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When Law Meets Theology

Legality and Revelation in the Jewish, Islamic, and Zoroastrian Traditions in the Abbasid Period

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I INTRODUCTION

Recent decades have seen growing interest in the interplay of law and religion, moving beyond the constitutional context (freedom of religion) and other practical legal concerns, to explore the broader dynamics of law and religion as "sciences" and classification systems.[1] The underlying assumption of research in the field has typically been that "law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing-over and cross-fertilizing each other."[2] This working assumption, however, rests, to a large extent, on the uncritical acceptance of certain binary distinctions entrenched in Western legal culture and the history of Christianity,[3] compartmentalizing the notions of *logos* and *nomos*, law and faith, letter and spirit, and church and state. These distinctions can be traced back to the Greco-Roman dichotomy between divine (or natural) and positive law,[4] on the one hand, and antinomian tendencies pervading ancient Christianity, especially Paul's writings,[5] that reject the very idea that *nomos*, in the sense of positive law, can be a medium of revelation and manifestation of God's word and wisdom. The absence, moreover, of a distinctive category for

[1] The literature is vast. See, e.g., Harold Berman, The Interaction of Law and Religion (1974); Harold Berman, Faith and Order: The Reconciliation of Law and Religion (1993); Law and Religion (Gad Barzilai ed., 2007); Perry Dane, *Constitutional Law and Religion*, in A Companion to Philosophy of Law and Legal Theory 119, 119–22 (2nd ed. Dennis Patterson ed., 2010).

[2] John Witte, Jr . & Frank S. Alexander , Christianity and Law: An Introduction 1 (2008). For one recent example of this discourse, see Rafael Domingo, *Theology and Jurisprudence: A Good Partnership?* 32(1) J.L & Relig. 79 (2017) (arguing for the restoration of a "dialogue" between theology and jurisprudence, since "interactions, synergies, and communication between sciences play an important role in the development of a scientist's knowledge").

[3] See Joseph David, Jurisprudence and Theology in Late Ancient and Medieval Jewish Thought (2014).

[4] Christine Hayes, What's Divine about Divine Law? Early Perspectives 54–89 (2015).

[5] This is hardly the only possible reading of Paul. Indeed, Paul's view of the law is complex, "at times, his attitude toward the law is mildly positive, at times neutral, and at times harshly critical and condemnatory." (*id*., at 141). For the inconsistency in Paul's treatment of the law see Hayes, Divine Law, *id*., at 140–64 and the vast literature cited.

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religion and the religious sphere in premodern contexts,[6] even within the confines of the Western tradition, further obscures the discursive categorization of law and religion as distinct, yet interacting, orders of classification.

When we cast our gaze beyond the Western and Christian traditions, however, we encounter a range of alternative possibilities that blur the Western bifurcation and defy the compartmentalization of law and religion.[7] According to David Novak, commenting on law and religion in the Jewish tradition, "while today many regard law and religion as separate spheres and sciences of life, Judaism has long regarded these phenomena as overlapping, if not virtually identical."[8] Similar observations can constructively be made for other non-Western legal and religious traditions, such as Islam, Zoroastrianism, and Brahmanic Hinduism, to name just a few. In such contexts, it would perhaps be more productive to replace the discourse of law *and* religion, tendentiously assuming the existence of distinct spheres and orders of classification interacting with each other, with one of law *as* religion and religion *as* law, as framed by the present volume, reflecting the essential "fuzziness" of these categories, which can represent two sides of the same coin.

One need not envision a dichotomy between "Western" and "non-Western" approaches to law and religion. It is simply that we can gain a more nuanced and variegated appreciation of these intersecting and overlapping spheres, by a conscious attempt to evade bifurcated modes of analysis entrenched in Christianity and Western legal culture, in search of alternative models beyond the confines of the Occident. The present article, centered on Jewish, Islamic, and Zoroastrian perceptions of revelation and legality in the Abbasid period – offers yet another example of the problematization and unsettling of the "law and religion" paradigm by non-Western and non-Christian discourses.

The first centuries of the Abbasid period[9] – between the mid-eighth and early-eleventh centuries – roughly corresponding to the late Geonic era in rabbinic periodization, can arguably be seen as a landmark in the development of Jewish, Islamic, and Zoroastrian jurisprudence. This is not to say of course that the beginnings of Jewish, Islamic, and Zoroastrian law – in the sense of comprehensive systems of positive law – should be traced to this juncture. Indeed, the Jewish and Zoroastrian legal traditions are firmly rooted in late antiquity,[10] as reflected in the

[6] See Brent Nongbri, Before Religion: A History of a Modern Concept (2013); Carlin Barton & Daniel Boyarin, Imagine No Religion: How Modern Abstractions Hide Ancient Realities (2016).

[7] The literature is vast. See, e.g., Religion, Law and Tradition: Comparative Studies in Religious Law (Andrew Huxley ed., 2002).

[8] David Novak, *Law and Religion in Judaism*, in Christianity and Law, *supra* note 2, at 33; The Cambridge Companion to Judaism and Law 2–3 (Christine Hayes ed., 2017).

[9] For historical overviews of the period, see Michael G. Morony, Iraq after the Muslim Conquest (1984); Muhammad Q. Zaman, Religion and Politics under the Early Abbāsids: The Emergence of the Proto-Sunni Elite (1997); Amira K. Bennison, The Great Caliphs: The Golden Age of the 'Abbasid Empire (2009).

[10] The chronological limits of late antiquity are rather elusive. Certain scholars still do not include the rise of Islam within the confines of late antiquity, see, e.g., The Formation of the Islamic World,

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detailed legal systems contained in the classical talmudic corpus,[11] on the one hand, and the Zoroastrian Zand (the Pahlavi translation and commentary on the Avesta)[12] and collection of Sasanian case law,[13] on the other hand. Islamic law is likewise rooted in late antiquity, as much of early Islamic law is indebted to pre-Islamic traditions and customs (including Roman, Sasanian, Jewish, and local Arabian law and custom).[14]

Notwithstanding the late-ancient origins of these legal traditions, the distinctive Islamicate[15] legal culture that emerged in Iraq and its surroundings under the early

Sixth to Eleventh Centuries, The new Cambridge History of Islam, Vol. I (Chase F. Robinson ed., 2011). To date, most scholars, however, do include the inception of Islam within late antiquity, see, e.g., Thomas Sizgorich, *Narrative and Community in Islamic Late Antiquity*, 185(1) Past & Present 9 (2004); Thomas Sizgorich, Violence and Belief in Late Antiquity: Militant Devotion in Christianity and Islam (2008); Robert G. Hoyland, *Early Islam as a Late Antique Religion*, in The Oxford Handbook of Late Antiquity 1053 (Scott Fitzgerald Johnson ed., 2012). Recently, Lena Salaymeh has suggested extending late antiquity to ca. 800 (while altogether discarding the conceptions of the "formative" and "classical" periods in Islamic legal history). See Lena Salaymeh, The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions 7–8 (2016). In the present context, I use the term "late antiquity" somewhat more conservatively, extending it only to the rise of Islam in the seventh century.

[11] That talmudic law amounts to a cohesive legal system, see Hanina Ben-Menahem, *Talmudic Law: A Jurisprudential Perspective*, in The Cambridge History of Judaism, vol. 4: The Late Roman–Rabbinic Period 877 (Steven T. Katz ed., 2006).

[12] For the pre-Islamic date of the Zand and its jurists see, e.g., Alberto Cantera, Studien zur Pahlavi-Übersetzung des Avesta 164–239 (2004); Shai Secunda, *On the Age of the Zoroastrian Sages of the Zand*, 47 Iranica Antiqua 317 (2012). The eighth book of the *Dēnkard* summarizes the contents of the (mostly lost) twenty-one *nasks* ("books") of the Avesta and Zand. But cf. Michael Stausberg, *The Invention of a Canon: The Case of Zoroastrianism, in* Canonization and Decanonization: Papers Presented to the International Conference of the Leiden Institute for the Study of Religions (LISOR) 257, 264–66 (9–10 Jan. 1997, Leiden; Arie van der Kooij & Karel van der Toorn eds., 1998) ("the twenty-one *nasks* of the *dēn* catalogued in *Dēnkard* book 8 are an attempt at classifying the entire religious tradition and not specifically the Avestan corpus as has been commonly assumed by the previous generation of scholars").

[13] The *Mādayān ī Hazār Dādestān* ("Book of a Thousand Judgements"), a collection of real and hypothetical case law, was compiled in the first-half of the seventh century prior to the Islamic conquest of Iran. See Maria Macuch, Rechtskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran: Die Rechtssammlung des Farrohmard i Wahrāmān 9–10 (1993); Maria Macuch, *Mādayān ī hazār dādestān*, in Encyclopædia Iranica (online edition; available at www.iranicaonline.org/articles/madayan-i-hazar-dadestan).

[14] See, e.g., Wael Hallaq, A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh 7–15 (1997); Wael Hallaq, The Origins and Evolution of Islamic Law 24–25 (2005). Some jurists, such as the eighth-century Ḥanafī legal scholar Abū Yūsuf (d. 798), went as far as consciously granting binding legal status to ancient pre-Islamic customs that are neither confirmed nor abolished or altered by Islamic law.

[15] Marshall Hodgson was the first to coin the term "Islamicate" as referring "not directly to the religion, Islam, itself, but to the social and cultural complex historically associated with Islam and the Muslims, both among Muslims themselves and even when found among non-Muslims." See Marshall G. S. Hodgson , The Venture of Islam: Conscience and History in a World Civilization, Vol. 1, 59 (1974); See also Salaymeh, *supra* note 10, 9 ("The category of Islamicate is a heuristic tool that enriches our understanding of Islamic legal history by recognizing that Islamic law, from its beginning, structured relationships between and among Muslims and non-Muslims. The result was Islamicate legal syncretism").

Abbasid Caliphate was marked by an unprecedented level of reflexivity, systematization, professionalization, and theorization of the law. This is manifest in the gradual shift from oral to written culture; the transformation from anonymous and collective authorship to specialized legal works attributed to named jurists; the institutionalization of academies and cross-regional legal "schools"; the professionalization of judges and jurisconsults; the coming of age of legal hermeneutics; and the emergence of legal theory and reflexive engagement with the nature of the law.[16] In this context, Jewish, Islamic and Zoroastrian authors endeavored to provide a clearer definition of the law's "roots" (*uṣūl al-fiqh* to use the prevalent vernacular), and articulate its basic "rule of recognition," identifying the authoritative legal sources and setting criteria for legal validity.

In this context, several Jewish, Islamic, and Zoroastrian authors, who seem to have shared a postclassical consciousness vis-à-vis earlier generations, sought to confine their legal systems' jurisprudential sources (and, implicitly, the legal sources available to judges and jurisconsults) to the canonical textual manifestation of God's revelation. The assertion that the system's legal sources are confined to the textual articulation of God's revelation was connected, not only with the gradual shift from oral to written culture, but also with an ongoing process of normative and theological canonization,[17] in which compilations of earlier legal traditions came to be regarded as binding legal "sources" in a jurisprudential sense and theological manifestations of the divine will. In this context, a similar voice was echoed in Jewish, Islamic, and Zoroastrian circles in the Abbasid period insisting on the textual confinement of God's law to closed textual corpora – the Torah and Mishnah-cum-Talmud, the Quran and Hadith, and the Avesta and Zand – and facilitating a process by which these corpora came to be regarded as binding legal "codes" and the exclusive, complete, and authoritative articulation of God's revelation.[18]

From a legal theoretical perspective, the idea that the law is exhausted by its textual-statutory articulation (rather than being custom-based or judge-made) is consistent with legal formalism, an important dimension of which is the reductive confinement of the law to an exhaustive and self-contained body of norms, often manifest in the form of a comprehensive statutory code.[19] The textual-statutory

[16] The literature exploring these processes is exceedingly vast. For a summary, see the description and references listed in Yishai Kiel, A Jurisprudential Reading of Rav Sherira's Epistle and Legal Responsa in the Light of Rabbinic, Islamic and Zoroastrian Legal Culture 16–22 (PhD dissertation; The Hebrew University of Jerusalem, 2020).

[17] For the relationship between normative and theological canonization, on the one hand, and textual canonization (the establishment of a textually crystallized and thematically fixed version of a sacred work), see Ahmed El-Shamsy, The Canonization of Islamic Law: A Social and Intellectual History 3–4 (2013).

[18] The connection between canonization, limitation, confinement and closure will be discussed below. See generally Jonathan Z. Smith, *Sacred Persistence: Towards a Redescription of Canon*, in Imagining Religion: From Babylon to Jonestown 48 (1982).

[19] On legal formalism, see, in general, Judith N. Shklar, Legalism: Law, Morals, and Political Trials (1964); Duncan Kennedy, *Legal Formality*, 2 J. Leg. Stud. 351 (1973); Fredrick Schauer, *Formalism*,

demarcation of the law is also consistent with a formal interpretation of the notion of "legality" and the "rule of law,"[20] entailing the law's generality, accessibility, prospectiveness, coherence, clarity, stability, and predictability.[21] From a theological perspective, the textual-statutory confinement of God's law reflects the perception of God as legislator and "author" of the law, at the expense of human participation in the revelatory and legislative processes.

The idea that God is the legislator and author of a textually confined body of law, containing stable and predictable laws, to which all (including the sovereign) are subject, is not a trivial one and, in fact, has a history that requires unpacking. In the context of the ancient Near East, something approximating a theological version of the "rule of law" can be found, as early as the first half of the first millennium BCE, in the Bible[22] and, to some extent, in the young Avesta and Old Persian inscriptions.[23] The idea that God is the author of

97 Yale L.J. 509 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949–1016 (1988); D. Lyons, *Legal Formalism and Instrumentalism – A Pathological Study*, 66 Cornell L. Rev. 949 (1988); Brian Leiter, *Positivism, Formalism, Realism* 99 Colum. L. Rev. 1138 (1999); Larry Alexander, *"With Me, It's All or Nothing": Formalism in Law and Morality*, 66 U. Chi. L. Rev. 530 (1999); Martin Stone, *Formalism*, in The Oxford Handbook of Jurisprudence and Philosophy of Law 166–205 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2002); Ernest J. Weinrib, *Legal Formalism*, in A Companion to Philosophy of Law and Legal Theory 327–38 (Dennis M. Patterson ed., 2008).

