

Rabbinic Discourse, Law and the Culture of Opposition

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Abstract

A style of discourse associated with a rabbinic tradition in Judaism exemplifies a core oppositional process of the persistent identity system of Jewish culture. Based in an interpretation of law as represented by Torah and Talmud, this style of discourse undermines central reifications of the Greco-Roman-Christian tradition, which constitutes the historical framework for contemporary Western cultural hegemony. A central precept is that identity is contingent and not, as in the predominant Western tradition, something that is natural, transcendent, and absolute. The implicit critique of Western identity allows rabbinic discourse to deconstruct and challenge the authority of law and governmentality.

In an article rarely cited except by his own students, Edward Spicer (1971) proposed the notion of persistent identity systems as an object worthy of study by social scientists. Spicer was struck by the persistence of certain cultures or systems of cultural elements in stable form over long periods of time. These cultures showed the ability to resist destruction, assimilation, or other assaults from surrounding, dominant cultural environments. The essential feature of this refractory phenomenon Spicer called identity systems. The definitive characteristic of an identity system is personal identification with certain symbols or their referents. He went on to try to isolate what quality or qualities might be part of those cultures exhibiting persistent identity systems. The one commonality he found was conflict with controllers of the surrounding state apparatus, and especially conflict over issues of incorporation and assimilation. Opposition, then, seems to be the crucial part in the development of persistent identity systems.

Chief among the examples of persistent identity systems was that of the Jews. The Jewish example is probably the true test of Spicer's conception. Considering the protean, sprawling, heterogeneous nature of Jewish culture, or more accurately, cultures, spread out over much of the globe, perhaps the only common denominator is the sense of identity itself. Another aspect that makes Jewish culture exemplary is its placement in the development of Western culture—the cultural tradition of Western Europe and more recently, North America. At the very

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heart of it, and from the very beginning of Western hegemony, it was opposed by Jewish culture. To be sure, asserting that something as vague as Jewish ‘culture’ opposed Western hegemony is to assert nothing at all. The task is to find the factor in Jewish culture that maintained the oppositional process. I argue that this factor is a particular *way of symbolizing*. This way of symbolizing is found in ‘rabbinic discourse,’ a tradition of discursive practices, rooted in historical circumstances, but overflowing historical particularity. This way of symbolizing has come to exceed anything that is necessarily part of the Jewish religion; rather it is a model for cultures of opposition. It is the oppositional quality, coupled with historical tradition that has led to relatively contemporary discourses of opposition found within Western hegemony.

Survival, Opposition and Reflexivity

Barbara Myerhoff, in her ethnographic study of a Jewish senior citizens’ center in the United States, reports a story told by one of the members of the center—Shmuel, a survivor of the holocaust.

When the great Hasid, Baal Shem Tov, the Master of the Good Name, had a problem, it was his custom to go to a certain part of the forest. There he would light a fire and say a certain prayer, and find wisdom. A generation later, a son of one of his disciples was in the same position. He went to that same place in the forest and lit the fire but he could not remember the prayer. But he asked for wisdom and it was sufficient. He found what he needed. A generation after that, his son had a problem like the others. He also went to the forest, but he could not even light a fire. ”Lord of the Universe,” he prayed, “I could not remember the prayer and I cannot get the fire started. But I am in the forest. That will have to be sufficient.” And it was.

Now, Rabbi Ben Levi sits in his study with his head in his hands. ”Lord of the Universe,” he prays, “look at us now. We have forgotten the prayer. The fire is out. We can’t find our way back to the place in the forest. We can only remember that there was a fire, a prayer, a place in the forest. So, Lord, now that must be sufficient.” (Myerhoff 1982:113)

For several thousand years Jewish culture has not only survived, but grew through a kind of process Myerhoff calls “re-membering.” Re-membering is an active, purposive process of unifying the self through the recollection of other figures in one’s life and of one’s past selves. It is the reaggregation of the members that make up the corpus of identity, and the reestablishment of one’s membership in corporate groups and the traditions of those groups. It is through this process that Jews have survived.

Jewish culture has done more than survive. It has resisted the hegemony of Western culture rooted deep in the Greco-Roman-Christian tradition. Through that resistance it has become the epitome of cultures of opposition. And even more, it has so influenced Western culture that people write of a Judeo-Christian tradition as a fundamental part of the West. Jewish culture runs like a red thread through the warp and woof of the West even while it resisted domination.

Anthropologists, especially American anthropologists are quite familiar with cultures being destroyed. To a large extent American anthropology established itself as a sort of salvage operation to preserve the cultures of Native American peoples. Lest it be thought that this phenomenon is peculiar to the historical circumstances of the

American experience, Michel de Certeau points out that “. . . it is at the moment when a culture no longer has the means to defend itself that ethnology and archaeology appear . . . “ (Certeau 1980:54).

Today, of course, there are numerous cultures in the process of destruction in Latin America, Africa, Oceania, and other parts of the world. Many of them were first ethnographed only a few decades ago. Less common than destruction, some cultures survive by massive syncretism, drawing on a variety of older traditions and mixing them with new, Western incursions of industrialization and urbanization. Rare indeed are those cultures that not only survive but actively resist Western hegemony and domination. Judaism has not only followed all these strategies, it has lent some of its own traditions thereby influencing the consciousness of the dominator in an oppositional manner. The bondsman has directed the consciousness of his master (Hegel 1949/1807).

