

## Exceptional Grace

### *Religion As the Sovereign Suspension of Law*<sup>1</sup>

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#### I THE FIRST CUT: MAKING AND MAPPING DISTINCTIONS BETWEEN LAW AND RELIGION

What is law? What is religion? And what sort of relation is implied by their conjunction? Does the phrase “law and religion” describe a fusion, a dichotomy, or something else? Such questions might appear either too basic or unanswerable, depending on one’s perspective. To complicate matters further, the directive posed to us by the editors of this volume is to look for areas of overlap – of congruence or even identity – between these two categories that are normally viewed as mutually exclusive. So, we must sketch a picture that recognizes identity-within-difference, or at least convergence-within-distinction, between law and religion.

In perusing the existing scholarly literature in the relevant disciplines, I find a basic lack of agreement, and thus of clarity, concerning what distinguishes and what unites “law and religion.” For many lawyers who choose to operate strictly within the confines of doctrine, it is often taken for granted what both law and religion are. Law consists of the constitution, statutes, case law, and other authoritative norms that are the basis for deciding a case. Religion is a bit more problematic, but can be defined through the manner in which such legal sources have demarcated religion from nonreligion. The fact that “religion” (e.g. as “freedom of religion”) appears in these sources of law is a clear indication that religion is something that is an object of law: a word, originally drawn from natural language, that must be given legal meaning and effect. Only recently have some dissenters begun to argue that the legal system constructs religion as an object, and thus brings it into being – or at least distorts and deforms it – in a manner that belies its independent existence.<sup>2</sup> When courts construe what legally protected “religion” is, they are, for all practical purposes, theologizing, and in this regard, filling the role formerly played by inquisitors when discriminating between

<sup>1</sup> I would like to acknowledge the generous assistance of Bernard Jackson and Devin Singh, both of whom offered helpful suggestions for the revision of this paper.

<sup>2</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005; new ed. 2018) is the *locus classicus* for such arguments.

orthodoxy and heresy. Strictly speaking, the separation of law from religion that is supposedly the hallmark of legal secularism is impossible. This perspective obviously implies a form of mutual interdependence of law and religion, or at least a dependence of religion on law, but not, I think, of the sort intended by our editors.

What happens if we consider religion outside of the judicial process, and move beyond current legal doctrine to consider history and anthropology? Historians of religion, such as myself, are intimately familiar with the increasingly prevalent claim that “religion” is a second-order term that bears the imprint of modern, European (and thus post-Christian) culture and that, when used outside of this culture, must be applied with caution and, usually, an asterisk or scare quotes. There are also arguments that something like the idea of religion has been recognized and demarcated through concepts and special terms in premodern and non-Western cultures. (We shall see Ivan Strenski’s version of this argument shortly.) This demarcation of “religion” is often against “politics,” as in the medieval Catholic distinction between two spheres of authority: that possessed by the *sacerdotium*, or priestly power, and that of the *regnum*, or royal/imperial power. This distinction was arguably grounded in Holy Scripture, with Jesus’s injunction to “Render therefore to Caesar”<sup>3</sup> and his disclaimer that “my kingship is not of this world,”<sup>4</sup> and was embodied in the legal institution of the Roman Catholic Church. So much of this background has rooted itself into our brains and languages that we (meaning English-readers) often assume the naturalness of the distinction between Church and State, here capitalized, as they often are, to signal their fictive personhood, or indeed metaphysical substantiality. Such a separation can hardly apply in the same way to cultures where this institutional division has not occurred.<sup>5</sup> Incidentally, this already highlights the erroneousness of the claim that the “separation of Church and State,” without further qualification, is a distinctive feature of secular societies; the idea of such a separation grounded the Roman Catholic Church’s claim to an independent authority.

What about the conjunction indicated by the term “religious law”? A few years ago I participated in a conference that posed the question whether religious law has a right to exist in modern, secular societies. The phrase “religious law” was understood by all, including myself, to describe the laws of particular religious communities: for example, Roman Catholic canon law, Jewish law, Islamic Shari’ah, etc. This makes sense under the current order, where an ostensibly secular and universal law confronts the normative traditions of communities that aim to practice a limited form of self-government and, perhaps, of legal pluralism. However, for more abstract and general scholarly purposes, this concept of “religious law” obviously depends on the prior definition of certain groups as “religious” and not merely as, for example,

<sup>3</sup> Matthew 22, Mark 12, Romans 13. All biblical references are to the RSV unless otherwise specified.