[20] See Lon Fuller, The Morality of Law 46–90 (1964 [rep. 1969]). For more recent discussions, see, e.g., Andrei Marmor, *The Rule of Law and Its Limits*, in Law in the Age of Pluralism 3 (2007); Andrei Marmor, *The Ideal of the Rule of Law*, in A Companion to Philosophy of Law and Legal Theory 666 (2nd edition; Dennis Patterson ed., 2010); Jeremy Waldron, *The Rule of Law*, in The Stanford Encyclopedia of Philosophy (2016) (available online at https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/); Jeremy Waldron, *The Concept and the Rule of Law*, 43 Georgia L. Rev. 1 (2008); Scott Shapiro, Legality 388–400 (2011). For the debate over the moral vs. formal nature of the "rule of law" and principles of "legality," see, e.g., Fuller, *id.*, at 200–23; H.L.A Hart, *Book Review: Lon Fuller. The Morality of Law*, 78 Harv. L. Rev. 1281 (1965); Ronald Dworkin, *Elusive Morality of Law*, 10 Villanova L. Rev. (1965); Matthew Kramer, In Defense of Legal Positivism: Law without Trimmings (2003); Nigel Simmonds, Law as a Moral Idea (2007); Joseph Raz, The Authority of Law: Essays on Law and Morality 210–31 (2009).

[21] For a useful summary of Fuller's principles of "legality," see Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 Law & Phil. 239, 240–42 (2005).

[22] See, e.g., Bernard M. Levinson, *The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy*, 27(4) Cardozo Law Review 1853 (2006) (demonstrating Deuteronomy's division of political power into separate spheres of authority and the subordination of each branch to the authority of the law).

[23] I refer specifically to Xerxes' reference to "the law set down by Ahura Mazda," as distinct from the law of the king, and the Avestan underpinnings of this stance. See Yishai Kiel, *Reinventing Mosaic Torah in Ezra-Nehemiah in the Light of the Law (dāta) of Ahura Mazda and Zarathustra*, 136(2) Journal of Biblical Literature 325 (2017). See also Yaakov Elman, *Contrasting Intellectual Trajectories: Iran and Israel in Mesopotamia*, in Encounters by the Rivers of Babylon: Scholarly Conversations between Jews, Iranians, and Babylonians in Antiquity 7, 13–14 (Shai Secunda & Uri Gabbay eds., 2014) ("in vital respects Israelite religion and Zoroastrianism stood apart from Sumero-Akkadian religion even in Achaemenid times. Both had become, or were in the process of becoming, scriptural religions, that is, religions whose central doctrines were embodied in a revelation vouchsafed to a prophet in the form of a long compilation, though it would be more than a millennium before

a prescriptive legal "code," which developed in ancient Israel and Iran, stands in contrast to the prevailing paradigm in the ancient Near East, according to which the gods were perceived as guardians of justice who authorize the laws of the kings by establishing them and conferring upon them the principles of justice and the wisdom essential to fulfill their role. In this context, the laws were generally produced and authored by the kings, not the gods, and known by their names.[24]

Later expressions of the compatibility of the idea of God as legislator and author of the law and the formal principles of the "rule of law" can be gleaned, for example, from Josephus's interpretation of theocracy[25] or the Quranic emphasis on the subjection of prophets and sovereigns to God's law.[26] In the present context, I seek to highlight the significance of a particular juncture in the convoluted history of the interplay of legality and revelation, as manifest in Jewish, Islamic, and Zoroastrian thought in the Abbasid Near East.

Zoroastrianism's 'scripture' would be written down"). For the history of "divine law" in ancient Israel see, e.g., Michael LeFebvre, Collections, Codes and Torah: The Re-characterization of Israel's Written Law (2006); Hayes, Divine Law, *supra* note 4; John Collins, The Invention of Judaism: Torah and Jewish Identity from Deuteronomy to Paul (2017).

[24] Hayes, *id.*, at 31–36. See also Bernard Levinson , Legal Revision and Religious Renewal in Ancient Israel 27 (2008) ("Israelite scribes introduced into the ancient world a new idea: the divine revelation of law. Accordingly, it was not the legal collection as a literary genre but the voicing of publicly revealed law as the personal will of God that was unique to ancient Israel"). Cf. LeFebvre, *supra* note 23, at 1–30 (arguing for the nonlegislative and nonprescriptive nature of ancient Near Eastern law in general and the essential conformity of biblical law to this model) and Raymond Westbrook, *What Is the Covenant Code?* in Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation and Development 15–36 (Bernard M. Levinson ed., 2006). Also compare the Akkadian examples discussed in Peter Machinist & Hayim Tadmor, *Heavenly Wisdom*, in The Tablet and the Scroll: Near Eastern Studies in Honor of William W. Hallo 146, 146–47 (1993); Karel van der Toorn, Scribal Culture and the Making of the Hebrew Bible 207–11 (2007); Uri Gabbay, *Akkadian Commentaries from Ancient Mesopotamia and Their Relation to Early Hebrew Exegesis*, 19 DSD 267 (2012).

[25] David Flatto, *Theocracy and the Rule of Law: A Novel Josephan Doctrine and Its Modern Misconceptions*, 28 Dine Israel 5–30 (2011) (rejecting the popular and scholarly perception of theocracy, which is often used to designate fundamentalist religious leadership that undermines the "rule of law" and constitutional values, suggesting instead an opposite notion of theocracy, developed by Josephus, that is grounded in the "rule of law" and constitutional values). See also Re´mi Brague, The Law of God: The Philosophical History of an Idea (2007); Ran Hirschl, Constitutional Theocracy (2010).

[26] Wael Hallaq, The Impossible State: Islam, Politics, and Modernity's Moral Predicament 48–73 (2013) (arguing for a robust constitutional paradigm in Islam as early as the Quran itself and rejecting Western scholarship's assumption of the impossibility of such a constitutional organization in Islamic governance); Wael Hallaq, *Quranic Magna Carta: on the Origins of the Rule of Law in Islam*, in Magna Carta, Religion and the Rule of Law 157–76 (Robin Griffith-Jones & Mark Hill QC, 2015). (providing a "constitutional" reading of Q. 3:79: "It is not for a human [prophet] that Allah should give him the Scripture and authority and prophethood and then he would say to the people, 'Be servants to me rather than Allah,' but [instead, he would say], 'Be pious scholars of the Lord because of what you have taught of the Scripture and because of what you have studied'," which asserts the separation of powers and the supremacy of God's law over the sovereign).

The Jewish, Islamic, and Zoroastrian legal traditions generally hold that, alongside the authoritative revelation vouchsafed in the Torah, Quran, and Avesta, respectively, God imparted additional normative directives connected with the rabbinic idea of *torah she-be-ʿal pe* (Oral Torah) revealed at Sinai alongside the Written Torah,[27] the Islamic concept of *sunna* (the traditions, practices, and sayings associated with the Prophet Muhammad) complementing the Quran,[28] and the Zoroastrian notion of the *dēn*, expressing the totality of the Zoroastrian Tradition.[29] While Hebrew *torah she-be-ʿal peh*, Arabic *sunna*, and Pahlavi *dēn* ultimately came to be associated with textually demarcated legal corpora, they initially seem to have denoted an amorphous body of oral tradition.[30] In the early Abbasid period, several jurists argued for the authority of a textually-demarcated version of this "body of oral tradition" and the statutory and "codificatory" confinement of God's law to the corpora of the Mishnah-cum-Talmud, Hadith, and Zand (in addition to the Torah,

[27] For the development and meaning of the rabbinic notion of *torah she-be-ʿal peh* see, e.g., Gerald Blidstein *A Note on the term 'Torah she-be-ʿal peh'*, 42(3–4) Tarbiz 496 (1973); Martin S. Jaffee, Torah in the Mouth: Writing and Oral Tradition in Palestinian Judaism, 200 BCE–400 CE (2001); Yaʿaqov Sussman, *'Torah she-be-ʿal peh' – peshuṭa ke-mashmaʿa: koḥo shel qotzo shel yod*, in Meḥqere Talmud 3:289 (3 vols.; Yaʿaqov Sussman & David Rosenthal eds., 2005); David Weiss Halivni, *The Breaking of the Tablets and the Begetting of the Oral Law: A History of 'Torah Sheb'al Peh'*, in Jerusalem Studies in Jewish Thought: In Memoriam of Gershom Scholem (1897–1982) Vol. 2, 137–63 (Joseph Dan ed., 2007); Israel Y. Yuval, *The Orality of Jewish Oral Law: from Pedagogy to Ideology*, in Judaism, Christianity, and Islam in the Course of History; Exchange and Conflicts 237–90 (Lothar Gall & Dietmar Willoweit eds., 2011); Natalie B. Dohrmann, *Can "Law" Be Private? The Mixed Message of Rabbinic Oral Law*, in Public and Private in Ancient Mediterranean Law and Religion 187–216 (Clifford Ando & Jörg Rüpke eds., 2015).

[28] For the concept of *sunna* in early Islam see Patricia Crone and Martin Hinds, God's Caliph: Religious Authority in the First Centuries of Islam 58–80 (1986); G.H.A Juynboll, *Some New Ideas on the Development of Sunna as a Technical Term in Early Islam*, 10 Jerusalem Studies in Arabic and Islam 97 (1987); Joseph Lowry, Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī 165–205 (2007); See also the recent collection in The Sunna and Its Status in Islamic Law: The Search for a Sound Hadith (Adis Duderija ed., 2015).

[29] For the concept of *dēn* in Zoroastrianism, see Prods Oktor Skjærvø, *The Zoroastrian Oral Tradition as Reflected in the Texts*, *in* The Transmission of the Avesta 3, 20–25 (Alberto Cantera ed., 2012); Yuhan Vevaina, *Enumerating the Dēn: Textual Taxonomies, Cosmological Deixis, and Numerological Speculations in Zoroastrianism*, 50 History of Religions 111 (2010). For other meanings associated with Pahlavi *dēn* (in relation to Av. *daēnā* and New Persian and Arabic *dīn*), see Mansour Shaki, *Dēn*, in Encyclopædia Iranica 7: 279–81 (available online at www.iranicaonline.org/articles/den). It would seem that much of the semantic range of Pahlavi *dēn* is already present in the Young Avestan *daēnā*. The latter term, which in the Old Avesta seems to refer primarily to a mental faculty that "sees" in the other world and guides the sacrifices, assumes in the Young Avestan texts several additional meanings, one of which is the totality of Ahura Mazdā's teachings and traditions (but not his "religion" as often translated). See Kiel, *Reinventing Mosaic Torah*, *supra* note 23, at 343–44.

[30] For the initially amorphous nature of *sunna* see, for example, Lowry, Early Islamic Legal Theory, *supra* note 28, at 168 ("Most often, however, the term *sunna* appears in the general sense of "tradition," "precedent," or "time-honored way of doing things"); for *dēn*, see, e.g., Stausberg, *The Invention of a Canon*, *supra* note 12, at 266 ("It shows the tendency to identify the Avesta with the religious tradition. This tendency is the result of an unconscious application of a Jewish, Christian, or Muslim concept of 'canonical scripture' to Zoroastrian material"). For *torah she-be-ʿal peh*, see, e.g., Halivni, *The Breaking of the Tablets*, *supra* note 27.

Quran, and Avesta), which were rhetorically presented as the exclusive manifestation of God's law and the complete embodiment of his revelation.

The emerging theoretical assertion of the textual-statutory confinement of God's law and revelation – connected with a strong emphasis on God's "authorship" of the law, on the one hand, and the principles of "legality," on the other hand – is consistent with a shift in the conceptualization of legal authority, in which context communal authority underwritten by a personal and mimetic relationship between master and student was gradually replaced by impersonal, textual, and hermeneutic authority,[31] while a deontic perception of legal authority was replaced by an epistemic one centered on the jurists' knowledge of posited textual sources.[32]

The legal theoretical shift was, at times, more declaratory and rhetorical perhaps than reflective of the actual legal mode of operation. This can be gleaned from the varying levels of willingness of jurists to incorporate other legal "sources" competing for prominence, such as "extra-canonical" textual traditions, "post-canonical" enactments, customary law, precedent, consensus, and independent reasoning not based on the canonical textual sources. In a similar manner, it has been correctly observed that the mere claim of a legal system to be of divine origin does not suffice, in itself, to indicate that it is actually "religious" in any practical sense.[33] But even insofar as rhetoric is concerned, one must pay close attention to the subtleties of the claim to divine origin, by interrogating the notions of "legal revelation" and "divine law" and delving into the meaning of the linkage posited between the legal and the divine. The various law codes of the ancient Near East, the laws of the Pentateuch, Greco-Roman discourses of natural law, and Manu's laws all claim to be "divine" in one sense or another, but the meaning and significance of this assertion differ considerably from one cultural context to another.

In the course of the present discussion, I will employ a distinction between personal-authorial and impersonal-formal claims concerning the law's "divine" nature;[34] between "participatory" and "stenographic" theories of revelation reflective

[31] For personal and impersonal constructions of legal authority, see Martin S. Jaffee, *A Rabbinic Ontology of the Written and Spoken Word: On Discipleship, Transformative Knowledge, and the Living Texts of Oral Torah*, 65(3) Journal of the American Academy of Religion 525–49 (1997); Hanina Ben-Menahem, *Two Talmudic Understandings of the Dictum 'Appoint for Yourself a Teacher'*, in Thinking Impossibilities: The Intellectual Legacy of Amos Funkenstein 288 (Robert S. Westman & David Biale eds., 2008); Yishai Kiel, *Filial Piety and Educational Commitments: A Talmudic Conflict in Its Cultural Context*, 21 Jewish Studies Quarterly 297 (2014).

[32] For "epistemic" and "deontic" authority, see Richard T. De George, The Nature and Limits of Authority (1985). Cf. Max Weber's classification of authority into charismatic, traditional, and legal-rational: Max Weber, *The Three Types of Legitimate Rule*, *in* 4(1) Berkeley Publications in Society and Institutions 1 (1958). For the shift in the conceptualization of legal authority from late antiquity to the early medieval period in Jewish, Islamic, and Zoroastrian law, see the preliminary remarks in Yishai Kiel, *The Authority of the Sages in the Babylonian Talmud: A Zoroastrian Perspective*, 27 Shenaton ha-mishpat ha-ivri 131 (2012–13).

[33] Hanina Ben-Menahem, *Is Talmudic Law a Religious Legal System? A Provisional Analysis*, 24 J.L. & Relig. 379, 383 (2008–09).

