizes a far broader scope of human experience and activity. Given how frequently legal systems appeal to states of mind, it's not clear what is to be gained by saying that these appeals reflect a particular conception of the law, or — more to the point of Hayes' analysis — in what way invoking states of mind indicates the deviation of law from objective truth, especially if we are only interested in the rabbis' self-perception of the law-truth divide.[14] Hence, while I

[14] Jonathan Klawans makes a similar point in his response to Hayes' book in the aforementioned symposium.

think Hayes' definition of realism is eminently useful for analyzing rabbinic law, I would characterize nominalism not as the consideration of mind-dependent phenomena, but rather as the *de*emphasis of mind-*in*dependent ones: a nominalist insists that legal categories need not be perfectly coextensive with mind-independent phenomena, even in cases when those phenomena would seem to be relevant to the laws at hand.

Legal formalism and legal fictions

This point carries importance beyond the narrow scholarly concern of the nominalism/realism distinction because it touches on the broader question of how we relate to the formalistic elements of law. Law has no shortage of features — rigid statuses and sharply defined categories — that lend it a constructed, artificial quality. It is these elements — the basic *forms* of legal discourse — that lead jurists to construct analogies between apparently dissimilar cases (e.g., treating psychological intent as equivalent to physical action, or symbolic actions or objects like substantive ones) or conversely to make distinctions between cases that seem to be equivalent. Scholars often analyze these formal features of law as legal *fictions*, inasmuch as they do not reflect any reality outside of legal discourse, and Hayes, too, adopts this approach. Thus she analyzes phenomena like the hybrid status of the convert (who is considered a full-fledged Jew for most but not all purposes) or the *eruv tehumin* (a legal device that transforms a shared courtyard into a private domain for purposes of carrying on Shabbat) as evidence of the rabbis' nominalist approach to law, i.e., one that deviates from a notion of objective truth. Yet the fact that all developed legal systems contains these sorts of formalisms suggests that they are integral to the way law functions, rather than a choice to do law one way or another. In other words, many of the features that Hayes and others regard as fictions are simply part of the language of law, and those for whom the law is a lived reality — such as the rabbis — typically regard these elements as no more fictitious than the categories created by other languages or cultural discourses.

Formalisms shift into fictions, however, in cases where there is a clear discrepancy between the categories of law and those of other aspects of human experience, such as empirical observations of nature (what we now call science). It is this narrower set of phenomena that Hayes is most judicious in distinguishing as "nominalist," and it is in these cases where she finds the most evidence of rabbinic self-consciousness regarding disparities between Halakhah and objective truth. Based on this, we may concur with Hayes that conversion qualifies as a legal fiction, but not because of the aspects of conversion that she mentions, namely the distinctions between converts and native-born Jews (a typical legal category distinction, which may even be rooted in a realist, hereditary view of Jewish status). Rather, the aspect of halakhic conversion that is most patently fictitious is the discrepancy between the convert's genealogical identity and her legal identity: the rabbis rule that a convert is "like a newborn child" and is legally no longer related to her blood relatives, even those who convert with her (*Yevamot* 97b)!

Yet this perspective on legal formalism also undermines the evidence Hayes cites for her thesis that the rabbis' self-consciousness about legal nominalism stems from external pressure. Hayes cites numerous rabbinic passages in which outsiders — sectarians or Palestinian rabbis (who are outsiders relative to the Babylonian Talmud) — object to or deride a certain halakhic position. Yet nearly all the halakhic issues at stake in these passages are standard instances of legal formalism, with nothing to suggest tension between the law in

question and a mind-independent reality. They cohere into a critique of rabbinic nominalism only if one conflates nominalism with formalism. But given how essential formalism is to legal discourse, and given that almost all the rabbis' interlocutors are themselves committed to some version of halakhic observance, such a critique seems highly implausible.

Conclusion

There is much more to say about this engrossing, if uneven, book, but one final issue bears mentioning here. At one point while reading the book, it struck me that for a work about divine law in Judaism, it contains relatively little overt discussion of rabbinic theology. Not that this is entirely unexpected: Hayes is analyzing rabbinic literature through the lens of the Greco-Roman concept of divine law, which is informed to a far greater degree by philosophy than by theology. Nonetheless, Hayes' research raises interesting questions about the relationship between theology and law in Judaism. The Bible leaves no doubt that God as a character in the biblical narrative is one and the same with the divine lawgiver. Yet biblical prose also reflects a stylistic division between the genres of narrative and law, suggesting that the divine authority that underpins the law stands at a distance from the role that God plays in actively judging human behavior. This distinction might be understated enough to ignore if not for the fact that it becomes much more extreme in rabbinic literature, where the genre of "Halakhah" — the codes and discursive texts that address the practical aspects of Jewish law — contains sparingly little discussion of God, while the rabbis' theological reflections are overwhelmingly found within the hodgepodge of genres — narratives, homilies, etc… — that are collectively labelled "*aggadah*." As we mentioned above, it is in aggadic depictions of God acting as a judge that we find some of the clearest examples of Greco-Roman influence on the rabbinic concept of divine law. Rather than seeing these as evidence of the rabbis' view of divine law in general, perhaps we should distinguish between two senses of divine law within rabbinic literature, one theological — law as applied by God Himself, the other legal — God's law as implemented by humans. To wit, the picture may be even more complex than Hayes makes it out to be.

The most radical expression of the divergence of law and theology in rabbinic literature is, of course, the celebrated "Oven of Akhnai" story (*Bava Metzia* 59b), in which the rabbis rebuff God's direct interference in a minute legal dispute with the verse, "It is not in heaven" (Deut. 30:12). This narrative barely registers in Hayes' study, which again is not terribly surprising: scholars have analyzed the episode so exhaustively that one wonders if there is anything new left to say about it. But perhaps it is time to de-familiarize ourselves with this very provocative story and remind ourselves quite how scandalous *this* aspect of the rabbinic construction of divine law — that the law, once given, does not bend to God's will — must have seemed in its time. Hayes is certainly correct that the Greco-Roman intellectual milieu was one factor that 'estranged' divine law for the rabbis and other ancient Jewish writers. But it seems that in other ways, the rabbis needed no assistance at all.

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