<sup>4</sup> John 18:36.

<sup>5</sup> However, for an analysis of similar distinctions beyond European Christianity, see Rodney Needham, “Dual Sovereignty,” in *Reconnaissances* (Toronto: University of Toronto Press, 1980), 63–105.

minority groups, diasporic cultures, or voluntary associations.<sup>6</sup> “Religious law” then means just the laws regulating such groups. This is clear enough, and may serve for some pragmatic purposes, but as it depends on circular reasoning, it lacks a theoretical foundation. The other meaning of “religious law” is laws pertaining to religious matters, and arguably runs into the same tautology or logical regress, unless we can identify what such matters are.

Historians used to debate whether law was originally religious or not, meaning whether in ancient times it would have made sense to speak of “law” and “religion” as separate domains. In the nineteenth century, Henry Maine argued that Hindu law, as represented by the *Laws of Manu*, was originally religious, as it more closely resembled Leviticus than the Roman Institutes. He extended this to all systems of law in their primitive stage of development: “For Manu, though it contains a good deal of law, is essentially a book of ritual, of priestly duty and religious observance; . . . There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance.”<sup>7</sup> Maine’s characterization of Hindu law followed earlier Christian parallels between Hindus and Jews, and reflected the idea that religious laws are not “proper” laws: not rational, modern, secular. This thinking was parochial: the Sanskrit term *dharma* (as in *Mānavadharmasāstra*, one name for Manu’s text) cannot be translated simply as either “law” or “religion”; it encompasses both of these concepts and extends also to ritual performances. The indigenous category describes a unified conception to which the composite term “religious law” may be applied only as an approximation, and an anachronistic one at that.

Arthur S. Diamond argued, conversely, that there was never a time when religion and law – meaning the norms that govern the mundane order – were not regarded as distinct.<sup>8</sup> David Daube took a moderate position on the question. Noting scholarly bias in favor of “the theory that in the early life of nations all precepts were religious precepts, the separation of law and religion being achieved at a more advanced stage of civilization,” he declined to affirm or deny this theory, and argued that in any case it would not be appropriate to generalize from one culture, such as that of ancient Israel as reflected in the Hebrew Bible, to all cultures.<sup>9</sup> Moreover, Daube provided examples of the sacralization of law – “how legal ideas developed into religious ideas under the hands

<sup>6</sup> See Naomi Goldenberg’s argument that what we call “religions” are actually “vestigial states” and markers of ethnic nationhood. Naomi Goldenberg, “The Category of Religion in the Technology of Governance: An Argument for Understanding Religions as Vestigial States,” in Trevor Stack, Naomi Goldenberg, and Timothy Fitzgerald, eds., *Religion as a Category of Governance and Sovereignty* (Leiden: Brill, 2015), 280–92.

<sup>7</sup> Henry Maine, “The Sacred Laws of the Hindus,” in *Dissertations on Early Law and Custom* (London: John Murray, 1883), 1–25 at 5.

<sup>8</sup> Arthur S. Diamond, *Primitive Law Past and Present* (London: Methuen, 1971), 47–49, 80, 89–91, 104, 109–13, 124–26.

<sup>9</sup> David Daube, “Law in the Narratives,” in *Studies in Biblical Law* (Cambridge: Cambridge University Press, 1947; reprint ed. Ktav Publishing, 1969), 1–73 at 1.

of priests and prophets”<sup>10</sup> – one of these being the borrowing of the idea of redemption from debt as a metaphor for salvation in Jewish and Christian traditions.<sup>11</sup> As this example is discussed in Section VI below, I leave it aside for now.