[34] See, e.g., Hayes, Divine Law, *supra* note 4, at 1–4 (juxtaposing the personal biblical conception of divine law with the formal and impersonal sense of Greco-Roman discourses of divine law, according

of the relative role of humans vis-à-vis the divine in shaping the revelatory content;[35] and between "retrieval" versus "constitutive" paradigms of transmission in legal systems that look back to a defining moment of revelation.[36] We will see that, in the Abbasid period, the Jewish, Islamic and Zoroastrian legal traditions reflect an increasingly stronger "authorial" and "stenographic" rhetoric of God's law (undermining the role of human agency in the legal process), on the one hand, and an emphasis on the textual confinement of the law, consistent with the formal principles of "legality," on the other hand. Paradoxically, then, it is precisely when the law is said to be thoroughly theologized (rather than secularized) that it acquires its clearest legalistic facets, reflecting the law's generality, accessibility, prospectiveness, coherence, clarity, stability, and predictability. Indeed, the "religious" and the "legal" are mutually enforcing.

The textual demarcation of the law and its theologization are generally characteristic of Jewish, Islamic, and Zoroastrian thought in the Abbasid period. In this article, I will center on three exemplary authors in particular, Rav Sherira Gaon (906–1006), head of the Rabbinic academy at Pumbeditha; Muhammad b. Idrīs al-Shāfiʿī (767–820), the so-called "architect" of Islamic jurisprudence; and Mānuščihr, a ninth-century Zoroastrian jurist and high priest. These authors were chosen for two main reasons. First, these authors do not only rhetorically declare the canonical status of the Mishnah-cum-Talmud, Hadith, and Zand (alongside the Torah, Quran, and Avesta), but practically seek to subordinate or otherwise subject extratextual legal sources and methodologies – such as consensus (*ijmāʿ*, *ham-dādestānīh*, *haskamah*); reason and discretion (*raʾy*, *istiḥsān*, *istiṣlāḥ*, *meh-dādestānīh*, *sevara*, *shiqul hadaʿat*) and custom/practice (*ʿamal*, *ʿurf*, *ʿāda*, *kardag*, *minhag*, *maʿase*) – to the canonical textual sources against the backdrop of competing tendencies prevalent among their contemporaries and predecessors.[37] Second, these authors address the canonical status of the textual-statutory sources systematically in the form of epistolary essays intended, among other reasons, to establish and

to which the law is divine by virtue of certain qualities inherent in it, i.e., rationality, truth, universality, and unchangeability).

35 See, e.g., Benjamin D. Sommer, Revelation and Authority: Sinai in Jewish Scripture and Tradition 2 (2015). ("Participatory" theories of revelation typically hold that the law constitutes a mixture of revelation and human responses to the divine will, while the law is created through a constant dialogue and the joint efforts of God and humans. "Stenographic" theories of revelation, on the other hand, typically hold that the law in its entirety was "handed down" and articulated by God).

36 See, e.g., Moshe Halbertal, People of the Book, Canon, Meaning and Authority 54–81 (1997) (the "retrieval" model grounds the authority of the law in a complete and perfect moment of revelation, while eliminating human agency and creativity. The jurists and exegetes merely reconstruct, unearth, and retrieve the content related at the initial moment of revelation. The "constitutive" model, on the other hand, holds that the jurists and exegetes possess the authority to constitute the law itself).

37 For a detailed discussion of these issues and the various approaches among Jewish, Islamic, and Zoroastrian jurists to "noncanonical" legal sources (e.g., "extra-canonical" textual traditions, "post-canonical" enactments, customary law, precedent, consensus, and independent reason not based on the canonical textual sources), see Kiel, Jurisprudential Reading, *supra* note 16.

ground the idea of the demarcation of God's law in a specific textual corpus. Thus, they played a particularly crucial role in articulating the stakes of the normative and theological canonization of their respective religious traditions during the Abbasid period, arguing for the textual confinement of revelation in designated corpora.[38]

In terms of social history, the Jewish, Islamic, and Zoroastrian jurists in the Abbasid period can be seen as members of dynamic normative communities engaged in a continuous effort to create legal meaning, while negotiating their particular legal identities within the broader framework of Islamicate legal culture. As such, these jurists were not "influenced by" or "resistant to" the surrounding legal culture, so much as they were an integral part of it, while having at the same time to balance their particular legal heritage with broader cultural identities. This is no less true for culturally "conservative" jurists, such as Sherira, Shāfiʿī, and Mānuščihr, who were, at one and the same time, members of a particular religious and normative tradition and the broader Islamicate legal culture.

Revisiting the theory of communal autonomy of religious minorities under Islam, Uriel Simonsohn[39] has argued that the consolidation of legal autonomy was an ideal fostered by religious and legal elites on both sides of the border, whose authority depended on the construction of such boundaries.[40] The practice "on the ground," however, transgressed these confessional aspirations, as evident from the fact that Jews and Christians regularly availed themselves of Muslim courts,[41] a practice which extended to other Islamicate minorities such as Zoroastrians.[42] It seems, however, that the "murky" boundaries between the various normative communities inhabiting Iraq and its surroundings in the Abbasid period were not simply the outcome of "popular" defiance of elite aspirations, as the Jewish, Islamic, and Zoroastrian authorities themselves shared deep structures of meaning (whether or not they cared to acknowledge it) and a postclassical consciousness connected with the idea of the textual-statutory demarcation of God's law.

[38] For the connection between canonization, limitation, and textual closure see the "classical" treatment by Smith, *Sacred Persistence*, *supra* note 18.

[39] Uriel Simonsohn, A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam 6–10 (2011).

[40] Compare Daniel Boyarin, Border Lines: The Partition of Judaeo-Christianity 1–33 (2004) (arguing that despite the attempts of the inspection-officers/heresiologists on both sides of the Jewish-Christian border to protect and maintain the borders, people were smuggling ideas and practices the whole time.)

[41] Simonsohn, Common Justice, *supra* note 39, at 6–10. For a similar juxtaposition of elite aspirations vs. a murky situation on the ground (although not in the context of Iraqi legal culture), see recently Eve Krakowsky, Coming of Age in Medieval Egypt: Female Adolescence, Jewish Law, and Ordinary Culture (2017).

[42] See the curious account of Zoroastrians under Islam in Sherman Jackson, I*slam and the American Common Good*, 1(1) The Journal of Islamic Faith and Practice 27, 35 (2018). I would like to thank Ahmed El-Shamsy for this reference.

II CANONIZING GOD'S LAW IN SHERIRA'S EPISTLE

This section will center on Sherira's account of the transmission history of the Oral Torah initially revealed at Sinai (alongside the Written Torah) and particularly the "constitutional" moment of the Oral Torah's textual crystallization in the Mishnah and, ultimately, in the Talmud. In this context, Sherira makes unprecedented claims about the legal and theological status of these works, claims which can be illuminated by contemporaneous reconstructions of the legal and theological status of the Quran and Hadith in the Islamic tradition and that of the Avesta and Zand in the Zoroastrian tradition.

Sherira opens his famous epistle[43] with the following statement concerning the canonical status of the Mishnah:

> Thus, we have witnessed that the six orders (of the Mishnah) were all arranged by our holy Rabbi (Rabbi Yehudah the Patriarch), so that we can recite them (systematically) one halakhah after another; one may not add (to the Mishnah) nor subtract from it.[44]

The idea that one may not add to the Mishnah nor subtract from its content and words seems to paraphrase Deuteronomy 4:2 ("You must neither add anything to what I command you nor take away anything from it"), thus aligning the unchangeable, static, and canonical status of the Pentateuch with that of the Mishnah as textual embodiments of the Written and Oral Torah, respectively. By pointing out the unchangeable nature of the Mishnah at the outset of the epistle, Sherira seems to set the stage for the ensuing discussion, in which he will make the case for the unique jurisprudential and theological status of the Mishnah, as the ultimate source of Jewish law and the complete and authoritative textual articulation of God's revelation.

[43] On Sherira's epistle see, in general, Gerald Blidstein, *Ra'ayon torah she-be-'al peh ve-toldotav be-iggeret rav sherira gaon*, 4 Daat 5 (1980); reprinted as *Oral Torah: Ideology and History in the Epistle of Sherira Gaon*, in Religious Knowledge, Authority, and Charisma: Islamic and Jewish Perspectives 73 (Daphna Ephrat & Meir Hatina eds., 2014) (further references will be to the English version); Robert Brody, The Geonim of Babylonia and the Shaping of Medieval Jewish Culture 20–25 (1998); Robert Brody, *On the Sources for the Chronology of the Talmudic Period*, 70 Tarbiz 75 (2000); Robert Brody, *Epistle of Sherira Gaon*, in Rabbinic Texts and the History of Late Roman Palestine 253 (Martin Goodman & Philip Alexander eds., 2010); Isaiah Gafni, *On the Talmudic Chronology in Iggeret Rav Sherira Gaon*, 52 Zion 1 (1987); Isaiah Gafni, *On Talmudic Historiography in the Epistle of Sherira Gaon*, 73 Zion 271 (2009). See also Adam Becker, Fear of God and the Beginning of Wisdom 107–10 (2006); Adam Becker, *The Comparative Study of 'Scholasticism' in Late Antique Mesopotamia: Rabbis and East Syrians*, 34 AJS Review 91 (2010); Gerson Cohen, Sefer Ha-Kabbalah 50–56 (1967); Joseph David, *As Explained in the Book of Adam: The History of Halakha and the Mythical Perception of History in the Late Geonic Period*, 74(4) Tarbiz 577, 594–95 (2005); Simcha Gross, *When the Jews Greeted Ali: Sherira Gaon's Epistle in Light of Arabic and Syriac Historiography*, 24(2) Jewish Studies Quarterly 122 (2017); Kiel, Jurisprudential Reading, *supra* note 16. For the only critical edition of the epistle see Iggeret Rav Sherira Gaon (Hebrew, B. M. Lewin ed., 1921).

[44] Iggeret, *id.*, at 7 (French recension).

Sherira's claims on behalf of the Mishnah, to be sure, are hardly trivial. Whatever its authors intended for it, the Mishnah, prior to the late Geonic period, was not perceived as the exclusive and complete articulation of the Oral Torah,[45] and certainly not as a binding legal "code."[46] While the amoraim and redactors of both Talmuds situated the Mishnah (or parts thereof) at the center of their interpretive endeavor (thus reflecting some degree of "canonicity"), they consciously and regularly deviated from the Mishnah's rulings[47] on the basis of both textual and nontextual legal traditions.[48] Sherira's assertion, by contrast, according to which "one may not add (to the Mishnah) nor subtract from it," seems to suggest the equivalence of the Pentateuch and Mishnah as exclusive, binding, and complete textual articulations of God's Written and Oral Torah.

Assuming the Mishnah's antiquity, the questioner – Jacob b. Nissim Ibn Shahin in the name of the Rabbanite community of Qayrawan – suggests that the Mishnah was composed in piecemeal fashion, a process stretching back to the early Second Temple period (notwithstanding the Sinaitic origin of the Oral Torah).[49] In his response, Sherira draws a distinction between the content of the Oral Torah, which

[45] See, e.g., David W. Halivni, *The Reception Accorded to R. Judah's Mishnah*, in Jewish and Christian Self-Definition, Vol. 2, 204 (E. P. Sanders ed., 1981); Mayer I. Gruber, *The Mishnah as Oral Torah: A Reconsideration*, 15 Journal for the Study of Judaism in the Persian, Hellenistic and Roman Period 112 (1984). In fact, the few talmudic references to a theory of an Oral Torah suggest a much more amorphous and dynamic body of tradition. See especially Halivni, *The Breaking of the Tablets*, *supra* note 27 (arguing that only in the post-talmudic period does the doctrine of the Oral Torah reach its "mature" form, according to which Moses received at Sinai every last detail of rabbinic tradition that will unfold throughout history. At this point, the Oral Torah becomes as static and unchangeable as the Written Torah). Cf. Samuel Safrai, *Oral Torah*, in The Literature of the Sages, vol. 1: Oral Tora, Halakha, Mishna, Tosefta, Talmud, External Tractates 35–119 (Samuel Safrai ed., 1987).

[46] See, e.g., Yaakov Elman, *Order, Sequence and Selection: The Mishnah's Anthological Choices*, in The Anthology in Jewish Literature 53, 54–55 (David Stern ed., 2004) (pointing out the Mishnah's lack of cohesiveness, internal contradictions, unresolved disputes, duplications, lack of comprehensiveness in terms of the topics covered, and lack of organization in terms of the noncontextual arrangement of the material). See also Avraham Goldberg, *The Mishna: A Study Book of Halakha*, in The Literature of the Sages, vol. 1: Oral Tora, Halakha, Mishna, Tosefta, Talmud, External Tractates 211–62 (Samuel Safrai ed., 1987); Ishay Rosen-Zvi, *Introduction to the Mishnah*, *in* The Classic Rabbinic Literature of Eretz Israel: Introductions and Studies, Vol. 1, 47–48 (2 vols., 2018).

[47] See, e.g., Halivni, *The Reception Accorded to R. Judah's Mishnah*, *supra* note 45, 204–12. By contrast, Geonic deviation from the Mishnah (and its authoritative interpretation in the Babylonian Talmud) is marginal. See Uziel Fuchs, The Geonic Talmud: The Attitude of Babylonian Geonim to the Text of the Babylonian Talmud 171 (2017) ("It is true that the later Geonim decided, here and there, not in accordance with the Talmud and, sometimes, interpreted the Mishnah against the grain of its talmudic interpretation . . . . But, those were all *rare exceptions*" [my translation and emphasis]).

[48] Cf. Rosen-Zvi, *Introduction to the Mishnah*, *supra* note 46, at 2 (arguing that the Mishnah in the early amoraic period was regarded as "a complete and binding corpus").