Social scientists have not ignored Judaic culture, but they have not conducted studies in the context of opposition to cultural hegemony. For example, Mark Zborowski and Elizabeth Herzog (1952) treated the Ashkenazic tradition as a memory culture. A number of sociological works have dealt with Jews as an ethnic group in America or as peculiar, circumscribed religious communities (Blau 1976, Eisen 1983, Gans 1958, Goldscheider 1986, Moore 1981, Prell 1989, and Sleeper & Mintz 1971). The relatively limited treatment of Judaic culture stems from two, not unrelated factors.

The first has to do with Certeau's dictum. Judaic culture resists ethnological study precisely because it has the means to defend itself. An inherent element of ethnological discourse is the power to create an object of study, and part of the power to create the object of study also creates the subject of the student because of the dialectical relation between subject and object. Judaic culture, however, includes within itself its own discourse of study. It retains *within itself* both subject and object. This is a source of its effective resistance. Judaic culture is not just reflective; it is reflexive.

The factor limiting study of Judaism pertains to the substance of its traditions. Nineteenth and early twentieth century studies were based on the assumption that the ideas of a people and culture make history. Beginning probably with Salo Baron's work (1937, 1942), there has been an increasing awareness of the importance of social historiography (Alon 1980, Gottwald 1985, Hengel 1980, and Neusner 1976). These social histories have tried to show linkages between the developing social circumstances of Jews and the ideas of Jewish culture. The result of these endeavors tends to retain a focus on the expressions of Judaism—whether Scripture, hagiography, Talmud, or post-Talmudic exegesis—while neglecting the enactment of such expressions. The assumption is that what holds a people and culture together is the substance of its cultural expressions. This viewpoint captures Judaic culture as a mirror; it captures its reflective aspect, but not its reflexive aspect.

The socio-historical approach has another, related drawback. It cannot explain the success of Judaism as a culture of opposition, in part because reflexivity contributes to its oppositional nature. An implication of the socio-historical approach leads students to look for cultural elements that bind people together. For instance, one might look to the political order as performing this bonding, but there was no Jewish state for two thousand years from the fall of the Hasmonean state in 6 CE to the founding of the state of Israel in 1948. Of course, the principal assumption of these social histories is that religion provided the binding force. While not gainsaying

that assumption all together, it cannot account for the variation in religious beliefs and practices among Jews throughout the world and throughout history. Moreover, many cultures have possessed important religious expressions, but that has not prevented their destruction.

A succession of linguists and ethnologists favor language as an element of social bonding. In that view, language functions as a sort of parabolic mirror, which both focuses and reflects. But if language has a crucial binding power, why do hypothesized linguistic communities exhibit so much variation? Even more pithy, how does one identify language in the Samuel Heilman's following description of a Talmudic study circle?

The languages in contact during *lernen*, those used alternately by the same persons, are essentially Hebrew, Aramaic, Yiddish, and English . . . In addition to the alternations among these various languages, there are also phonemic, syntactic, and intonational interferences. In the course of a . . . typical class, the language may become so fraught with [code] switching as to suggest an argot all its own the switching . . . becomes so frequent at times . . . that, for example, during one *shiur* the Rav—as he frequently does—stopped in mid-sentence and asked one of his students, “How ya doin? By the way, do you understand Yiddish?” Only to receive the reply, “Fine, I thought you were speaking English.” (Heilman 1983:170-71)

To call what is going on here a special argot, as Heilman does, misleads the reader, because in the context of his study, he makes the point that such occurrences are not peculiar to this particular study circle, but form an integral part of most such groups. Intense code switching constitutes an important part of Talmudic study. What then, is “the language” that binds these students? Perhaps it is not the languages spoken during *lernen*, but rather the text of the Talmud. Such would be the conclusion from the viewpoint of socio-historical scholarship. In a sense, the Talmud does bind them together, but not solely because of the language of the text, or the ideas contained within it.

The binding force of the Talmud is a type of cultural performance of which the Talmudic text is a part. The performance is Rabbinic discourse. It is not limited to what rabbis do in their particular historic circumstances, and it is not a category or type of discourse. What distinguishes Rabbinic discourse is its style, in the sense that Alfred Kroeber (1957) used the word to distinguish civilizations. Therefore, rabbinic discourse does not just refer to rabbis or the generation of the sages expounding and interpreting the law. It does include anyone who engages in this kind of cultural performance, and it includes the entire historical tradition of such performances, since these performances did not just bind the group at some certain time, but bound them with and through the tradition in all its historical vicissitudes. That is the red thread of oppositional culture to follow.

Instead of trying to pick out the thread in every epoch and cultural setting in which Jews have been embedded, only the most salient and significant periods serve to reveal its course. It originated in the period of the Second Temple. Significant traces emerged again in the redactions of the Talmuds in the fourth to sixth centuries CE. The treatment here is different from that in established Talmudic scholarship, since the objective is different. The goal is to examine the form of the Talmudic texts so as to gain insight into the cultural performances of Rabbinic discourse. Also, the effects of Rabbinic discourse show up in certain kinds of oppositional or resistant products of Western culture, such as some Marxian and Freudian thought. Finally, rabbinic discourse may serve

as a model for understanding contemporary law in ways that do not just constrain people but also offer paths for resistance against domination and oppression.