The question of whether law was “originally religious” is indeed quite difficult to answer, even if we focus only on the Hebrew Bible. On the one hand, as Maine already noted, we know that substantial parts of the Pentateuch concern “priestly duty and religious observance” or more bluntly “ritual.” On the other hand, there is much of secular law there as well. In terms of historical development, it is noteworthy that the law codes of the Hebrew Bible appear much more “religious” in this sense than the older and related Code of Hammurabi. This is also true because the biblical laws, whether they have to do with ritual or secular matters (such as cases of assault or property damage), are presented as the product of divine revelation. Such observations imply a process of “sacralization” of law in the biblical milieu, along the lines of what Daube described. We know from other cultural contexts that “secular” and “religious” systems of rules can coexist: the *Arthasāstra* or “Treatise on Politics” from ancient India is an example of the former, if there ever was one, and is of similar antiquity to the *Laws of Manu*: both are roughly two millennia old. Whereas *Manu* was written mainly by and for priests, there are examples of other, mainly later *dharmaśāstra* texts, such as the *Nāradaśmṛti*, that are much more “secular,” in the sense that they are more concerned with, for example, commerce, and with norms enforced by the court, and less with ritual matters and the afterlife.<sup>12</sup>

Much more is at stake here than ancient history. Secularization – meaning the separation of law from religion, and with this, the reciprocal independence of each from the other – is part of the autobiography of modernity. Paradoxically, the idea of secularism itself is not nonreligious, but indebted in complex ways to Christianity, as Ze’ev Falk noted:

A few remarks must be made on the idea of the separation between law and religion. Separation, or rather secularization, may be defined as the emancipation of humanity from the religious dimension in general, and from clerical rule in particular. It must be understood that this has been a particular phenomenon in the history of Christianity, and must not necessarily play the same role in other religions, such as Judaism, Islam or mystical systems. Although many Christian churches resisted secularization, it is implied in the Christian dichotomy between *God* and *Caesar*, *Civitas Dei* and *Civitas Terrena*, as well as between *spirit* and *body*. Paul’s spiritualization of biblical law, drawn to its logical conclusion, means irrelevance of law for salvation, which in turn calls for secularization of law.<sup>13</sup>

<sup>10</sup> Ibid., 3.

<sup>11</sup> Ibid., 39–62.

<sup>12</sup> See discussion in Robert A. Yelle, *The Language of Disenchantment: Protestant Literalism and Colonial Discourse in British India* (New York: Oxford University Press, 2013), 146–47.

<sup>13</sup> Ze’ev Falk, *Law and Religion: The Jewish Experience* (Jerusalem: Mesharim, 1981), 13.

Falk accordingly rejected Diamond's contention that law and religion were originally distinct in Judaism.<sup>14</sup> Falk's argument anticipated some more recent arguments, including my own, that secularization was originally a Christian idea that, already in Paul, was directed against Mosaic law. Paul's idea that the Gospel is a matter of grace (*charis*) rather than of law (*nomos*), or of the spirit rather than the letter of the law, sharpened a distinction between law and religion in a way that had profound consequences, not only for Christian-Jewish relations but also for the entire trajectory of European culture. I have traced how the traditional Christian division of the Mosaic law into three separate categories – natural or moral law, civil or judicial law, and ceremonial law – informed the separation of religion from both law and ritual, particularly during and after the Protestant Reformation.<sup>15</sup> The idea that the ceremonial law had been abrogated by the Gospel went back to Paul, but was deployed by Protestants against both Jews and Catholics in the process of redefining religion as a matter of belief or interior piety. These categories were not indigenous to Jewish tradition, although the latter did identify certain Mosaic ritual laws as *hukkim* or “statutes” and debated whether these were susceptible to rational explanation.<sup>16</sup> Evolutionary accounts of secularization echo older Christian supersessionist narratives according to which religion may have been originally “legalistic” and “political,” but was freed from such mundane things by the Gospel. At the same time that religion became spiritual – a matter of grace – law and politics became nonreligious or secular. “Render therefore to Caesar,” indeed. What was excluded (marginalized, disestablished) was largely ritual. This can be put tentatively into the form of an equation: (RELIGIOUS LAW) – (RITUAL) = (SECULAR LAW) + (SPIRITUAL RELIGION).

Comprehending the relationship between law and religion has been complicated dramatically by the legacy of Christian bias regarding the Mosaic law, Torah, or *halakhah*. Christian polemics against Judaism as legalistic and ritualistic accelerated during the Reformation, and influenced ostensibly scientific scholarship on the Hebrew Bible, such as Julius Wellhausen's reconstruction of the Pentateuch, which

<sup>14</sup> *Ibid.*, 17.