[49] Iggeret, *supra* note 43, at 5 (French recension): "And as for your inquiry concerning how the Mishnah was written, and whether the members of the great assembly started writing it, and the sages of every generation wrote parts of it, until Rabbi came and sealed it." (ודשאלתון כיצד נכתבה המשנה אם אנשי כנסת הגדולה התחילו לכתוב וכתבו חכמי כל דור ודור מקצתה עד שבא רבי וחתמה). The question seems to allude to the position of Rav Saʿadya as recorded in *Sefer Ha-Galui*. See Hanoch Albeck, Introduction to the Mishnah 65–66 (1959); Rosen-Zvi, *Introduction to the Mishnah*, *supra* note 46, at 12n. 51. For *Sefer Ha-Galui* see most recently Rav Saadya Gaon, in the Focus of

can be traced back to Sinaitic revelation, and which was well-known to the early sages, and its textualization-crystallization in the Mishnah[50] (albeit in oral form).[51] As explained by Robert Brody,

> there was no need in Second Temple times for a specific formulation of the tradition, which was universally agreed upon and understood; each master was free to transmit the material to his students in any style he chose. It was only with the crisis surrounding the destruction of the Temple that misunderstandings and doubts proliferated and the need for an established text was perceived, and only in the days of R. Judah the Prince was the time ripe for the production of such a text, which was immediately recognized as the canonical Mishnah.[52]

The Oral Torah's textualization-crystallization realized in Rabbi's codificatory project is described in the epistle in the following manner:

> And authority was bestowed upon Rabbi (from Heaven) together with his Torah, for his entire generation was subservient to him all of his days. As we have learned (*b. Git.* 59a): Rava the son of R. Abba said, and some say (it was) R. Hillel the son of Rabbi: from the days of Moses until Rabbi, we have not found Torah and authority combined in one person (lit. "in one place") . . . In his days, the rabbis were spared all persecution due to the love (Emperor) Antoninus had for him. He (=Rabbi) then decided to arrange/systematize the law, so that the rabbis would recite it uniformly rather than each his own version. Since, those early rabbis before the destruction of the Temple did not require this (=a crystallized version of the Oral Torah) since it is an oral Torah and they did not receive the rationales of known matters in the form of the Written Torah. Rather, the rationales were preserved in their hearts, and each of them taught his students just as a person conveys a matter to his friend in whatever manner of speech he fancies. And as they convened in the Temple and the academies, the legal matters arranged in their hand, with authority and without fear and anxiety, they were aided from Heaven insofar as the underlying rationales of the Torah were as clear to them as the law given to Moses at Sinai . . . And in the days of Rabbi, their matters were aided, so that the words of the Mishnah were just as they were pronounced by the Almighty and they were like a sign and a wonder. But Rabbi did not compose (these matters) on his own accord (lit. "out of his own heart"). Rather, (they were) the words recited by some of those early rabbis.[53]

The Mishnah's status as the complete and ultimate textual embodiment of God's Oral Torah is reflected in the assertion that "the words of the Mishnah were just as they were pronounced by the Almighty." While Sherira acknowledges and discusses

Controversies in Baghdad: Saadya's Sefer Ha-Galuy and Mevasser's Two Books of Critique of Him 80–167 (Joshua Blau & Joseph Yahalom eds., 2019).

[50] See Blidstein, *Oral Torah*, *supra* note 43.

[51] At least according to the French recension (MS Aleppo) of Rav Sherira's Epistle, which is generally regarded as more reliable than the Spanish one, the author was acutely aware of the oral nature of the Mishnah's compilation. See Brody, Geonim, *supra* note 43, at 21–22.

[52] *Id.*, at 278–79.

[53] Iggeret, *supra* note 43, at 21–23 (French recension).

the specific historical circumstances that led to the compilation of the Mishnah by Rabbi many years after the moment of the Sinaitic revelation, he insists on the fact that the final product of the Mishnah reflects the exact words pronounced by God to Moses.

Elsewhere in the epistle, Sherira alludes to social convention and the consensus of the sages and nation at large as constitutive of the Mishnah's jurisprudential status as the ultimate source of rabbinic law.[54] In this passage, however, he seems to ground the Mishnah's unique status in divine providence and inspiration.[55] Talya Fishman[56] notes in this regard that Sherira makes unprecedented claims, not only about the legal status of the Mishnah, but also about its theological status, portraying Rabbi as an agent in a divinely guided project aimed at a comprehensive textual articulation of the Oral Torah. It is God who revealed the Oral Torah to Moses at Sinai and it is he who, after many generations, guided the compilation of the Mishnah, so as to systematically articulate its accurate words. The divine characteristics of the Mishnah are manifest, accordingly, in the providential support that accompanied its production, which is reflected in the fact that Rabbi encountered no objection or difficulty, from within or from without the rabbinic community, to hinder his ambitious compilation project. The Mishnah's "divine" status is further reflected in its textual, stylistic, and organizational "perfection."[57] "And when everyone saw the beauty of the Mishnah's arrangement and the truth of its reasoning and the precision of (its) words, they all abandoned those (other) tannaitic teachings they had been reciting."[58]

Fishman further notes in this context that Sherira's allusions to divine guidance and the stylistic and linguistic "perfection" of the Mishnah are reminiscent of contemporaneous Islamic rhetoric concerning the Quran's inimitability (*iʿjāz al-Qurʾān*).[59] Like the Quran's inimitable and miraculous nature, which is believed to be manifest in its perfect style, the uniqueness of its language, and its concise nature,[60] Sherira emphasizes the Mishnah's textual, stylistic, and organizational "perfection" in rather similar

[54] Yishai Kiel, *Reinventing Yavneh in Sherira's Epistle: From Pluralism to Monism in the Light of Islamicate Legal Culture*, *in* Strength to Strength: Essays in Honor of Shaye J. D. Cohen 515 (Brown Judaic Studies ed., 2018).

[55] This duality in the epistle was briefly noted in Blidstein, *Oral Torah*, *supra* note 43, at 83.

[56] Talya Fishman, *Claims about the Mishnah in the Epistle of Sherira Gaon: Islamic Theology and Jewish History*, in Beyond Religious Borders: Interreligious Interaction and Intellectual Exchange in the Medieval Islamic World 65, 67 (David Freidenreich & Miriam Goldstein eds., 2012).

[57] See Talya Fishman, Becoming the People of the Talmud: Oral Torah as Written Tradition in Medieval Jewish Cultures 41 (2011).

[58] Iggeret, *supra* note 43, at 30 (French recension).

[59] Fishman, *Claims about the Mishnah*, *supra* note 56, at 67; Fishman, People of the Talmud, *supra* note 57, at 41–42, 249n. 131. For the doctrine of *iʿjāz al-qurʾān*, see Richard C. Martin, *Inimitability* in Encyclopædia of the Quran 2:526 (available at https://referenceworks.brillonline.com/entries/encyclopaedia-of-the-quran/inimitability-EQCOM_00093).

[60] These facets, I might add, are emphatically stressed throughout Shāfiʿī's epistle on legal theory. See, e.g., Shāfiī, Risāla, 53–71 [The Epistle on Legal Theory: A Translation of Shāfiʿī's Risāla 22–28 (Joseph Lowry trans., 2015)].

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terms. While Jewish authors more commonly participated in this type of discourse by arguing for the perfection and conciseness of scripture (often in response to Islamic claims of *taḥrīf* ["distortion, falsification"]), Sherira seems to extend the contours of this discourse by making similar claims about the Mishnah.

Sherira further grounds the authority of the Mishnah in a myth, according to which the closure and canonicity associated with Rabbi's codificatory project were predestined and prophesied in the "Book of Adam:"[61] "As explained in the Book of Adam: Rabbi and R. Nathan are the end of Mishnah."[62]

The narrative and mythical framework in which Sherira couches his jurisprudence lends itself to a "Coverian" analysis focused on the interplay of nomos and narrative[63] and the grounding of legal cultures in constitutional "myths."[64] In line with Robert Cover's view of the normative sphere as one defined not only by statutes and legal institutions but also by narratives and myths providing meaning to the law, I read the providential support guiding Rabbi's codificatory project, the miraculous alignment of the Mishnah's wording with the Sinaitic articulation of the Oral Torah, and the predestination of Rabbi's endeavors prophesied in the "Book of Adam," as the narrative context for Rav Sherira's jurisprudence. In this framework, the textual-statutory confinement of the Oral Torah and the view of the Mishnah as "authored" and articulated by God are confirmed and validated through the narrative and mythical framework.[65]

Rav Sherira's jurisprudential claims on behalf of the Mishnah, however, are not simply upheld by the mythical and narrative framework. While the miraculous and divine characteristics of the Mishnah indeed support its unique status, it is not entirely clear how the myths surrounding the Mishnah square with its jurisprudential construction as the ultimate source of Jewish law. Does the Mishnah's exclusive jurisprudential status rest on its divine and miraculous qualities or on the positivist notion of social convention reflected in the consensus of the sages and nation at large. As in Cover's model, the sphere of narrative and myth does not simply and

[61] For Sherira's employment of the "Book of Adam" see David, *As Explained in the Book of Adam*, *supra* note 43.

[62] Iggeret, *supra* note 43, at 59 (French recension), based on *b. B. Metz*. 85b–86a. Sherira further argues based on the talmudic tradition that, "in this manner, (rabbinic) instruction accumulated generation after generation until Ravina at whose time it ceased. As Samuel, the astronomer, had seen written in the Book of Adam: Ashi and Ravina are the conclusion of instruction" (Iggeret, *id.*, at 69). See also Iggeret, *id.*, at 28: "And our rabbis have taught that even Adam took joy in R. Akiva's Torah, when the Holy One, blessed be he, showed him every generation and its sages."

[63] See Robert Cover, *The Supreme Court, 1982 Term – Forward: Nomos and Narrative*, 97(4) Harv. L. Rev. 4 (1983).

[64] See Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5(1) Journal of Law and Religion 65, 66 (1987) (juxtaposing the foundational myths of Sinai and the Social Contract, which underly the Jewish and Western legal cultures).

[65] For another example of Sherira's use of jurisprudential myths see Kiel, *Yavneh*, *supra* note 54 (regarding the founding rabbinic "council" at Yavneh)

uncomplicatedly uphold the nomos, but rather often problematizes its very assumptions.

Sherira's declaratory statements concerning the divine nature, not only of the Oral Torah per se, but also of its textual articulation in the Mishnah, reflect a "stenographic" model of revelation and a rhetoric of divine "authorship" of the law, as opposed to weaker interpretations of the law's divine origins underlying the "participatory" model of revelation. This seems to accord with the rhetoric of other late Geonic authorities, most notably Saʿadya, whose claims on behalf of God's "authorship" of the Oral Torah were often described as rhetorical overstatements/exaggerations, likely motivated by the Karaite challenge to rabbinic authority.[66] The revelatory model upheld by Saʿadya reflects the comprehensiveness and singularity of the Sinaitic revelation, the content of which might be "retrieved" by jurists, but is not "constituted" by them, and the rejection of "participatory" interventions in the content revealed.[67] Sherira's assertions to that effect might similarly be construed as ideologically motivated rhetoric countering Karaite claims.[68]

[66] For Saʿadya's 'overstatements' in this regard and his anti-Karaite agenda, see, e.g., Brody, Geonim of Babylonia, *supra* note 43, at 96–99, 244–48; Marina Rustow, Heresy and the Politics of Community: The Jews of the Fatimid Caliphate 25–26 (2008); Jay Harris, How Do We Know This? Midrash and the Fragmentation of Modern Judaism 79 (1995); Eliezer Schlossberg, *Ha-pulmus be-yeṣirato shel rav saʿadya gaon* 126–27 Sinai 305 (2000–01); Marc Herman, Systematizing God's Law: Rabbanite Jurisprudence in the Islamic World from the Tenth to the Thirteenth Centuries 39–42 (PhD dissertation; University of Pennsylvania 2016); Marc Herman, *Prophetic Authority in the Legal Thought of Saadia Gaon*, 108(3) Jewish Quarterly Review 271, 278–81 (2018).

[67] According to this approach, rabbinic midrash (ostensibly deriving the law by means of scriptural exegesis) should be regarded as an attempt to scripturally ground preexisting laws already known to the exegetes through tradition, rather than "real" law-generating activity. This paradigm associates midrash with "retrieval" rather than "constitution." The "retrieval" model is related theologically to the "authorial" and "stenographic" paradigms of revelation, both upholding the completeness and singularity of the Sinaitic revelation, while downplaying human involvement in the revelatory process. In addition to the studies by Halbertal (*supra* note 36) and Sommer (*supra* note 35) mentioned above see also Harris, How Do We Know This, *supra* note 66, at 73–102; Yohanan Silman, Qol gadol ve-lo yasaf: torat israel ben shelemut le-hishtalmut 39–69 (1999).

[68] His hyperbolic rhetoric notwithstanding, Sherira advocates a somewhat more moderate version of the Oral Torah's revelatory status in comparison with Saʿadya. Robert Brody observes in this regard that, "In addition to literary crystallization … Sherira is willing to allow for a substantial degree of historical evolution in the specific contents of the Oral Torah, while at the same time maintaining the extreme antiquity of the tradition as a whole. Aside from doubts and controversies concerning the details of earlier traditions, new problems arose from time to time, which had to be resolved by analogy with established tradition. The essence of his position appears to be that all the later ramifications were contained *in potentia* in the earliest tradition and would have been clear to the earliest authorities had they considered these questions" (Brody, Geonim of Babylonia, *supra* note 43, at 279). Indeed, it would seem that Sherira's "formalistic" and "legalistic" rhetoric is complicated by the role (however limited) he assigns to human agency in the legal process. Compare with Maimonides' "cumulative" paradigm outlined in Halbertal, People of the Book, *supra* note 36, at 59–63. For the differences between Saʿadya and Sherira in this regard see Harry Fox, *Neusner's The Bavli and Its Sources, A Review Essay*, 80(3–4) Jewish Quarterly Review 353–54 (1990); Herman, Systematizing God's Law, *supra* note 66, at 63–64.

It must be stressed that the assertion of the textual-statutory demarcation of the Oral Torah (however rhetorical and hyperbolic) represents an unprecedented claim in rabbinic thought. The (few) talmudic sources that clearly subscribe to a theory of a dual Torah given at Sinai, one in writing and the other orally,[69] provide a rather loose definition of the content of this amorphous body of rabbinic tradition.[70] In fact, in as much as the textual and substantive limits of the Oral Torah remain undefined in the classical talmudic sources, any rabbinic tradition can tendentiously be subsumed under its authoritative wings. Any rabbinic tradition, be its source and origin as it may, can simply be integrated into the inchoate body of Oral Torah revealed at Sinai.[71] With the exception perhaps of a few talmudic statements,[72] the Oral Torah represented for the classical rabbis a dynamic and living tradition, not one that is textually and literarily demarcated and confined.[73]

By contrast, Sherira's innovative declaration (however exaggerated or overstated) regarding the Mishnah's exclusive status as the textual-statutory embodiment of the Oral Torah,[74] underwritten by the theological assertion that God himself guided and ordained the Mishnah's composition, has far-reaching ramifications on the theoretical perception of the law. Indeed, the idea that the law is textually confined is consistent with legal formalism and the (formal) principles of legality, both of which are largely uncharacteristic of the talmudic worldview. The epistle, moreover, does not simply assert the jurisprudential status of the Mishnah (and Talmud) as the ultimate and complete embodiment of God's law, but also represents an attempt to articulate the historiographic, mythical, and theological underpinnings of this stance.