The cultural performance of rabbinic discourse functions to bind together subject and object into a unified self. This self is a psych-social-cultural construct. It emerges from cultural performances where, “as heroes in our own dramas, we are made self-aware, conscious of our consciousness” (Myerhoff 1982:105). Psychologically, such a self is narcissistic in that it results from a libidinal investment in one’s own person (Kohut 1977). Unlike the Greek myth from which the psychological process gets its name, real life narcissism is not found in a reflecting pool. It is only available by and through other people. It is a group phenomenon, a social phenomenon. Its cultural character comes from its integral relationship with the cultural traditions of a group. Self esteem is built out of group values. The cultural tradition is what ties narcissism to memory; an involuntary memory one that is inscribed in the body yet carried by the group. The notion resembles Bourdieu’s (1977) *habitus*, which includes deportment, demeanor, patterns of enunciation and articulation, and so on. This kind of memory only becomes available through public performance. Only by doing the memory and having it interpretively reflected by others does it become conscious. The result is a dynamic—a memory that is subject to being re-written with each performance.

Notions of memory and time are crucial to understanding the binding force and cultural significance of rabbinic discourse. In this kind of memory the test of its effect is not objective, not a matter of absolute truth. It is not a matter of historical accuracy, but rather one of construction or reconstruction of the performance. For instance, in studying the Talmudic tractate related to procedures for Temple sacrifice, it is not a matter of what the High Priest *is supposed to do* (Heilman 1983:103-104). In such a performance of memory “. . . the sense of duration is suspended and all of life is experienced as a single moment” (Mendilow 1952:137). To study the Talmud is to be a participant in a cultural tradition that, in the case of this particular tractate, merges the student into the scene of the Second Temple. To modify Shmuel’s story quoted earlier, one may no longer have a sacrifice, nor is there a High Priest to officiate, nor is there even a temple in which to perform the sacrifice, but one can remember there were such things, and that will have to be sufficient.

The History

Aside from the contemporary functions of rabbinic discourse, what makes its kind of cultural performance different from others? What is it that makes it so central to Judaic culture, especially as a culture of opposition? After all, this ‘self’ construction and time binding are generalizations about cultural performances of all kinds. One way to answer these questions and objections comes from a contrast between rabbinic discourse and the Greco-Roman-Christian traditions in the West—Agorian discourse.

More or less contemporaneously with the origins of rabbinic discourse, Athenians began to practice Agorian discourse. The principal characteristics of Agorian discourse include its hierarchical structure, its purpose conceived as a means to an end, and the site of its production—both social and geographic. Agorian discourse was recorded neither in Scripture, nor in anything like the Talmud. Its main written source is found in Plato.

The mise-en-scène of Agorian discourse is the polis, especially Athens. The formation of the polis took place at the expense of the oikos. A series of constitutional reforms codified the shift throughout the fifth and sixth centuries BCE. These reforms progressively redefined citizenship and marriage such that lineage went from association with an oikos to a politically defined legitimacy, which determined a person's status as a citizen of the polis. As of 451 BCE, Athenian citizenship became determined bilaterally. Both mother and father had to be Athenian citizens. The power to legitimize shifted from the hearth of the oikos to the agora. Along with this shift came a shift in understanding of the origins of Athenians (Loraux 1993).

In the fifth century, the autochthony of the people was problematic. The Athenian Acropolis depicted the resolution of the problematic. On its walls Athena receives the son, Erichonius, from Ge and Hephaestus: Athens can be parent to its people as educator even while lineage depends on the people's derivation from the earth, Ge. By the end of the fifth century, autochthony was no longer an issue since what really counted, access to political participation, came from laws derived from Agorian discourse (Loraux 1979).

The shift from oikos to polis, from autochthony to polity, demanded a new foundation for legitimacy. This new basis was political talk in the agora; the logos of Agorian discourse. Parmenides made an important distinction between ordinary talk and logos. Logos is the way to absolute truth, a means to get in touch with the ideal and universal verities of being (Kirk and Raven 1957). Through logos, talk becomes logic, which is the way to truth and therefore a means of legitimizing political decisions. Somewhat later, Plato made this new basis for legitimacy the foundation for an entire, ideal political and social order in his *Republic*. At the same time, power and legitimacy condensed into politics (Arendt 1959). Aristotle codified this approach and much later, in the face of the collapse of politics and the polis—this time in its imperial, Roman version—Augustine transferred the political ideal to that of the divine in *The City of God*.

Augustine's vision set the template for much of Western thought and culture for the next thousand years. His notion of the sign and ultimately the best illuminates the concept. Jesse Gellrich (1985:44) notes that “. . . the idea of the Book is perpetuated in a sense of writing as a metaphor of the ‘system of signified truth.’” In this tradition, the sign, word, and Scripture are metaphorical; they intervene between reality and consciousness—logos becomes a means to an end.

In the third century CE the Phoenician Porphyry gave form to the hierarchical model that is immanent in the notion of logos as legitimizing. Later Boethius (c. 480-525 CE) elaborated the so-called Porphyrian tree. It functions to structure the power of definition into a tree or taxonomy of superordinate and subordinate categories. In the model, the superordinate category is more general and more abstract. In such a system, one understands the particular by reference to the general, token by type. The movement of knowledge goes from species to genera, instance to ideal. Agorian discourse is structured similarly. One starts from the specific and material instance and reasons upward to greater abstractions and generalities. That is the way to knowledge and understanding. Agorian discourse locates the universal at the top of the tree along with its fruits, truth and legitimacy.