<sup>15</sup> Robert A. Yelle, “Moses' Veil: Secularization as Christian Myth,” in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (Stanford: Stanford University Press, 2011), 23–42; “The Hindu Moses: Christian Polemics against Jewish Ritual and the Secularization of Hindu Law under Colonialism,” *History of Religions* 49 (2009): 141–71, republished as ch. 5 of *The Language of Disenchantment*; “Imagining the Hebrew Republic: Christian Genealogies of Religious Freedom,” in *Politics of Religious Freedom*, ed. Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter Danchin (Chicago: University of Chicago Press, 2015), 17–28; “By Fire and Sword: Early English Depictions of Islam and Judaism as ‘Impostures’ or Political and ‘Unfree’ Religions,” *Patterns of Prejudice* 53 (2020): 91–108.

<sup>16</sup> “Dietary Laws,” *Encyclopedia Judaica* (Jerusalem: Keter Publishing House, 1971), 26–45 at 42; see more generally Isaac Heinemann, *The Reasons for the Commandments in Jewish Thought, from the Bible to the Renaissance*, trans. Leonard Levin (Boston: Academic Studies Press, 2008). See also Diamond's claim (126) that in the Hebrew Bible *mishpatim* refers to legal as distinguished from religious and moral rules.

relegated many ritual laws, particularly those regarding sacrifice, to a later phase of priestly consolidation of the Torah in order to rob them of the prestige of origins.<sup>17</sup> For Wellhausen and many other Protestants, the contrast between “the law and the prophets” described a dichotomy between priestly law and true, inspired religion that aligned with the opposition between Judaism and (authentic) Christianity. In this way, the Gospel could be interpreted as a restoration of the original, prophetic impulse of ethical monotheism, against corruptions introduced by priests, first within Judaism and then within Roman Catholicism.

## II THE SECOND CUT: *AUCTORITAS* VERSUS *POTESTAS*

The first attempt to make sense of “law and religion” has ended with an impasse. We have seen that in some cultures these are combined, while in others they are distinct; and that our propensity to regard them as describing two different domains of culture has been conditioned both by Christian theology and by secularism. In short, these are not natural and perennial categories, but cultural and, therefore, historically determined ones. We cannot, in fact, define what either “law” or “religion” in general is with cross-cultural, trans-temporal validity.

However, despite having contributed myself to the genealogical critique of the ostensibly secular opposition between law and religion, I do not think we need to abandon all hope of the possibility of finding something analogous to this distinction in many other societies. Such an analogy is necessarily structural, and systematic. It depends, not on any substantive definition of either law or religion, but rather on the recognition of the dynamic and fluid tension that characterizes the relationship between these two domains. This argument builds from the previously mentioned efforts to stabilize the category of religion as against that of politics. Ivan Strenski has argued that the opposition between religion and politics is better understood as that between *auctoritas* and *potestas*, or “authority” and “power.”<sup>18</sup> These distinctions go back to republican Rome, where *auctoritas* originally referred to the ability of the Senate, inter alia, to authorize and thus legitimize an action that would be carried out by another who had *potestas*. In 494 CE, Pope Gelasius I sent a letter to Emperor Anastasius I Dicorus, in which he appropriated these terms to distinguish their respective spheres of authority:

Two there are . . . by which this world is chiefly ruled, namely, the sacred authority [*auctoritas sacrata*] of the priesthood and the royal power [*regalis potestas*]. Of these the responsibility of the priests is more weighty in so far as they will answer for the kings of men themselves at the [divine] judgment. Know . . . that, although you [Emperor Anastasius] take precedence over all mankind in dignity, nevertheless you must piously bow the neck to those who have charge of divine affairs and seek from

<sup>17</sup> Robert A. Yelle, “From Sovereignty to Solidarity: Some Transformations in the Politics of Sacrifice from the Reformation to Robertson Smith,” *History of Religions* 58, No. 3 (February 2019): 319–46.