While the Mishnah's perceived stylistic, linguistic, and organizational "perfection" might be regarded as more conducive to Sherira's presentation of it as a binding and canonical legal "code" containing the ultimate articulation of God's Oral Torah,[75] the Talmud is another story altogether. While the Talmud

[69] For rabbinic controversy over the doctrine of the Oral Torah, see, e.g., *Sifra*, Behuqotai, 8:12 (ed. Weiss, 112b).

[70] See, e.g., *Sifre Deuteronomy* 351 (ed. Finkelstein, 408) and *b. Git.* 60b. The ambiguity surrounding the actual content of the oral revelation at Sinai is highlighted in the famous story recorded in *b. Menah.* 29b.

[71] See, e.g., *b. Yoma* 28b (cf. *m. Qid.* 4:14; *t. Qid.* 5:17).

[72] See esp. *b. Ber.* 5a. See also Gerald Blidstein, *Oral Law as Institution in Maimonides*, in THE THOUGHT OF MOSES MAIMONIDES 167, 175 (Ira Robinson et al. eds., 1990); Berakhyahu Lifschitz, *Minhag 'u-meqomo be-midrag ha-normot shel torah she-be-'al-peh*, 24 SHENATON HA-MISHPAT HA-IVRI 123, 213 (2006–07); SOMMER, REVELATION AND AUTHORITY, *supra* note 35, at 253–54. For the fascinating textual history of this tradition see Roni Shweka, *The Tablets of Stone, the Law, and the Commandment*, 81 TARBIZ 343 [2013]).

[73] See Halivni, The *Breaking of the Tablets*, *supra* note 27.

[74] See also Sa'adya's claims at the beginning of the second part of his *Kitāb Tahsīl al-Sharā'i' al-Sam'iyya* ("Book on Attaining the Revealed Commandments"), according to which "This essay establishes the tradition known from the Mishnah and Talmud." See DAVID E. SKLARE, SAMUEL BEN HOFNI GAON AND HIS CULTURAL WORLD: TEXTS AND STUDIES 160 (1996).

[75] As I mentioned, however, Sherira's claim constitutes a stretch even for the Mishnah, given the presence of numerous contradictions, duplications, and inconsistencies.

was, more or less, textually fixed by the time of Rav Sherira (that is, in terms of its content, sequence, and general order, notwithstanding ongoing lexical fluidity),[76] it hardly resembles a legal "code" in any meaningful sense.[77] And yet, Sherira (in line with other late Geonic authorities) portrayed the Talmud – alongside the Mishnah – (however rhetorically) as a canonical and binding statutory "code" and the ultimate source of Jewish law. Indeed, not unlike the textual-statutory demarcation of the Oral Torah in the text of the Mishnah, "They (=the Geonim) did battle not merely on behalf of an amorphous body of tradition, but also on behalf of a specific literary crystallization, the Babylonian Talmud, which serves as the flagship of that tradition … the Talmud served as the source of authority, from which almost all legal decisions were to be derived."[78]

[76] Jacob Nahum Epstein has argued that the Geonim preserved, at times, alternative "editions," which predate "our edition" of the Talmud. See, e.g., Jacob Nahum Epstein, Studies in Talmudic literature and Semitic languages 2:378 (3 vols., Melamed ed., 1983–91). See, more recently, Yoav Rosenthal, *On the Early Form of Bavli Mo'ed Qatan 7b-8a*, 77(1) Tarbiz 45–70 (2007). Others maintain that significant textual variants preserved by the Geonim stem neither from earlier stages of the Talmud's consolidation and redaction nor from the later history of the Talmud's textual transmission, but rather from an intermediate stage of development in which the Talmud's content and order were largely determined, but its language and phraseology remained fluid. See, e.g., Eliezer S. Rosenthal, *The History of the Text and Problems of Redaction in the Study of the Babylonian Talmud*, 57 Tarbiz 1 (1988); Eliezer S. Rosenthal, *'iyunim be-toledot Ha-nosakh shel hatalmud ha-bavli*, in Jubilee Book in Honor of Rabbi Mordechai Breuer 2:571 (2 vols.; Moshe Bar Asher ed., 1992); Robert Brody, *Geonic Literature and the Talmudic Text*, in Mehqere Talmud 1: 237, 275 (Yaakov Sussman & David Rosenthal eds., 1990). Still others have argued that even the more "significant" textual variants generally reflect later developments in the history of the Talmud's textual transmission, stemming from "creative transmission" and deliberate interventions in an attempt to improve the text. See, e.g., Shamma Friedman, *On the Formation of Textual Variation in the Bavli*, 7 Sidra 67, 73–74 (1991). For a recent summary and reevaluation of this matter see Fuchs, The Geonic Talmud, *supra* note 47, at 28–29, 53.

[77] See, e.g., Fishman, People of the Talmud, *supra* note. 57, at 1 ("When considered from certain vantage points, the Talmud's role as a guide to Jewish life is bewildering. Though construed as a legal reference work, a significant proportion of the Talmud's content does not pertain to law, and the legal traditions themselves are presented in the form of pending disputes (critical scholars have determined that the resolved disputes are actually late interpolations into the talmudic text). In other words, there is no evidence that the sages whose teachings are preserved in the Talmud, Babylonian amoraim of the third through sixth centuries C.E. intended to produce a prescriptive guide to applied Jewish law"); Brody, Geonim of Babylonia, *supra* note 43, at 161 ("The Talmud is an extremely complex literary work, comprising legal and other materials, which evolved over several centuries. Even in its legal portions, many discussions are wholly or partly of an academic nature, and many disputes on practical issues remain unresolved. Furthermore, the material is not organized systematically, in the style of a legal code; a single issue may figure in a variety of contexts, and the relationship (if any) between the various discussions, as well as the weight to be assigned to them in deriving legal conclusions, is rarely self-evident. We have no way of knowing to what extent, if at all, the 'editors' of the Talmud – as distinct from the authors of the legal dicta embedded within it – intended to create a normative legal work rather than an academic or literary corpus").

[78] Brody, Geonim of Babylonia, *supra* note 43, at 161–62.

As in the case of the Mishnah, Sherira provides us with a theological, mythical, and narrative framework for the unique canonical status of the Talmud. In this context, the epistle maintains a structural and thematic equivalence between the historical processes and conditions that led to the composition of the Mishnah by Rabbi and those which led to the redaction of the Talmud by Ravina and Rav Ashi. Sherira emphasizes, moreover, that, much like Rabbi, Rav Ashi enjoyed the undivided subservience of his colleagues, employing the very same phraseology to portray the two monumental projects. There is even a hint at divine providence, which ostensibly accompanied and guided the redaction of the Talmud by Ravina and Rav Ashi:

> During all those years from after (the time of) Rav Papa, Rav Ashi was Gaon at Sura and he had come to Mata Mehasya . . . and his Torah and authority were affluent and abundant. And Huna bar Nathan, who was the exilarch during his days, and Maremar and Mar Zutra who came after him, were all subordinate to Rav Ashi . . . as we learned: "Rav Aha the son of Rava said: we too may say that from the days of Rabbi until Rav Ashi, we have not found Torah and authority combined in one person (lit. 'in one and the same place')".[79]

Sherira further asserts that, just like Rabbi's codification project, the canonization and closure associated with Ravina and Rav Ashi's redactorial project were predestined and revealed in the Book of Adam. Indeed, after Ravina and Rav Ashi legislative instruction ceased, while only interpretation and analogical-inductive reasoning based on the canonical sources remained within the purview of legitimate juristic activity.

> In this manner, (rabbinic) instruction accumulated generation after generation until Ravina at whose time it ceased. As Samuel, the astronomer, had seen written in the Book of Adam[80]: Ashi and Ravina are the conclusion of instruction. And after (this), although there was no instruction, there were interpretations and logical inferences, which are close to instruction, and those rabbis were called *rabbanan sabora'e* (lit. "the rabbis who conduct logical inferences").[81]

The epistle thus stresses the normative and theological equivalence between the canonical status of the Mishnah and that of the Talmud. By asserting that the composition and redaction of the Talmud was divinely guided, predestined, and socially ratified, Sherira lays the foundation for the unique jurisprudential status of the Talmud, alongside the Mishnah, as the ultimate source of Jewish law and the exclusive and complete textual articulation of God's Oral Torah.

[79] Iggeret, *supra* note 43, at 90–91 (based on *b. Git.* 59a). Compare Sherira's assertion above, according to which "from the time of Moses until the time of Rabbi we did not find Torah and authority in one and the same place."

[80] See David, *Book of Adam*, *supra* note 43, and the discussion above.

[81] Iggeret, *supra* note 43, at 69 (French recension).

III SHĀFIʿĪ AND THE TEXTUAL-STATUTORY DEMARCATION OF ISLAMIC LAW

Shāfiʿī is often credited in the literature as the "architect" of Islamic jurisprudence and the promulgator of the "four-sources" theory of Islamic law – that is, the idea that Islamic law is based on four "roots": Quran, Hadith, consensus (*ijmāʿ*), and analogy (*qiyās*).[82] It has correctly been noted, however, that, since consensus and analogy are in fact viewed by him as subordinate to, and dependent on, the textual sources and not as independent sources of law from which new directives can be derived, they should not be regarded as "official" sources of Islamic law, certainly not on a par with the Quran and Hadith.[83]

Joseph Lowry has argued in this regard that the various combinations of Quran and Hadith indicated by the concept of *bayān* lies at the heart of the jurisprudential theory presented in Shāfiʿī's epistle.[84] According to this theory, the entirety of the law resides in the complementarity of Quran and Hadith, while all legal norms are necessarily and by definition manifested through one of five possible combinations of these sources: (1) Quran alone; (2) Quran and Hadith together, each expressing

[82] For the "four-sources" theory of Islamic law and Shāfiʿī's epistle, see, e.g., Joseph Schacht, An Introduction to Islamic Law 59–60 (1964).

[83] Joseph Lowry, *Does Shāfiʿī Have a Theory of 'Four Sources' of Law?* in Studies in Islamic Legal Theory 23 (Bernard Weiss ed., 2002). Compare also Hallaq, Islamic Legal Theories, *supra* note 14, at 29 ("It is no wonder then that the bulk of the treatise [=Shāfiʿī's epistle] is devoted to a discussion of the Sunna, its types, interpretation, and its function in elaborating the Sharīʿa. Nearly everything else seems tangential, discussed to a greater or lesser extent in order to shed light on, or expound, the Sunna. In insisting on Prophetic Sunna as the only binding textual authority next to the Quran, Shāfiʿī was arguing for a law that would be exclusively divine in its origin, and this required that he explain the manner in which non-textual sources – i.e., consensus and *qiyās* – may be utilized while maintaining the fundamental proposition that law derives from the Divine will.")

[84] See Lowry, Early Islamic Legal Theory, *supra* note 28, at 23–24; Joseph Lowry, *Some Preliminary Observations on al-Šāfiʿī and Later* Uṣūl al-Fiqh: *The Case of the Term* Bayān, 55(5–6) Arabica 505 (2008). The idea that the Quran and Hadith are the only binding and authoritative legal sources articulating the totality of God's revelation can also be seen as an argument for the very authority of Prophetic Hadith alongside the Quran. See, e.g., Hallaq, Islamic Legal Theories, *supra* note 14, at 29; Lowry, Early Islamic Legal Theory, *id.*, at 165 ("It also seems clear from the structure of the law as portrayed in the Risalā and from some of Shāfiʿī's remarks therein that Shāfiʿī considered the prophetic Hadith to be revelation, on a par in that respect with the Quran"); Shāfiī, Risāla, *supra* note 60, at 101 [translation, at 150]. ("Moreover, He paired the wisdom [understood as the practice of God's Emissary] imparted by Prophetic Practice with His Book, and made it to follow the Book") See also Shāfiī, Risāla, *supra* note 60, at 98 [translation, at 39]. ("Al-Shāfiʿī said: God put his Emissary in a position relative to His religion, His obligations, and His Book, in a way that clarified that He had made him a signpost of His religion. He did this by imposing the obligation to obey him and making disobedience to him unlawful. God also provided a clear statement about his excellence by pairing together faith in his Emissary and faith in Him"); and Shāfiī, Risāla, *supra* note 60, at 285–86 [translation, at 103].("I said to him: If it were permissible to abandon a Prophetic practice – because of the conclusions arrived at by some, out of ignorance of the position of such practices relative to the Book (=the Quran) – then one could abandon what we have mentioned above . . . Whoever holds such an opinion invalidates the totality of the practices of God's Emissary, and that opinion is a sign of the ignorance of the one who holds it").

the same rule; (3) Quran and Hadith together, whereby the Hadith elaborates that which is only briefly mentioned in the Quran; (4) Hadith alone; (5) and, finally, in case the law is not manifest in either the Quran or the Hadith, one is authorized to engage in *ijtihād* (legal reasoning) and *qiyās* (analogical-inductive reasoning) based on strict inferences from the Quran and Hadith. Thus, according to Shāfiʿī, only the textual-statutory sources (i.e., the Quran and Hadith) should be regarded as binding legal sources.

Shāfiʿī's legal theory – namely, the idea that the Quran and Hadith enjoy an exclusive position as the primary sources of Islamic law, while consensus and legal reasoning are subordinate to the authority of the textual-statutory sources – was developed against the foil of competing theories, which recognized other legal sources as independent sources of law on a par with the Quran and Hadith. At the risk of oversimplification, early Islamic legal theory can be described as divided along the lines of legal "rationalists" (*ahl al-raʾy*), who used reason in addition to textual sources to determine the law, and legal "traditionalists" (*ahl al-ḥadīth*), who relied exclusively on the textual sources, the Quran and Hadith, to determine the law. The camps of legal "traditionalists" and "rationalists" represent in fact two extremes, while most jurists occupied a range of attitudes situated in between the two poles.[85] The followers of al-Ẓāhirī were regarded as the most extreme "traditionalists," insofar as they relied exclusively on the manifest meaning of the Quran and rejected, not only the use of independent reasoning/discretion (*raʾy*), but also more restricted forms of logic included under the rubric of *qiyās*.[86] Close by were the followers of Ibn Ḥanbal.[87] The early Ḥanafīs were situated on the opposite end of the

[85] For surveys see, e.g., Joseph Schacht, The Origins of Muhammadan Jurisprudence, 98–132, 311–28 (1982); Aron Zysow, The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory 159–258 (2013); Hallaq, Islamic Legal Theories, *supra* note 14, at 82–124.