Rabbinic discourse is the obverse of Agorian discourse. The movement of knowledge and understanding flows

in the reverse direction, down to the roots of the tree instead of up to its branches. In the process of discourse, but not necessarily in terms of the substance or object of discourse, the rabbinic and Agorian modes act as dialectical antitheses. In the rabbinic mode, definitions are modeled on the encyclopedia rather than the dictionary. Umberto Eco compared the two.

If the so-called universals, or metatheoretical constructs that work as markers within a dictionary-like representation are mere linguistic labels that cover more synthetic properties, an encyclopaedia-like representation assumes that the representation of the content takes place only by means of *interpretants*, in a process of unlimited semiosis. These interpretants being in their turn interpretable, there is no bidimensional tree able to represent the global semiotic competence of a given culture. Such a global representation is only a semiotic postulate, a regulative ideal, and takes the format of a multidimensional network . . . (Eco 1986:68)

David Daube (1975) observes that the way the rabbis built the colossal system of the Talmud, I would include the Midrash as well as some upon some of additional exegeses; from the relatively scanty and terse provisions contained in the Bible is still a mystery. Nonetheless, treating the rabbinic endeavor as a protean, multidimensional cultural record, as opposed to a cultural synthesis, makes it less mysterious. The rabbis undertook to legitimize the Bible, specifically the Torah within the life of the Jews from roughly 500 BCE to 500 CE. The way they did it contrasts with the Agorian task of legitimizing by reference to rationalized universals. The Agorian tradition seeks legitimacy by locating it in an abstract truth as a unity, whereas the rabbinic tradition keeps legitimacy embedded in ongoing culture, which requires reflexivity.

From whence came the motivation for the rabbinic endeavor? Unlike the Athenians, autochthony never troubled the contemporaneous Jews. At the time parallel to the Greek consolidation of the polis, the Persians were integrating Palestine into their empire as a satrapy. That is the context for the Ezra-Nehemiah mission of reform in the last half of the fifth century BCE. The Persians saw Palestine as a secure frontier stronghold. That project entailed economic stabilization and regulation of civic affairs. The reforms of Nehemiah became part of the Persian imperial policy to promulgate civil law. Through that same process Jewish identity became defined as adherence to the law alongside monotheistic worship and cult sacrifice. These reforms laid the foundation for the Pharisees of later Hellenistic times and their conflict with the Sadducees during the Hasmonean period.

Briefly, the theoretical dispute between the Pharisees and Sadducees concerned the extent of the law. The Sadducees claimed law pertained to matters of cult and state. The Pharisees argued that it extended to all areas of life. The law in question is less a matter of which laws, there was probably as much agreement between the two factions as disagreement with in each on that question. The more important issue was one of interpretation and application. The law was the Torah, both its Scriptural and oral form. The Scriptural Torah contains the 613 commandments set forth in the five books of Moses. Nonetheless, the great bulk of the Torah was not Scriptural, but came from a variety of sources including prophecies, various literature of the Second Temple period, and custom. It is, in fine, “The Constitution and living regime of a people . . . an institution of customs and traditions that are linked to one another by innumerable threads that tie them to the past of the people” (Urbach 1975:290). Among the Sages of the first century CE, this second Torah became acknowledged and

established as the oral Torah.

When the Romans destroyed the Second Temple in 70 CE, they also destroyed the basis for the dispute between the Sadducees and Pharisees. The Romans destroyed a good deal more than that. What they left were many Jewish communities in dispersion throughout the eastern Mediterranean and Persia having the tradition of the Torah. The Torah no longer paralleled the cult; instead it was the only remaining cultural expression of Judaism. The ensuing centuries saw the codification of the oral Torah in the form of the Mishna in about 200 CE and its exegesis in the Talmuds from the fourth to sixth century CE. Later, commentaries were added to the Talmud in the Middle Ages, when the Midrash, the commentary on Scripture, was also composed.

After the destruction of the Second Temple, two forces molded rabbinic discourse. The first came from implications of the destruction of the sacrificial cult. The second was the study and promulgation of the Torah by means of cultural performance by those versed in the law.

The destruction of the Second Temple ended the religion built around sacrifice. At about the same time, a new religion, Christianity was in its formative stage. This new religion modified and extended the idea of sacrifice to include what Kenneth Burke (1984:284) has called “victimage,” which Burke argues is integral to the hierarchical order of Western society. Burke’s argument in this regard articulates with Walter Benjamin’s (1978/1923) discussion of law and violence and Giorgio Agemben’s (1998/1995) analysis of sacrifice and sovereignty. The function of sacrifice in Judaism, along with many other religions, provided a means for the community to unburden itself of sin. Sin could be acquired from any number of sources, generally it meant ritual uncleanness. Sacrifice restored the cleanliness, which Mary Douglas (1966) has interpreted as a matter of boundaries. Ultimately, they are boundaries of the self, socially defined and constructed personhood. Victimage restores purity of the self by subjugating it to a hierarchical order.

Without sacrifice and eschewing victimage, post-destruction Jews had to look elsewhere for a means of self restoration. They found it in the cultural performance of Rabbinic discourse. It is important that during the century when the rabbis first formulated rabbinic discourse, the Torah was expressed principally in oral form. Even after the Mishna, Midrash, Talmud and additional commentaries were written down; they could not have been available to the greatest mass of Jews because there was no printing. Therefore, although the rabbis may have studied written texts in the academies, and even there access was probably quite limited, bringing the Torah to the people must have been an oral act. Study of the Torah was largely an oral affair. Even after the texts became more available, solitary study remained insufficient, because the form of the texts embodies the public performance character of rabbinic discourse.