<sup>18</sup> Ivan Strenski, *Why Politics Can't Be Freed from Religion* (Malden, MA: Wiley, 2010).

them the means of your salvation. . . . For if the bishops . . . recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned . . . With what zeal ought you to obey those who have been charged with the administration of the sacred mysteries?<sup>19</sup>

Gelasius' idea that the Pope's *auktoritas* and the Emperor's *potestas* governed different domains, but that the Pope ultimately, because of the greater importance of salvation, possessed the higher authority, came to be known as the doctrine of the Two Swords, and served as the basis for the Christian opposition between the spiritual and temporal powers, the ecclesiastical and civil laws, etc.<sup>20</sup>

Extending Gelasius's distinction beyond its original context of application, Strenski argues that religion is (mainly) a type of *auktoritas* that, for this reason, can never be finally and fully separated from politics, which is (mainly) a type of *potestas*. These two qualities exist in a dialectical relationship, in which religion is a second-order form of politics, as it were, that can lend meaning and legitimacy to the existing order, or conversely serve as a basis for contesting and even changing that order.

While a given "religion" may display both *potestas* and *auktoritas*, no "religion" is conceivable without *auktoritas*. Yet, some religions are conceivable in the absence of *potestas*. But, on the other hand, while politics too reveals a mixture of both *potestas* and *auktoritas*, it is conceivable without *auktoritas*, but no political entity lacking *potestas* is conceivable. While elements of this definition are well rooted in everyday notions of religion, I think the definition takes us beyond mere recycling of everyday understandings of religion. It puts the notion of authority forward – ultimate, sacred, and transcendent authority, to be precise.<sup>21</sup>

Strenski thus describes a Venn diagram in which *auktoritas*/religion and *potestas*/politics overlap, but do not entirely converge. Indeed, he laments the loss of understanding of *auktoritas* as this has been collapsed into the mere exercise of worldly power or *potestas*, a collapse that he finds in, among others, Michel Foucault. Strenski attributes our inherited imbalance or rather conflation between these two qualities to the Pope's own power grab, his attempt to assert a plenary temporal *potestas* in addition to his spiritual *auktoritas*: "Both Church and emperor claimed to rule by virtue of their *potestas*. We thus think about power as a unified field rather than as an arena of complementary differences because the Church simply ceased representing the spiritual alone."<sup>22</sup> According to Strenski, the Roman Church was the first absolutist state, and the Pope the first absolute sovereign.<sup>23</sup> Strenski therefore appears to retell a version of the story of modernity as a decline – a fall from grace – that began either with the Investiture Controversy or a bit later, in the High Middle Ages.

<sup>19</sup> Brian Tierney's translation, quoted in *ibid.*, 75.

<sup>20</sup> *Ibid.*, 77 states that Gelasius' own formulation was effective for only two centuries.

<sup>21</sup> *Ibid.*, 52; see also 64, 91.

<sup>22</sup> *Ibid.*; see also 80, 98, 116–18.

<sup>23</sup> *Ibid.*, 80–81.

Strenski generalizes the *auctoritas-potestas* distinction beyond its immediate historical context, applying it, for example, to the distinction between *Brahman* (priest) and *Kṣatriya* (ruler) and between *dharma* (justice) and *artha* (power) in ancient India.<sup>24</sup> Some would object to this generalization on the grounds that it makes a parochial, medieval Christian category appear universal. However, this objection is arguably itself too general, as any set of categories that might be deployed in cross-cultural comparison must originally be borrowed from some natural language and historical tradition. I am quite sympathetic to Strenski's effort to find a definition of religion in structural rather than essentialist terms. Having acknowledged that there is no *substantive* definition of religion that possesses any cross-cultural or trans-historical validity, we must pursue such structural or systems-theoretical redescriptions of religion, or abandon any engagement with the data.

Yet I think we can (and must) improve upon Strenski's effort. One route forward lies in mapping out more precisely what is meant by the distinction between *auctoritas* and *potestas*. As previously noted, this predates Gelasius, and actually goes back to pagan Rome, where the distinction was applied to describe two different types of political power.<sup>25</sup> The Senate had *auctoritas*, the power to authorize or legitimate an action, while the magistrate had *potestas*, the power to implement or carry out that action. Although the terms were not always used consistently through the centuries of the Republic and subsequent Empire, and *auctoritas* could be attributed to persons of esteem who lacked political office, a useful contemporary analogy would be to the distinction between legislative and executive power under the modern doctrine of separation of powers.

To understand this better, let's look at some of the later iterations of this distinction, as laid out in Table 7.1.