[86] For Ẓāhirī "scripturalism" and the rejection of reason and logic see, e.g., Ignaz Goldzieher, The Ẓāhirīs: Their Doctrine and Their History 11–18 (trans. W. Behn, 1971); Zysow, Economy of Certainty, *supra* note 85, at 167–87; David Vishanoff, The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law 78–88 (2011); Robert Gleave, Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory 147–50 (2013). On the Ẓāhirī madhhab in general see Amr Osman, The Ẓāhirī Madhhab (3rd/9th–10th/16th Century): A Textualist Theory of Islamic Law 11–47 (2014); Devin Stewart, *Muḥammad b. Dawūd al-Ẓāhirī's Manual of Jurisprudence, al-Wuṣūl ilā Maʿrifat al-Uṣūl*, in Studies in Islamic Legal Theory 99–158 (Bernard Weiss ed, 2002); Abū Ḥanīfa Numān ibn Muḥammad (al-Qāḍī al-Numān), The Disagreements of the Jurists: A Manual of Islamic Legal Theory 212–67 (Devin Stewart ed., 2015). On Ibn Ḥazm's rejection of *qiyās* see George F. Hourani, Reason and Tradition in Islamic Ethics 167–89 (1985); F. I. Abdallah, *Notes on Ibn Ḥazm's Rejection of Analogy (Qiyās) in Matters of Religious Law*, 2 American Journal of Islamic Social Sciences 207–224 (1985); J. P. Montada, *Reason and Reasoning in Ibn Ḥazm of Cordova*, 92 Studia Islamica 165–85 (2001). On Ibn Ḥazm's connections with the Ẓāhirīs see Camilla Adang, *The Beginnings of the Ẓāhirī Madhhab in al-Andalus*, in The Islamic School of Law: Evolution, Devolution, and Progress 117–25 (Peri J. Bearman et al. eds., 2005).

[87] See, e.g., Goldzieher, The Ẓāhirīs, *supra* note 86, at 81–84; Schacht, Origins, *supra* note 85, at 128–32; Hourani, Reason and Tradition, *supra* note 86, at 273–74. On Ibn Ḥanbal's legal theory see in general Christopher Melchert, Ahmad Ibn Hanbal (2006); Saud Al Sarhan, *The Responsa of Aḥmad Ibn Ḥanbal and the Formation of Ḥanbalism*, 22 Islamic Law and Society 18 (2015).

spectrum, as they tended to embrace a relatively wide range of legal practices associated with reason and discretion, which extended far beyond the strict use of analogical-inductive reasoning (*qiyās*).[88] Shāfiʿī, who launched a systematic critique of the early Ḥanafī use of arbitrary forms of reason, offered a "compromise," rejecting those dimensions of *raʾy* that were associated with subjective and independent reasoning, while accepting the doctrine of *qiyās* in the sense of strict analogical-inductive reasoning based on the textual sources. Thus, he asserts:

> No one may express an opinion except on the basis of analogy (قياس) … "Do you yourself," he continued, "permit someone to say: I employ preference without analogy" (استحسن بغير قياس)? "In my view," I replied, that is not permissible for anyone – though God knows best. Only scholars should express any such opinions at all, not others, and they should express opinions that are related to a report (الخبر) by following such a report, and in situations in which there is no report, by analogizing from a report (بالقياس على الخبر). If it were permissible to invalidate an analogy, then it would be permissible for the rationalists (لاهل العقول), who are not scholars of religious knowledge (اهل العلم), to express opinions, concerning matters for which there is no report according to whatever answer they happen to have at hand based on preference (من الاستحسان). Opinions given on the basis of anything other than a report or analogy are impermissible (وإن القول بغير خبر ولا قياس لَغَير جائز).[89]

Shāfiʿī also rejected Ibn ʿUlayya's (d. 834) view of consensus (*ijmāʿ*) as an independent legal source and insisted, in contrast to the view of Ibn Ḥanbal and others who accepted a broad definition of Hadith, that only authentic Prophetic Hadith should be deemed authoritative and binding.[90] In the present context, it is particularly instructive to examine Shāfiʿī's jurisprudential theory against the backdrop of the ideas espoused by his former master, Mālik b. Anas (d. 796), according to whom the ongoing communal practice and collective tradition of Medina, the city of the Prophet, vouchsafed and preserved by the Medinan scholars and those who received from them, should be regarded as a jurisprudential source of law and an independent site of revelation, alongside the Quran and Hadith.[91] The authority vested in the Medinan

[88] See Hallaq, Islamic Legal Theories, *supra* note 14, at 107–08; Rumee Ahmed, Narratives of Islamic Legal Theory 113–47 (2012); El-Shamsy, The Canonization of Islamic Law, *supra* note 17, at 22–28. After the ninth century, to be sure, Ḥanafī jurists "took steps to disassociate themselves from the reputation of being arbitrary reasoners." (Hallaq, Islamic Legal Theories, *id.*, at 108. See also Ahmed, Narratives of Islamic Legal Theory, *id.*, at 114).

[89] Shāfiʿī, Risāla, *supra* note 60, at 613 [translation, at 213], from a chapter on subjective reasoning/preference (باب الاستحسان). Compare also Shāfiʿī, Risāla *supra* note 60, at 616 [translation, at 214: "If that is so, then scholars should not express any opinions in such cases except on the basis of religious knowledge – and the source of religious knowledge is a binding report – by means of an analogy from the indications of what is correct"].

[90] Ibn Ḥanbal purportedly accepted the authority of nonprophetic hadith reports. See, e.g., Al Sarhan, *The Responsa of Aḥmad Ibn Ḥanbal*, *supra* note 87, at 38–39.

[91] For discussions of Shāfiʿī's text-based jurisprudence as opposed to Mālik's custom-based jurisprudence see, e.g., Brannon Wheeler, Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship 43–45 (1996); Yasin Dutton, The Origins of Islamic Law: The Qur'an, the Muwatta and Madinan Amal 4–5 (1999); El-Shamsy, The

tradition can be described as customary, bottom-up, communal, memetic (*taqlīd*-based), and deontic, in contrast to the textual, top-down, hermeneutic (*ijtihād*–based), and epistemic nature of legal authority in Shāfiʿī's jurisprudence.[92] While the early theory of legal authority espoused by Mālik is largely consistent with the perception of legal authority found in the Talmud,[93] Shāfiʿī's construction of legal authority is more compatible with the rhetorical assertions of the late Geonim, most notably those of Saʿadya and Sherira.

In opposition to Mālik's reliance on bottom-up communal practice (*'amal*) as an independent source of law and carrier of revelation, Shāfiʿī sought to ground the entirety of Islamic law in the textual and revelatory authority vested in the Quran and Prophetic Hadith. The mimetic following of Medinan tradition was viewed by him as a negative form of *taqlīd* (imitation), contrasted with *ijtihād* (legal reasoning), which he understood as "the acceptance of a position without (textual-hermeneutic) evidence" (*qabūl qawl bi-lā ḥujja*).[94]

While Mālik exerted some influence on Shāfiʿī in the earlier stages of his career, in his final years, Shāfiʿī's critique of Mālik's communitarian construction of Islamic law and the jurisprudential and revelatory significance attached to Medinan practice (*'amal ahl al-madīna*) matured into a comprehensive polemical treatise entitled *Ikhtilāf Mālik* ("Disagreement with Mālik"), which was integrated into the Umm

Canonization of Islamic Law, *supra* note 17, at 63–68. For Mālik's theory of *'amal* see also Faruq Abd-Allah, Mālik's Concept of Amal in Light of Mālikī Legal Theory (PhD dissertation; University of Chicago, 1978); El-Shamsy, The Canonization of Islamic Law, *id.*, at 38–43. According to El-Shamsy (The Canonization of Islamic Law, *id.*, at 42), this understanding of Medinan tradition can serve as a corrective to the view of Schacht (An Introduction to Islamic Law, *supra* note 82, at 28–29), who argued that the earliest form of what later became the Islamic "legal school" (*maddhab*) was of regional nature ("This does not mean that the proto-Maliki school consisted of a unitary doctrine propagated by all Medinan scholars. Rather, the terms "the Medinans" [*al-madaniyyūn*] and "people of Medina" [*ahl al-madīna*] refer to scholars who claim to speak in the name of the Medinan tradition – irrespective of whether they form the majority or minority in Medina, or even whether they live in Medina at all. The early legal schools were regional in the sense that they were justified in regional terms"). See also the critique in Wael Hallaq, *From Regional to Personal Schools of Law? A Reevaluation*, 8 Islamic Law and Society 1 (2001).

[92] For the Islamic notions of *taqlīd* (imitation) and *ijtihād* (legal reasoning) see, in general, Hallaq, History of Islamic Legal Theories, *supra* note 14, at 121–23.

[93] See Kiel, *Authority of the Sages*, *supra* note 32; and Kiel, *Filial Piety*, *supra* note 31. To exemplify the notion of mimetic, interpersonal, and deontic authority characteristic of the Babylonian Talmud consider the anecdote in *b. Ber.* 62a (cf. *b. Hag.* 5b). The story rhetorically pushes the mimetic aspects of legal authority to its limits. While the student is reproached by his master for hiding under the bed, so as to obtain knowledge of proper sexual etiquette, the redactors give the final word to the student, who artfully justifies his actions by his need to learn Torah. This anecdote represents a Babylonian rabbinic reworking of a Palestinian rabbinic story concerning tannaitic authorities who followed their masters into the privy (*y. Ber.* 9:5 14c). For the relationship between the Palestinian and Babylonian versions, see Shamma Friedman, *A Good Story Deserves Retelling: The Unfolding of the Akiva Legend*, 3 *JSIJ* 73–76 (2004); Jeffrey Rubenstein, Stories of the Babylonian Talmud 211–14 (2010).

[94] See Ahmed El-Shamsy, *Rethinking* Taqlīd *in the Early Shāfiʿī school*, 128 Journal of the American Oriental Society 1 (2008); El-Shamsy, The Canonization of Islamic Law, *supra* note 17, at 65–66.

(8:513–778).[95] In a passage contained in this work, Shāfiʿī points out the tendentious, amorphous and ambiguous employment of *ʾamal* by his Mālikī interlocutors:

> So, I cannot comprehend what you mean when you say *ʾamal*, nor do you seem to know it yourself according to what you have told me, nor could I find clarification with any one of you about what *ʾamal* or consensus (*ijmāʿ*) are. I am forced to conclude, then, that you simply call your own opinions *ʾamal* and consensus (*ijmāʿ*).[96]

In another passage, Shāfiʿī writes:

> I used to hold this opinion with this justification, but I stopped doing so, and may God grant me what is best; because I found some of them [the Medinans] claiming it as tradition (*sunna*), but then I did not find their claimed tradition to reach back to the prophet.[97]

This assertion highlights the significance Shāfiʿī attached to the textual basis of received tradition. Not unlike Sherira who stressed the reciprocal relationship of the textual-statutory sources and the established rabbinic tradition vouchsafed in the official custom of the two Geonic academies and courts, Shāfiʿī insisted on the reciprocity of received tradition and its textual-statutory embodiment in the form of reliable hadith-reports, in which context tradition is sifted through text and the textual reports are, in turn, validated and confirmed through an unbroken chain of tradition (*isnad*).

Ahmed El-Shamsy[98] argued that Shāfiʿī's epistle on legal theory represents a watershed in Islamic jurisprudence, insofar as the locus of legal authority is transferred in it from the living practice of the Muslim community to an increasingly demarcated canon of textual sources. Prior to Shāfiʿī, the Quran and *sunna* represented the "raw material" of religious law, vouchsafed in a vague notion of revelation, but, in no way, were regarded as the sole canonical embodiment of God's revelation. In this context,

[95] El-Shamsy, The Canonization of Islamic Law, *id.*, at 63–64 (suggesting three gradual stages in the maturation of Shāfiʿī's position. In his earlier debate with the Ḥanafīs, "he still paid lip service to the Medinan legal tradition" [Umm 8:66, 84, 90]. In the debate with Ibn ʿUlayya "he declared local traditions to be unstable and equivocal" [Umm 9:25–26]. Only in the debate with Mālik he "would finally abandon the concept of a local legal tradition entirely").

[96] Umm 8:739; El-Shamsy, The Canonization of Islamic Law, *supra* note 94, at 65. According to El-Shamsy, Shāfiʿī points out in this passage that "the anonymous '*'amal* of Medina' cannot in fact produce a single coherent result: it contains multiple contradictory voices but does not offer any systematic method for adjudicating among them . . . The reasons why certain sources – prophetic reports, scholars' opinions, and so on—were accepted as normative while others were not could not be deduced from an examination of the sources themselves, but only by reference to their reception, that is, whether or not they were followed by the community. This opacity rendered Mālik's *ʾamal* a 'black box.' One could not trace the reasoning that led to a particular ruling; one could only follow it blindly." For *ʾamal* as an early form of consensus see Lowry, Early Islamic Legal Theory, *supra* note 28, at 321–22; Dutton, The Origins of Islamic Law, *supra* note 91, at 35.

[97] Umm 9:105; El-Shamsy, The Canonization of Islamic Law, *supra* note 17, at 67.

[98] El-Shamsy, The Canonization of Islamic Law, *supra* note 94, at 3–4.

the Quran and *sunna* were continuously sifted through the filters of communal practice, local custom, and judicial discretion. Shāfiʿī's project of legal and theological canonization of the Quran and Hadith[99] validated their authority as the very fountain of Islamic normativity and embodiment of God's revelation.

Shāfiʿī's theory of the textual confinement of God's law and the elevation of the Quran and Hadith to canonical status as the exclusive sources of Islamic law and ultimate embodiment of divine revelation can shed light on Sherira's rhetoric surrounding the textual-statutory confinement of God's law in the text of the Mishnah-cum-Talmud. Both Sherira and Shāfiʿī voiced a clear formalist and legalistic rhetoric connected with the textual-statutory demarcation of the law and its perception as exhaustive, comprehensive, and self-sufficient. Both authors further manifested a discursive shift from communitarian, interpersonal, mimetic, customary, and deontic legal authority to textual, impersonal, hermeneutic, and epistemic legal authority focused on the exclusivity of the textual-statutory sources.