Consider a page of the Talmud. Its very construction in print recommends it as a paradigm of an “open Text” (Eco 1976). In the center, toward the top of the page, is the section of the Mishna. Beneath the Mishna is the gemora, the interpretations of the Sages as recorded from free discussion. The Tosafist commentaries of the Middle Ages surround that and often flowing above the Mishna, and on the left hand side of the page is the commentary by Rashi (1040-1105 CE). The reader moves out from the Mishna to encounter commentary upon commentary. Implicitly, the movement continues in an outward spiral from the page to even more commentaries

beyond it. The central text presents itself as infinitely interpretable.

At the beginning of a studying a Talmudic text the reader gains from voicing it, because the text itself is unvocalized and unpunctuated. Therefore, even a surface reading of the Talmud requires interpretation. It calls for the student not just to read, but to read into the text a meaning.

Now consider the gemora. This constitutes the bulk of the Talmud. It was what scribes finally redacted in the Babylonia and Palestinian academies. The gemora represents edited minutes of discussions among rabbis. They did not compose the gemora by sitting down and writing their thoughts. It includes commentaries by rabbis who lived centuries before the redaction, which form the recollection of the discussion at the time of the redaction, a re-membering in Myerhoff's (1982) terminology. The gemora is a written record of an oral tradition, which itself became available through public performance. How then, can the Talmudic student, who may be separated by many miles in space and centuries in time, to know how to read these rabbinic conversations? It can only be through continuation of the oral tradition.

Much of the content of the Midrash and even more the Talmud relates to ritual purity—that is, boundary conditions. Many of the Talmudic laws pertain to relations between Jews and Gentiles; others to social relations among Jews. The specific historical motive for redacting these texts in the fourth to sixth centuries CE remains unclear. The general conditions prevailing at the time include increasing dispersion of Jewish communities in reaction to increasingly onerous political and economic conditions in the eastern Mediterranean. Possibly, the redactions were meant to provide a tangible and portable guide for the oral Torah when social upheaval frequently interrupted regular commerce and travel. Under such conditions, a code of boundary conditions certainly would have been in order.

Whatever the motive, the nature of the code offers easier interpretation. As suggested earlier, the importance of the codes goes back to the Ezra-Nehemiah mission during consolidation of the Second Commonwealth under the Persian Empire. Ezra and Nehemiah were not only members of the Jewish community in exile in Babylonia; they were officials of the Persian court. They were charged with integrating the population of returned exiles who had gone back to Judea in several waves in the sixth and fifth centuries BCE. Those who had been exiled after 586 BCE were probably from the upper strata of Judean society, those most concerned with the priesthood and temple. Here was little reason to transport thousands of peasant small-holders. They exiles may have retained a somewhat similar elite position in Babylonia and Persia (Gottwald 1985, Neusner 1976). In the fifth century mercantile activity increased and gained in importance so it is likely that the Ezra-Nehemiah mission concerned itself not only with social reintegration, but also regulating relations of an emerging middle class of merchants, artisans, and merchant-farmers. They also had to address the issues of relations with Gentiles, not just within Palestine, but throughout the Persian Empire.

A particularly instructive reform forbade marriage with Gentiles and required divorce for those already married. In contrast to the almost contemporary Athenian law of 451 BCE, this reform did ratify an ongoing practice. While Athenian law ensured class endogamy—the group of citizens in Athens should be considered a class more than anything else (de Ste Croix 1981)—the post-exilic reform ensured religious endogamy. This represents the

central tendency of all the reforms. They aimed at unifying and integrating Jews as a religious community.

The reforms were legitimized in two ways. First, the Great Assembly, instituted in this period, a representative assembly of estates meeting irregularly, endorsed the reforms. Second, a system of civil courts was established, presided over by those learned in the law. The courts decided civil and religious matters. Thus, the same institutions regulated civil and religious life, laying the foundation for a tradition of common law and custom. These deciders of the law eventually gave birth to the Sages, who could, *inter alia*, certify a legal document. “When are the words of the Torah correctly said, asked the rabbis; ‘when their transmitter received them in an assembly’” (Faur 1986:95). A Sage, an expert in the law, is therefore one who legitimizes what is written such as a contract or bill of sale.

The bill of sale exemplifies the understanding of the sign in the rabbinic tradition. A bill of sale *is* a conveyance of property. It is not representative of it, a metaphor for it, or in any sense removed from the act; *it is the act itself*. The Sages’ oral interpretation is another act, which is an interpretant of the first. Neither is parasitic on the other. They are linked syntagmatically, not paradigmatically. Compare this to the Roman bill of sale. The Scandinavian philosopher, Axel Hägerström examined Greek and Roman law, especially bills of sale. He found that ritual surrounded them as a form of sacrifice to the gods (Olivecrona 1971:174). The key to their reasoning lay in legal performatives, which they compared to magical incantations. The example was the ancient Roman sales ceremony, the *mancipatio*, in which the seller orally affirms ownership, and then says he allows the property to be purchased by the buyer. The buyer is a passive onlooker as this ritual is performed before witnesses, and according to a rigid formula. As Olivecrona notes about this procedure, “What else but magic is it to call forth an effect through words, solemnly recited during a ritual act in strict accordance with an ancient model?” (Olivecrona 1971:229-30). In fact he noted that many basic ideas such as ‘right,’ ‘property,’ and ‘duty’ or ‘obligation’ were merely codes for the exercise of supernatural powers, which Vilhelm Lundstedt, his colleague, agreed, calling such entities “superstitious phantasms” (Olivecrona 1971:176). The rabbinic tradition interprets the act that is the bill of sale in its total legal and social context. The Roman tradition subordinates the act to words.