TABLE 7.1 *Auctoritas vs. potestas and related separation-of-power distinctions*

SOURCE	"RELIGION"	"LAW"
Ancient Rome	<i>Auctoritas</i>	<i>Potestas</i>
Two Swords in Medieval Christianity ca. 500–1500 CE	Ecclesiastical/ Spiritual Power ( <i>Sacerdotium</i> )	Civil/ Temporal Power ( <i>Regnum</i> )
Adolphe Thiers (19th c.)	"Ruling"	"Governing"
Emanuel Sieyès (late 18th c.)	Constituting Power	Constituted Power
Walter Bagehot (19th c.)	Dignified Power	Efficient Power
Modern parliamentary democracy	King/Queen (or President in some parliamentary systems)	Prime Minister

<sup>24</sup> For a related discussion of this opposition in ancient India, see Robert A. Yelle, "Spiritual Economies beyond the Sacred/Secular Paradigm: Or, What Did Religious Freedom Mean in Ancient India?" in *Varieties of Religious Establishments*, ed. Lori Beaman and Winnifred Fallers Sullivan (Farnham, Surrey, UK: Ashgate, 2013), 15–32.

<sup>25</sup> Strenski, *supra* note 18, 72–73, 93–94.



The distinction between *auctoritas* and *potestas* seems to have served as the basis for a number of later distinctions, each of which expressed the difference between a power that was exercised immediately and a power that was more remote from direct application and, perhaps by virtue of being above the fray, regarded as superior. Such appears to be the source of the distinction between “ruling” and “governing” expressed in Adolphe Thiers’ famous line, “The king rules, but he does not govern” (*Le roi règne, mais il ne gouverne pas*);<sup>26</sup> as well as of Walter Bagehot’s distinction between the “dignified” and the “efficient” parts of government in his work on *The English Constitution* (1867), where the “dignified” part refers to the mysteries of state embodied in the royal personage, which could be sullied by too close a contact with the messy affairs of the day-to-day business of government:

No one can approach to an understanding of the English institutions, or of others which, being the growth of many centuries, exercise a wide sway over mixed populations, unless he divide them into two classes. In such constitutions there are two parts (not indeed separable with microscopic accuracy, for the genius of great affairs abhors nicety of division): first, those which excite and preserve the reverence of the population – the *dignified* parts, if I may so call them; and next, the *efficient* parts – those by which it, in fact, works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved: every constitution must first *gain* authority, and then *use* authority; it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government. . . . The Queen is only at the head of the dignified part of the constitution. The prime minister is at the head of the efficient part. The Crown is, according to the saying, the “fountain of honour;” but the Treasury is the spring of business.<sup>27</sup>

The nineteenth-century formulations of Thiers and Bagehot show a lingering reference to divine right, and also perhaps to the idea of the mystical body of the sovereign, as opposed to his (or her) natural body.<sup>28</sup> The separation of powers continues in the distinction between the Queen and Prime Minister in the United Kingdom and that between the President and Prime Minister in certain other parliamentary democracies. The United States, as is well known, vests executive power in a President who is no mere figurehead. However, none of these modern versions of the separation of powers is particularly theological. A version of the

<sup>26</sup> *Le National* (January 20, 1830). The fuller version makes clear that this was an argument for limited monarchy: “Le Roi garde le trône, poste toujours menacé, pour qu’un ambitieux ne s’en empare pas. Le pays se gouverne sous ces yeux avec son assentiment et sa gloire, car on vient tous les ans le féliciter de la prospérité publique qu’il n’a pas faite mais qu’il a suffisamment faite s’il ne l’a pas empêchée. En un mot, il règne et le peuple se gouverne.” Another version of this is “Le roi n’administre pas, ne gouverne pas, il règne.” Thiers’ famous statement was later to be quoted by Pierre-Joseph Proudhon, Max Weber, and Carl Schmitt, among others.

<sup>27</sup> Walter Bagehot, *The English Constitution* (London: Chapman & Hall, 1867) (emphasis in original).

<sup>28</sup> Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957).

division of powers is also found in the distinction in business corporations between the Board of Directors and the Chief Executive Officer.

The distinction between *auctoritas* and *potestas* was – and perhaps still is – best understood as a distinction internal to politics. It was not originally a theological distinction at all, but rather became sacralized through its assimilation by Gelasius. Because, as indicated also by its contemporary versions, this distinction has to do with a separation of powers that can be of an entirely mundane, political or economic nature, it appears, at first glance, less than ideally suited for the work that Strenski assigns to it: namely, the expression of the distinction between religion and (worldly) politics.