IV THE TEXTUAL-STATUTORY DEMARCATION OF ZOROASTRIAN LAW

Not unlike their Jewish and Islamic contemporaries, Zoroastrian jurists in the early Abbasid period similarly engaged in a "positivist" enterprise aimed at identifying the authoritative sources of Zoroastrian law. In this context, a formalist and legalistic rhetoric, confining the official sources of the law to a textual-statutory corpus, came to dominate "mainstream" Pahlavi literature. The Zoroastrian jurists sought to establish the normative and theological canonicity (and the textual contours) of the Avesta and Zand as the exclusive and complete articulation of Ohrmazd's[100] revelation of his law (Pahlavi *dād*; Avestan and Old Persian *dāta-*)[101] and tradition (Pahlavi *dēn*; Avestan *daēnā*)[102] to Zarathustra.[103] While the Zand itself goes back to the Sasanian period and probably earlier,[104] the ninth- and tenth-century Zoroastrian authors elevated the Zand to canonical and "official" status, both

[99] Note the shift from the amorphous *sunna* to a corpus of Hadith.

[100] Ohrmazd is the Pahlavi form of the name of the supreme Zoroastrian God, Ahura Mazdā (Avestan)/Ahuramazdā (Old Persian).

[101] Kiel, *Reinventing Mosaic Torah*, *supra* note 23, at 339–47.

[102] Skjærvø, *The Zoroastrian Oral Tradition*, *supra* note 29, at 20–25; Shaki, *Dēn*, *supra* note 29, at 279–81.

[103] Certain scholars have attempted to marginalize the role of revelation in Zoroastrianism in comparison with Judaism and Islam. See, e.g., Janos Jany, Judging in the Islamic, Jewish and Zoroastrian Legal Traditions: A Comparison of Theory and Practice 45–50 (2012). See, however, the critique of this position in Kiel, *Authority of the Sages*, *supra* note 32, at 155–56 and Kiel, *Reinventing Mosaic Torah*, *id.*, at 339–47.

[104] For a reconstruction of an Old Persian Zand from the Achaemenid period, see Prods Oktor Skjærvø, *Avestan Quotations in Old Persian? Literary Sources of the Old Persian Inscriptions*, *in* 4 Irano-Judaica 1 (Shaul Shaked & Amnon Netzer eds., 1999). See also Prods Oktor Skjærvø, *The Achaemenids and the Avesta*, in Birth of the Persian Empire, vol. 1: of The Idea of Iran 52 (Vesta Sarkhosh Curtis & Sarah Stewart eds., 2005).

normatively and theologically, and demarcated its substantive boundaries alongside the Avesta.

According to several accounts preserved in the *Dēnkard*, the Zand was revealed to Zarathustra in its entirety together with the Avesta, much like the rabbinic attempt to trace both the Written and Oral Torah back to Sinai and Shāfiʿī's argument that the revelation of the Book and Wisdom means the Quran and Prophetic Sunna (concretized in the Hadith). In a manner quite similar to Sherira's portrayal of Rabbi's endeavor to recover and retrieve the dispersed content of the Oral Torah revealed to Moses at Sinai (and Ravina and Rav Ashi's attempt to retrieve the underlying reasons of the Mishnah's rulings), the *Dēnkard* portrays a multigenerational project of rediscovery and retrieval of the lost/contaminated contents of the Avesta and Zand undertaken by a series of Iranian kings and sages, highlighting significant moments in this process:[105]

> Dārāy, son of Dārāy, having committed to writing the entire Avesta and Zand as it had been received by Zarathustra from Ohrmazd, commanded two copies to be made – one to be kept in the gubernatorial treasury and one in the Fortress of Books.
>
> Walaxš, son of Aškān, commanded a memorandum to be made and sent to the various provinces with orders for the safekeeping of the Avesta and Zand as it had come down in unadulterated form, as well as the teachings – to the extent each had escaped the harm and chaos caused by Alexander and the pillaging and robbing by the Romans and were now scattered throughout Erānšahr – They remained with the sages in writing, but also in oral transmission.[106]
>
> His majesty Ardashir, king of kings, son of Pābag, guided on the straight path by Tansar, asked that all those scattered teachings be brought to the court. Tansar took charge: some he received, and some he left out of the "canon." And he issued the following order: As far as we are concerned, any exposition that differs from that in the Mazdayasnian Tradition, but which provides awareness and knowledge, is not inferior.
>
> Shapur (I), king of kings, son of Ardashir, brought back together the writings outside the Tradition on medicine, astrology and astronomy, time and place, nature and accident, becoming and decaying, transformation, logic and the many other

[105] Dēnkard 4.15–21 (ed. Dresden, at 321–22). For the translation, see Shai Secunda, *The Talmudic Bei Abedan and the Sasanian Attempt to 'Recover' the Lost Avesta*, 18 Jewish Studies Quarterly 343 (2011); Shai Secunda, The Iranian Talmud: Reading the Bavli in its Sasanian Context 59 (2013). See also Mansour Shaki, *The Denkard Account of the History of the Zoroastrian Scriptures*, 49 Archiv orientální 114 (1981); Shlomo Pines, *A Parallel between Two Iranian and Jewish Themes*, 2 Irano-Judaica 41 (1990); Carlo Cereti, La Letteratura Pahlavi: Introduzione ai testi con riferimenti alla storia degli studi ed alla tradizione manoscritta 59–61 (2001); Cantera, Studien, *supra* note 12, at 106–13; Kevin T. Van Bladel, The Arabic Hermes: From Pagan Sage to Prophet of Science 30–39 (2009).

[106] The notion that the Avesta and Zand "remained with the sages in writing, but also in oral transmission," while attributed to a much earlier period, is reflective of the situation at the time of the text's redaction, i.e., the Abbasid period, in which the Zoroastrian tradition was well on its way of being committed to writing, but remained pervasively oral nonetheless. This was also the situation on the Jewish and Islamic side.

> crafts and skills that were scattered in India, Rome, and other lands. He compared them with the Avesta and ordered any blemish-free copy to be given to the gubernatorial treasury. And he put up for discussion whether to place with the Mazdayasnian tradition all those that were not contaminated . . .
>
> Shapur (II), king of kings, son of Ohrmazd, brought everything that was said up for discussion and examination in the dispute with all of the countrymen regarding what constitutes contamination of the waters. After Adurbād escaped unharmed by the word of the ordeal, he said this too (in dispute) with both those (regular) heretics and Nask-studying heretics. And he also said: "Now, we have seen in this world, unless a person leaves his evil Tradition, we shall work on him diligently (to see that he does)." And, so he did.
>
> The present majesty, Xusrō, king of kings, son of Kawād, it is told, when he had overcome heresies and false doctrines by fully opposing them, he increased greatly, according to what was manifest in the Tradition, in every heresy the awareness and detailed examination of the four branches (priests, soldiers, farmers, artisans).

Scholars have previously noted the motif of lost/scattered Iranian wisdom recovered by a series of figures, a trope attested in numerous accounts in Middle Persian, New Persian, and Arabic,[107] while also stressing the affinity between the Iranian trope and similar Jewish traditions concerning the retrieval of the lost wisdom of the Hebrews.[108] In the present context, I note that the *Dēnkard*'s emphasis on the process of retrieving the scattered contents of the Avesta and Zand,[109] which were "stenographically" recorded by Zarathustra from the mouth of Ohrmazd and handed down "in unadulterated form" from generation to generation, is reminiscent of Sherira's portrayal of the multigenerational transmission/retrieval of the Oral Torah and particularly the involvement of Rabbi, and Ravina and Rav Ashi, in this process. The emphasis on fighting off heresy and false doctrine[110] (and particularly disbelief in the authoritativeness of the Zand itself)[111] is similarly reminiscent of the Karaite challenge to rabbinic tradition, which seems to underlie (at least in part) Sherira's agenda in composing his epistle.[112]

[107] Van Bladel, The Arabic Hermes, *supra* note 105, at 30–39.

[108] Pines, *Two Iranian and Jewish Themes*, *supra* note 105, at 41–51.

[109] Notably, according to the text, the lost Avesta and Zand are not identical to the scattered wisdom, although the kings and sages were involved in the collection and retrieval of both. While the scattered wisdom is purportedly contained at present in the *Dēnkard*, it would seem that the eighth book of the *Dēnkard* in particular constitutes an attempt to textually demarcate and delineate the contours of the Avesta and Zand, by classifying the contents of its twenty-one *nasks* ("books"). Cf. Stausberg, *The Invention of a Canon*, *supra* note 12, at 264–66 ("the twenty-one *nasks* of the *dēn* catalogued in *Dēnkard* book 8 are an attempt at classifying the entire religious tradition and not specifically the Avestan corpus as has been commonly assumed by the previous generation of scholars").

[110] Cf. Secunda, Iranian Talmud, supra note 105, at 58–63 (contextualizing the reference in this passage to heretics with the talmudic *be abedan* (בי אבידן).

[111] "Nask-studying heretics" (Pahlavi *nask-ōšmurdārān ī jud-ristagānēn*).

[112] For the extent of the anti-Karaite undertones in Sherira's epistle, see, e.g., Sklare, Samuel ben Hofni, *supra* note 74, at 90; Gafni, *On Talmudic Historiography*, *supra* note 43, at 293; Blidstein, *Oral Torah*, *supra* note 43, at 74. See, however, the assessment in Brody, Geonim, *supra* note 43, at 20n. 5 ("A number of scholars have suggested that these questions were motivated by a need to defend the

The *Dēnkard*'s account clearly reflects a "retrieval" model of legal transmission and a "stenographic" theory of revelation, according to which the extant Zoroastrian Tradition is the result of retrieval and preservation of that which has already been received in complete form by Zarathustra (*hamāg abestāg ud zand čiyōn zarduxšt az ohrmazd padīrift*; "the entire Avesta and Zand, as it had been received by Zarathustra from Ohrmazd").

This perspective, to be sure, is novel.[113] The structure of the surviving works of Zand[114] (redacted circa the late Sasanian period) generally reflects a "cumulative" model of legal transmission (which may be connected with a "participatory" paradigm of revelatory theology), according to which each generation adds another layer of tradition and participates in an ongoing effort to "constitute" the revelatory content. In that sense, even the insights of later jurists are introduced in the Zand with the formula *pad abestāg paydāg* ("in the Avesta it is manifest").[115] According to the pre-Abbasid scheme, the jurists were perceived as legislators partaking in the creation of Zoroastrian law.[116] The *Dēnkard*'s account, by contrast, echoes a legal-theological shift in Zoroastrian thought towards a stenographic-retrieval model of legal revelation, one which is likely informed by the legal and theological shifts that took place in the Islamic and Jewish legal cultures of the time, as reflected, in the thought of Sherira and Shāfiʿī.

Several Pahlavi texts describe a council/convention headed by the Sasanian king Xusrō that is said to have taken place in the sixth century. An illuminating version of this event, found in the letters of Mānuščihr, maintains that Xusrō and his council of jurists were essentially responsible for the canonization of the corpus of Avesta and Zand and the demarcation of its literary contours and legal contents:[117]

integrity of rabbinic tradition against Karaite criticism, but it now appears that they are representative of some of the sorts of questions which occupied the Rabbanite intellectuals of Qayrawan in this period"). See also the explicit reference in Iggeret, *supra* note 43, at 107 (French recension): "And in those days after him Anan [b. David] came forth" (ובאותן הימים בתריה נפק ענן).

[113] For contesting views of revelation in Zoroastrianism see, e.g., Shaul Shaked, *Esoteric Trends in Zoroastrianism*, 3 Proceedings of the Israel Academy of Sciences and Humanities 188–89 (1969); Yaakov Elman, *Scripture Versus Contemporary Needs: A Sasanian/Zoroastrian Example*, 28(1) Cardozo Law Review 154–56 (2006).

[114] E.g., the Pahlavi translations and commentaries to the *Videvdad*, *Hērbedestān* and *Nērangestān*.

[115] Traditionally, the term *paydāg* was translated "revealed," which highlights its theological undertones, but "visible, manifest" is more accurate. I would like to thank Prods Oktor Skjærvø for pointing this out to me.

[116] See Kiel, *Authority of the Sages*, *supra* note 32, at 158–59.

[117] An alternative reconstruction of Xusrō's council focuses on the "fighting off of heresy" and grapples with disbelief in the authoritativeness of the Zand. In addition to the *Dēnkard* passage above, see also Zand ī Wahman Yasn 2.1–4 ("In the Zand of the Wahman Yasn and Hordād Yasn and Aštād Yasn it is manifest that, one time, the accursed Mazdak son of Bām-Dād, the adversary of the religious Tradition (*dēn petyārag*), appeared. And they (i.e. his followers) brought adversity to the religious Tradition of the gods. And Xusrō of immortal soul summoned before him Xusrō son of Māh-Dād, Weh-Šāpūr, Dād-Ohrmazd the dastwar of Azerbaijan, and Ādurfarnbay the deceit-less, and Ādurbād, Ādur-Mihr and Baxt-Āfrīd. And he requested a pact of them: Do not keep these Yasnas in concealment, yet do not teach the Zand outside your offspring. They made a pact with Xusrō"). See The

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> It was like when Weh-šābuhr showed in the assembly of Xusrō of immortal soul, king of kings, son of Kawād, the twenty-one divisions (of the Avesta and Zand)[118] so that the "sages" (lit. "magi") abided by it. And they sealed a document (*nibišt āwišt*)[119] so that it was the way the "sages" (lit. "magi") (agreed) with it and as it had been decided. And, afterwards, the "sages" (lit. "magi") agreed with all the decisions he showed them and they were unanimous (*ham-dādestān*): to regard (them) as something special, as being on the level of certainty,[120] and in firm usage.[121]

In line with Sherira's account of the canonization of the Mishnah by Rabbi and that of the Talmud by Ravina and Rav Ashi, Mānuščihr envisions the canonization of the Avesta and Zand by Weh-šābuhr, a Zoroastrian jurist and high-priest (*mowbedān mowbed*) who lived during the sixth century,[122] as a "constitutional" moment in legal and revelatory history. Much like the authorization of the Mishnah's codification by Antoninus, Mānuščihr stresses that the canonization of the Avesta and Zand took

Zand ī Wahman Yasn: A Zoroastrian Apocalypse 134 [transcription], 150 [translation] (Carlo G. Cereti ed., 1995); Cereti, La Letteratura Pahlavi, *supra* note 105, at 59–61; Cantera, Studien, *supra* note 12, at 106–13; Van Bladel, The Arabic Hermes, *supra* note 105, at 30–39. On the question of the historicity of this council see Philippe Gignoux, *Sur l'inexistence d'un Bahman Yasht avestique*, 32 Journal of Asian and African Studies 53, 54–57 (1986), but cf. Secunda, *On the Age*, *supra* note 12, at 321–24.