Another characteristic of the Midrashic and Talmudic corpus that works against hierarchy, the Western tradition of Agorian discourse, and victimage is the assumption that every mark in the text is meaningful. At first, it seems a very small assumption to carry momentous implications, a veritable Ganesha’s mouse, but two implications follow from it. The first is that the truth has already been transmitted, but study is the way of realizing it—that is making it real in the world. The second is that effective study can only lead to the truth so long as the student remains unimpeded by other considerations; it must be completely disinterested study. Both implications pertain to rabbinic discourse.

Writing of the Midrash, William Braude (1975:57) asserts “If the full meaning of the text could ever be recovered the thing itself which the text describes would stand forth in full view.” Later Braude says “that a text in Scripture not only describes reality but reflects it and embodies it” (p.60). When viewing the text, in the tradition of rabbinic discourse, reality is before the student. It is the student’s task to spread it out, undo the

condensation. This spreading out is an enormous task because if the text, Scripture, embodies reality, then the text must be extremely condensed. Think of the universe shortly after the big bang. Student of Talmud and Scripture do not merely have to decode the text following certain technical procedures to get to the truth. That way of understanding the text depends on a correspondence theory of truth in which accurate signs stand for real things and conditions in the world. That theory of truth derives from an essentialist and Platonic viewpoint. Instead, the rabbinic tradition calls upon the student to view reality as encyclopedic and use a semiotic analysis to realize it.

A hierarchical social order is always clothed in condensed symbols of authority. To analyze the condensations is to break apart what appears to be the univocality of authority into a cacophony of competing voices and ideologies (Bakhtin 1981). This is precisely what rabbinic discourse does. Its intellectual strategy plays the role of Hegel's bondman's influence on the consciousness of the master. Historically situated, they have carried on the influence of elements of Judaic culture on Western dominance. Rabbinic discourse is part of the social amnesia of the West (Jacoby 1975), which can have a liberating effect if used strategically. "All reification is forgetting" (Jacoby 1975:4), said Max Horkheimer and Theodore Adorno in the *Dialectic of Enlightenment*. Jacoby quotes Horkheimer and Adorno's *Dialectic of Enlightenment*. The translation by John Cumming is (1987/1972:230) "All *objectification* is forgetting." The original is "alle Verdinglichung ist ein Vergessen, Jacoby points out in his footnote that translating Verdinglichung in this context as 'objectification' is to lose the distinction between Marx and Hegel.

Oppositional cultures need to undo the amnesia and break up the reifications. In Spicer's (1971) relatively neglected article, he accords a pivotal and causal role to the oppositional process in forming identity systems for peoples who are under domination by "controllers of the state apparatus" (p. 797). The rabbinic tradition, in contrast to the Agorian tradition and its dominant Western successors, offers an analytic for comprehending identity while treating it as in-process and continually problematizing it. The problem of identity, in the rabbinic tradition, is not solved by a reification which smoothes over contradictions, rather identity is a process of human reason and labor with no appeal to a higher authority, as in the Talmud story of Aknai's oven.

On that day R. Eliezer brought forth every imaginable argument, but they did not accept them. Said he to them: . . . if the law agrees with me, let it be proved from heaven! Whereupon a Heavenly Voice cried out: "Why do you dispute with R. Eliezer, seeing that in all matters the law agrees with him!" But R. Joshua arose and exclaimed "It is not in Heaven." What did he mean by this? Said R. Jeremiah: That the Torah had already been given at Mt. Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mt. Sinai. After the majority must one incline. (*Baba Metz'ia* a-b)

In the Talmudic view, the Torah, the law of the universe, is up to people to construe as a common enterprise. In so doing, the law is realized; the universe depends on people constantly to make it manifest. In contrast, consider Plato's description of the death of Socrates. According to Plato, only Socrates' identification with the abstract, overarching ideals of the polis justifies his moral identity. In the Agorian tradition, people achieve identity through identification with a superordinate authority. This identification makes identity absolute, not merely

contingent. In this view, individual identity does not come from people in their particular historical circumstances; it is an unbreachable and natural given.

Law, Physis, Dike, Themis and Torah

Juristic law is not scientific law. Observed regularities comprise scientific law. The law of gravity consists of such regularities so do regularities of human behavior and social relations. That most people stop at red lights is not juristic law, but an observed regularity; the normative requirement in the traffic code is the juristic law. *Physis*, the Greek law of nature, is natural law in the sense of Aristotelian *telos*, the final cause which results when things follow their true nature. Philippe Nonet (2006) argues that Antigone called upon the authority of *Physis* to demand the burial of her brother Polynices in Sophocles' play of that name. This kind of natural law is beyond morality. It is unspoken, neither coming from gods nor humans, neither positive law, nor natural law in the sense of divinely inspired.

The law also consists of texts. In the case of non-literate societies, the texts are oral, maintained by memory, and often performative. Literate societies maintain the law in written texts. Both kinds of legal texts express, formally, normative aspects of ideology. As ideologies change through time, the texts of laws may change, or the texts may stay the same, but receive different interpretations. Whatever kind of texts, oral or written, the legal expression of ideology is made of signs, as is ideology as a whole. “*Without signs, there is no ideology*” (Vološinov 1973:9). Ideological, and therefore legal, signs partake of the ongoing social semiotic, and consequently they express meaning. The signs are material, whether performative or written. That is, they have a physical, observable form. They are not *mere* ideas, not Platonic forms.

This fungibility of ideological signs also makes them refracting and distorting media. Ruling elites strive to impart an eternal character to such signs, to extinguish or occlude the social value of struggles indexed by the sign, and to make the sign uniaxential (Vološinov 1973:23).

In actual fact, each living ideological sign has two faces, like Janus. . . . This *inner dialectic quality* of the sign comes out fully in the open only in times of social crises or revolutionary changes. In the ordinary conditions of life, the contradiction embedded in every ideological sign cannot emerge fully because the ideological sign in an established, dominant ideology is always somewhat reactionary . . . so accentuating yesterday's truth as to make it appear today's. (Vološinov 1973:23-24)

William Chambliss' 1964 study of vagrancy law illustrates the process. By tracing a law prohibiting non-employment, Chambliss revealed the social struggles played out over six centuries. Certain themes kept repeating despite vast historical changes. What appeared to be a relatively stable law—certain definitional and penal aspects varied according to historical circumstance—became, on analysis, a story of class struggle over how to get the poor to work.

The law, in its totality, is a sign that stands for force. It is in this sense that law and the state co-emerge. As the state claims a monopoly on violence so it claims a monopoly on coining the law. At the same time, the state normalizes the law. Less necessary in absolutist governments where force, violence, and law exhibit quotidian links, forgetfulness of the force behind law reaches its apotheosis in liberal democracies. It is in law's “representativity that originary violence is consigned to oblivion. This amnesic loss of consciousness does not

happen by accident. . . . The parliaments live in forgetfulness of the violence from which they were born” (Derrida 1992:47). Derrida was commenting on Walter Benjamin’s 1921 essay, “Critique of Violence.” Benjamin singles out police violence.

Its power is formless, like its nowhere tangible, all-pervasive, ghostly presence in the life of civilized states. . . . their spirit is less devastating where they represent, in absolute monarch, the power of a ruler in which legislative and executive supremacy are united, than in democracies where their existence, elevated by no such relation, bears witness to the greatest conceivable degeneration of violence. . . . All violence as a means is either law making or law preserving. If it lays claim to neither of these predicates, it forfeits all validity. (287)

For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and, to that extent, an immediate manifestation of violence. (295)

Benjamin addressed the police power of the state, as in that asserted by the United States Supreme Court in the *Slaughter-House Cases*, 83 US 36 (1872):

This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. (49-50, footnotes omitted)

Benjamin goes on to contrast mythical violence of Greek gods with that of divine violence of Yahweh and that of the state. Mythical violence is a “mere manifestation of the gods . . . a manifestation of their existence” (Benjamin 1921:294). The mythical gods demanded sacrifice, and punished challenges to their power. Divine violence predicates equality before the law. Divine law claims justice. Benjamin, however, questioned the logic of such justice.

The law of the state is just another name for divine violence. “Divine violence, which is the sign and seal but never the means of sacred execution, may be called sovereign violence” (Benjamin 1921:300). The connection with divine violence is constitutional law, which Benjamin equated with the power to set boundaries, physical boundaries marking off the territory of the state’s governance. “Where frontiers are decided the adversary is not merely annihilated; indeed he is accorded rights . . . And these are, in a demonically ambiguous way, ‘equal rights’” (Benjamin 1921:295).

Classical Greek thought recognized two sorts of justice. Themis represents one and Dike the other. Themis was a pre-Olympian Titan, born of Gaia and Uranus, earth and heavens. She embodied natural law and strove for harmony. Dike has an ambiguous character, part justice and part force. The latter she inherited from her father, Zeus. Therefore, Dike includes equity but also test and tribulation. Dike’s sister was Eunomia, the rule of law

that brings harmonious civil life. How Dike, trial, came to represent justice in classical Athens starts with the story of sacrifice—that of Iphigenia by her father Agamemnon so he could invade Troy. Upon his return from triumphantly defeating Troy, his wife, Clytemnestra, killed Agamemnon. Orestes, their son, avenged his father by killing his mother. Acquitted by earthly law, Orestes is, nonetheless, pursued by the Furies. Without mercy, the Furies would punish all crime including the breaking of rules considering all aspects of society. They would strike the offenders with madness and never stopped following criminals. The worst of all crimes were patricide or matricide. They would also be the guardians of the law when the state had not yet intervened or did not exist, or when the crime was a crime of ethics and not actual law. Aeschylus' *Eumenides* is the story of the conversion of the Furies to the Eumenides by the intervention of Athena and her founding of the Aeropagus, the civilizing influence of the state. Concomitantly, Dike changes from an instrument of Zeus' power to the power of the state of Athens.