[118] For the twenty-one *nasks* of the Avesta and Zand, see Vevaina, *Enumerating the Dēn*, *supra* note 29.

[119] Although the "sealing" of a document indicates some sort of contract/agreement between the attendant jurists, it may also refer to the canonical "sealing" of the Avesta and Zand. It is noteworthy that the Aramaeogram for Pahlavi *āwištan* ("to seal") is HTYMWN, the same verb used by the Geonim to indicate the canonization and sealing of the Mishnah and Talmud. See, e.g., Iggeret, *supra* note 43, at 7 (French recension): "Until Rabbi came and sealed it (=the Mishnah)" (עד שבא רבי וחתמה). Sherira also uses the synonymous root סתם in this context. See Iggeret, *id.*, at 97: "And the Talmud was sealed" (ואיסתתים תלמודא). For the terminology and conceptualization of canonical "sealing" in the rabbinic tradition see Shlomo Z. Havlin, *On Literary Sealing as the Basis for Periodization in Halakha*, in Studies in Talmudic Literature 148, 154–62 (1983). Compare also the Islamic doctrine perceiving Muhammed as the "seal of prophets" (*khātam al-nabiyyīn*) first mentioned in Q. 33:40. The literature on the precise meaning of the Quranic phrase (finality, closure, confirmation?) and the history of the doctrine is vast. See the recent discussions in Uri Rubin, *The Seal of the Prophets and the Finality of Prophecy*, 164(1) Zeitschrift der Deutschen Morgenländischen Gesellschaft 65 (2014); David Powers, *Finality of Prophecy*, in The Oxford Handbook of the Abrahamic Religions 254 (A. Silverstein & G. Stroumsa eds., 2015). Also compare the notion of "closure of the gates of *ijtihād*" (*insidād bāb al-ijtihād*) in the Islamic tradition, for which see the classical study of Wael Hallaq, *Was the Gate of Ijtihad Closed?* 16(1) International Journal of Middle East Studies 3 (1984).

[120] Compare the parallel interest in epistemological certainty in Islamic jurisprudence, for which see Zysow, The Economy of Certainty, *supra* note 85, at 1–4. For the Geonic context, see Sklare, Samuel ben Hofni Gaon, *supra* note 74, at 159 ("Islamic legal theory is epistemological is nature. The central question is which of the sources of law (scripture, tradition, analogy or consensus) provides certain knowledge of legal rules and which furnish only probable opinion. The authority or legitimacy of a source is determined by its epistemological status. The Geonim and their contemporaries largely adopted this conceptual structure.")

[121] Mānuščihr, Nāmagīhā, 1.4.17–18 (trans. Prods Oktor Skjærvø [unpublished]). Cf. Maneck Fardunji Kanga, *Epistle 1, Ch. 4, of Mānuščihr ī Juwān-jamān: A Critical Study*, 27 Indian Linguistics 46, 56–57 (1966).

[122] On this figure see Secunda, *On the Age*, *supra* note 12, at 323–25.

place at a council summoned by the Sasanian King Xusrō and was thus authorized by his majesty.[123] Mānuščihr further emphasizes the unique legal and theological status of the Avesta and Zand, which were (now) believed to contain the binding and complete articulation of God's revelation, pointing out that the jurists agreed "to regard (them) as something special, as being on the level of certainty, and in firm usage." Sherira and Mānuščihr similarly stress the submission of Weh-šābuhr's, and Rabbi's (and Ravina and Rav Ashi's), colleagues and their yielding to the canonization project; both stress the idea of finality and closure connected with the "sealing" of the canonized works; and, finally, both authors emphasize the consensus and unanimity of the jurists.

The legal and theological canonicity accorded by Mānuščihr to the Avesta and Zand and that accorded by Sherira to the Mishnah-cum-Talmud are similar in many ways to the claims made by Shāfiʿī regarding the status of the Quran and Hadith. All three authors seem to participate in the elevation of their respective sacred works to canonical status in a normative and theological sense, while attempting to demarcate and confine God's law to a textual corpus. They share a formalist and legalistic rhetoric, connected with the textual-statutory confinement of the law, its comprehensiveness, and self-sufficiency. They similarly advocate a strong "authorial" interpretation of the law's divinity, and display a "retrieval" model of legal transmission in which the jurists are entrusted merely with unearthing and discovering that which has already been revealed by God. The "councils" surrounding the canonization projects similarly serve the purpose of grounding the formalist and legalistic jurisprudential rhetoric of these authors, connected with the textual-statutory confinement of God's law, in a founding myth.

In his letters, Mānuščihr launched a scathing attack directed at his brother Zādspram, himself a jurist and high-priest, for seeking to relax the requirements of the *baršnūm* ceremony – an Avestan purification ritual lasting nine days and nights prescribed for the removal of severe contamination (especially corpse impurity)[124] – utilizing in its stead a much simpler ceremony (*pixag*) consisting merely of fifteen ablutions, which was initially prescribed for lighter forms of ritual impurity.[125]

[123] This can be further compared with the Islamic legend concerning the council commissioned by the third caliph ʿUthmān ibn ʿAffān, which produced the canonical and authoritative Uthmanic codex of the Quran. I would like to thank Ahmed El-Shamsy and David Flatto for (independently) calling my attention to this comparison.

[124] A detailed description of the *baršnūm* ceremony performed when a person becomes polluted by dead matter is given in *Videvdad* chs. 8 and 9. See Mary Boyce, *Barašnom* in Encyclopædia Iranica, 3:756–57 (available online at www.iranicaonline.org/articles/barasnom). For the grades of ritual impurity associated with the *baršnūm* and *pixag* purification rituals, see, e.g., J. K. Choksy, Purity and Pollution in Zoroastrianism: Triumph over Evil 23–52 (1989); Yishai Kiel, *Shaking Impurity: Exegesis and Innovative Traditions in the Babylonian Talmud and Pahlavi Literature*, in Encounters by the Rivers of Babylon: Scholarly Conversations Between Jews, Iranians and Babylonians in Antiquity 413–34 (Uri Gabai & Shai Secunda eds., 2014).

[125] Mānuščihr, Nāmagīhā, *supra* note 121, 3.1–2: "It has come to my, Mānuščihr son of Juwān-jam, *rad* of Pārs and Kirmān, attention that, in some areas of the land of the Iranians, those who have made

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Among other things, Mānuščihr criticizes his brother Zādspram for relying on subjective and independent reasoning ("for he [=Zādspram] spoke his own view as it seemed to him" [*čē-š wēnišn xwēš čiyōn-iš sahist guft*])[126] that is not backed up by the textual-statutory sources. Mānuščihr further asserts: "The other things he [=Zādspram] wrote in connection with this – except for those (decisions) which are 'manifest' to him to be the words of Abarg and (contained) in (at least) one teaching (*čāštag*) among them – he adjudicated as it seemed to him and as he deemed (fit) (*sahist ī čiyōn-iš wizīrēnīd*)."[127] Mānuščihr seems to be accusing his brother Zādspram of issuing legal decisions on the basis of his own subjective reasoning and what seems to him (*sahist*) – rather than on the basis of the textual-statutory sources (the Avesta and Zand) – at least insofar as those decisions in which he does not rely on the teachings of Abarg and the other teachers of old recorded in the Zand.[128]

Read in the light of contemporaneous debates among Muslim and Jewish jurists regarding the jurisprudential and juridical status of reason, logic, and discretion, it would seem that the disagreement between Mānuščihr and Zādspram, two of the foremost jurists of the Zoroastrian community of Iran in the ninth-century, should be understood along similar lines. Mānuščihr, in line with the mainstream of legal "traditionalists," argues that the law is based on the textual-statutory sources, whereas Zādspram seems to have recognized independent reasoning based on subjective discretion as a legitimate source of adjudication. It is, admittedly, somewhat difficult to reconstruct the actual position of Zādspram, whose part of the correspondence (and other legal writings) did not survive.[129] But even to the extent that Mānuščihr might have misrepresented his brother's actual position, using him perhaps as a straw man

> decisions that pollution from corpses and other pollution are in the category of other (pollution), that should be washed with the *pixag*, they are (now) washing fifteen times with *gōmēz* (bull's urine) and once with water and (then) regard their bodies as clean. And, when they approach the water, fire, and ritually clean *barsom* (twigs) they do so in the measure of what (they regard as) ritually clean. They say: 'Zādspram son of Juwān-jam ordered the priests to give this kind of washing,' which seemed to me quite terrible and burdensome and, to my feeling, grasp, and liking, quite backward."
> Cf. M. F. Kanga, *Life and Letters of Manushchihr Goshnjam*, *in* Prof. Poure Davoud Memorial 2:189, 198–99 (2 vols., 1951).

126 Mānuščihr, Nāmagīhā, *supra* note 121, at 1.6.5. Cf. Manek F. Kanga, *A Critical Study of Epistle I* Ch. 6 *and* 7 *of Manuščihr Gošnjaman*, in Memorial J. de Menasce 251, 255 (Philippe Gignoux & Ahmad Tafazzoli eds., 1974).

127 Mānuščihr, Nāmagīhā, *supra* note 121, at 1.6.1. Cf. Kanga, *Epistle I* Ch. 6 *and* 7, *supra* note 126, at 254.

128 On the ancient sages recorded in the Zand see Philip Gignoux, *La controverse dans le mazdéisme tardif*, *in* La controverse religieuse et ses formes 127 (A. Le Bolluec ed., 1995); Cantera, *supra* note 12 164–239; Secunda, *On the Age*, *supra* note 12. On the legal "teaching" (*čāštag*) [as opposed to the "practice" (*kardag*) of the courts] in Zoroastrian law see Janos Jany, *The Four Sources of Law in Zoroastrian and Islamic Jurisprudence*, 12(3) Islamic Law and Society 291, 298–302 (2005). See also Shai Secunda, *The Sasanian "Stam": Orality and the Composition of Babylonian Rabbinic and Zoroastrian Legal Literature*, in The Talmud in its Iranian Context 140, 154–57 (Carol Bakhos & Rahim Shayegan eds., 2010); Secunda, *On the Age*, *id.*, at 337–38. And see Šāyist nē Šāyist 1.3–4 [Šāyast nē Šāyast : A Pahlavi Text on Religious Customs 28–29 (Jehangir C. Tavadia ed. and trans., 1930)].

129 Other (nonlegal) texts by Zādspram survived, namely the Selections of Zādspram (Wizīdagīhā ī Zādspram), for which see Anthologie de Zadspram : Edition critique du texte pehlevi traduit et

(not unlike certain Shāfiʿī attacks on Ḥanafī doctrine), the letters of Mānuščihr provide an indispensable glimpse into the legal theoretical discourse and concerns of Zoroastrian jurists in the ninth century. As such, Mānuščihr's juxtaposition of two competing theories of jurisprudence and adjudication, corresponding with the contemporaneous camps of legal "traditionalists" and "rationalists," however inaccurately attributed to individual jurists, constitutes an invaluable source for the reconstruction and contextualization of Zoroastrian legal theory within the broader legal theoretical "landscape" that pervaded the Islamicate Near East in the early Abbasid period.[130]

V CONCLUSION

In this article, I hope to have contributed to the unsettling of the Western bifurcation inherent in the "law and religion" paradigm, by examining the overlapping functions of the two categories as two sides of the same coin – law as religion, religion as law – in Jewish, Islamic, and Zoroastrian discussions of legality and revelation in the early Abbasid period. In this context, we saw that "religious" or "revelatory" rhetoric work in tandem to reflect a coherent jurisprudential view. In all three systems, we traced a process of theologization of the law (i.e., advocacy of strong "authorial" models of revelation and "retrieval" models of legal transmission, while minimizing in the process the role of human agency in effecting the content of revelation), on the one hand, and a process of textual demarcation and confinement (giving rise in embryonic fashion to the principle of "legality" entailing the law's prospectiveness and stability), on the other hand.

We saw that Sherira, Shāfiʿī, and Mānuščihr played a particularly significant role in framing and articulating the stakes of the normative and theological canonization of their respective religious traditions, by insisting on the textual confinement of God's revelation – as pronounced at the initial revelatory moment in unadulterated form – in the Mishnah-cum-Talmud, Hadith, and Zand, corpora which soon enough came to be regarded as the exclusive,

COMMENTÉ (Philippe Gignoux & Ahmad Tafazzoli eds., 1993). He is also reported to have written "The Book of the Enumeration of Races" (*nibēg ī tōhmag-ošmārišnīh*), a treatise which has not survived but must have contained a description of animal species. See Philippe Gignoux, *Zādspram*, in ENCYCLOPÆDIA IRANICA (online edition, available at www.iranicaonline.org/articles/zadspram).

[130] Although Mānuščihr essentially belonged to the camp of legal "traditionalists," as opposed to that of legal "rationalists," he was clearly far-removed from the more extreme "traditionalist" (or rather "scripturalist") tendencies of Ẓāhirī and certain Ḥanbalī jurists, who relied exclusively on the manifest meaning of the textual sources. Beyond his affirmation of the living Zoroastrian tradition vouchsafed in the doctrines of judicial practice (*kardag*) and legal consensus (*ham-dādestānīh*), Mānuščihr was acutely aware of the ambiguity inherent in the Avesta and Zand and the fact that varying textual accounts – either Avestan verses or legal teachings recorded in the Zand – occasionally support contradictory legal positions. Although Mānuščihr does not address *qiyās* (or its equivalent) explicitly, it would seem that some form or another of analogical-inductive logic based on the textual sources is inherent in his recognition of the ambiguity characterizing the revealed sources. In that sense, Mānuščihr's legal theory seems to resemble that of Sherira and Shāfiʿī, insofar as all three authors shared an aversion to subjective legal reasoning, while making a limited concession to the employment of analogical-inductive logic strictly based on the textual sources.

complete, and authoritative articulations of the law (alongside the Torah, Quran, and Avesta). Indeed, the parallel diachronic shifts in each of these religious traditions point to a broader legal-theological turn in the Islamicate culture of the early Abbasid period, which has major implications for mapping the history of the dynamics of law and religion.