In classical Athens Solonic law (594/3 BCE), with Cleisthenes' reforms (508/7 BCE), determined criminal justice (De Ste. Croix 2004). Outside of political crimes such as treason, Athenian law treated homicide as the most serious, and it could carry the death penalty. Intention of the accused determined the venue of the court, most of which were surrounding, or at least in close proximity to the Agora. Cases of involuntary homicide appeared in the Palladion and the most serious penalty was temporary exile. Voluntary homicide cases came before the Delphinium with a possible death penalty on conviction. The prosecutors were the relatives of the deceased. The major court remained the Aeropagus, but it usually heard only those cases that had significant social and political import. Professional lawyers, orators, pleaded for each side, the prosecution and defense. Juries paid by the state made the final decision (Freeman 1963; MacDowell 1963). Defendants acquitted of homicide in the court of the Aeropagus customarily went to the cave of the Furies to propitiate them with a purificatory offering (Freeman 1963:85).

Sacrilege was the only other category of crime that regularly had death as the punishment. In three dialogues (*Apology*, *Crito*, and *Phaedo*) Plato famously recounted the trial, conviction, and execution of Socrates for crimes against the gods. This was not, of course, his real crime, but rather his support for the tyranny of the Thirty that had overthrown Athenian democracy in 404 B.C.E., and his possible treachery with Sparta to install the oligarchic dictatorship (De Ste. Croix 1972, 2004:172; Stone 1988). Normally such a political crime would have led to ostracism, which was temporary and did not include loss of citizenship or property. At worst the penalty should have been permanent exile with loss of property. Granted, Socrates was age 70 at the time so ostracism would have been permanent. In any case, Socrates refused to leave Athens so the capital charge of sacrilege was the only way to dispose of him.

Crimes threatening civic solidarity embodied in the Athenian state were the most serious, and had the most severe penalties. Aeschylus, in his *Eumenides*, has the jury deadlock on Orestes' guilt of matricide. Athena herself casts the deciding vote acquitting him. Athena was not just the eponym for the city. The goddess symbolized the city-state; her presence was everywhere. Her intervention in the trial of Orestes can be read as state justice itself. While this *deus ex machina* transformed the tribal blood vengeance of the Furies, and created the Eumenides, the

Furies were not destroyed, but relegated to a cave. Thus, there is recognition of the persistence of primitive retribution, even while it is submerged, out of sight and out of public discourse in the Agora. Recall further, that the story of Orestes' crime starts with Agamemnon's sacrifice of his daughter, Iphigenia, who in the end accedes to her own death to serve the interests of the state. Classical criminal justice guards the integrity of the state. That was its purpose and its function in practice.

Rabbinic discourse contrasts with Greek Agorian discourse. Judaic justice is not measured by the state, and the community of Jews, in whatever political organization, cannot be symbolized by a god. These contrasts go to the basic levels of epistemology and categories of knowledge and civic practice.

The tendency to *gather* various meanings *into a one* is . . . characteristic of Greek thought in general: its movement towards the universal, the general, the univocal. The rabbinic tendency, by contrast, is toward differentiation, metaphorical multiplicity, multiple meanings. . . . Aristotle's theory of knowledge was at bottom representative, how the image is at the heart of Greek thought. (Handelmann 1982:33)

Keeping in mind the pivotal role of the goddess Athena, her ubiquitous representations in the center of civic life in Athens, and the important role of place in Athenian criminal justice, Susan Handelmann (1982) remarks on the difference from the present of the Hebrews. "The Greek *present* is defined by the place where the action takes place, and we are there as spectators and witnesses. The Hebrew present, however, is fluid, containing both past and future simultaneously" (p.37). In the rabbinic tradition the Torah is the law and justice. Moreover, the Torah is the law of the universe. That is, there is no distinction between natural law as in the law of gravity and criminal law as that which forbids homicide. The final pertinent, basic difference is that the Torah preceded the creation of the world. First there was the law, which provided the blueprint, then God created according to its instructions: "He [God] looked into the Torah and created the world" (Handelmann 1982:38 citing *Ber. Rab.* 1:1). The Torah, the law of the universe, is only realized through human interpretation and application. Justice must follow the law, but as it is applied with human reason in social and historical context. Justice is realized through understanding and applying the law in its particularity. There is no preexisting, transcendent Justice.

Instead of authority, instead of sacrifice to guard the state, rabbinic justice realizes creation. It is a continual process, always ongoing. Instead of place and presence where jurors witness justice, the rabbinic tradition of interpretation continually realizes justice. In this respect, it is not irrelevant that the rabbinic tradition—indeed the recording of the Talmud, which was the oral law as opposed to the written law of the Torah—took place when there was no Jewish state, after the destruction of the Second Temple in 70 CE. Therefore, Judaic justice in the rabbinic tradition cannot be the application of state power, as it is in the classical tradition. Rabbinic justice, like rabbinic discourse, is quintessentially deconstructive. It challenges authority, demanding it account for itself. Crimes arise, not from being the wrong kind of person, in the wrong place and time—such a construction would be utterly alien to the rabbinic tradition. Instead, crimes are those acts and practices that violate the law of the universe. The criminal is that which interrupts the duty of humanity to realize creation. Judaic justice resembles the Greek Themis more than Dike. Themis represents the harmonious functioning of the universe, and she is primordial, pre-Olympian, and pre-state. But rabbinic justice goes further, as there is nothing

prehistoric about it, no kind of autochthony. Rabbinic justice is and must be always already contemporary. To illustrate, there is a special law about informing. Anyone bearing witness against others to an alien authority—for example, the Roman state in antiquity, the Spanish state in the middle ages, or the Nazi state in modern time—is condemned to death (Steinsaltz 1976: 173-174). The rabbinic tradition of justice does not just deconstruct state authority; it challenges it.

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