### III THE THIRD CUT: SOVEREIGNTY VERSUS LAW

Or perhaps it is just that we have not yet understood the full implications of the distinction between *auctoritas* and *potestas*. Here Giorgio Agamben can be helpful, although as a non-Latinist I cannot evaluate the accuracy of all of his contentions. Agamben includes an important discussion of the distinction in his work, *State of Exception*, which is itself part of the *Homo Sacer* series.<sup>29</sup> He assimilates *auctoritas* to the idea of a self-legitimizing sovereignty that superintends and is capable of suspending the legal order, which is identified with *potestas*:

Let us try to better define the nature of this “power that grants legitimacy” in its relation to the *potestas* of the magistrate and the people. . . . Under extreme conditions . . . *auctoritas* seems to act as a force that suspends *potestas* where it took place and reactivates it where it was no longer in force. It is a power that suspends or reactivates law, but is not formally in force as law. . . . The juridical system of the West appears as a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric *potestas*) and one that is anomic and metajuridical (which we can call by the name *auctoritas*). The normative element needs the anomic element in order to be applied, but, on the other hand, *auctoritas* can assert itself only in the validation or suspension of *potestas*. Because it results from the dialectic between these two somewhat antagonistic yet functionally connected elements, the ancient dwelling of law is fragile and, in straining to maintain its own order, is always already in the process of ruin and decay. The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between anomie and *nomos*, between life and law, between *auctoritas* and *potestas*. . . . As long as the two elements remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome’s contrast between the Senate and the people, or in medieval Europe’s contrast between spiritual and temporal powers) their dialectic – though founded on a fiction – can nevertheless

<sup>29</sup> Giorgio Agamben, *The Omnibus Homo Sacer* (Stanford: Stanford University Press, 2017), 230–42.

function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine.<sup>30</sup>

Explaining all of the nuances of this passage within the context of Agamben's larger project is impossible here. What is important is to recognize that he assimilates the distinction between *auctoritas* and *potestas* to that between sovereignty and law, in accordance with Carl Schmitt's understanding of sovereignty as the power to suspend the law or to declare a state of exception (i.e. a state of emergency). Rather than some weak, effete power of authorization, such as is still possessed by the English monarch, who technically speaking must assent to all laws approved by Parliament, and could in theory refuse to do so, the form of *auctoritas* described by Agamben is the fulsome power possessed by the sovereign prior to the taming of divine right during and after the seventeenth century. *Auctoritas* coincides with the power to intervene in a normative order by creating, suspending, or breaking (and potentially remaking) that order. A similar force was attributed by some Christian theologians in the High Middle Ages to God as an omnipotent sovereign, whose absolute power (*potentia dei absoluta*) was capable of disrupting or suspending the existing framework of laws (*potentia ordinata*) through miracles and divine commands.

Agamben further identifies *auctoritas* as a personal quality held by an *auctor*, such as a *pater*, *princeps*, or *dictator*.<sup>31</sup> He does not hesitate to identify this quality with Max Weber's notion of "charismatic authority": "Charisma—as its reference to Paul's *kharis* [grace] (which Weber knew perfectly well) could have suggested — coincides with the neutralization of law . . . ."<sup>32</sup> This reinforces the connection of *auctoritas* with sovereignty, understood as the power of ultimate decision held by one ruler (monarch) in his or her personal capacity. The danger according to Agamben is that, in modern times, *auctoritas* and *potestas* have collapsed together, so that there is no separation of powers, no relationship of checks and balances, but only totalitarian dictatorship. Table 7.2 (next page) may assist in appreciating these associations.

As I have demonstrated elsewhere, such theological ideas concerning absolute power shaped the background of the early-twentieth-century debate between Carl Schmitt and Max Weber.<sup>33</sup> Weber explicitly opposed charismatic authority to legal authority, and identified the former with the power to suspend the law: "genuine charismatic domination knows no abstract laws and regulations and no formal adjudication. . . . [I]n a revolutionary and sovereign manner, charismatic domination transforms all values and breaks all traditional and rational norms: 'It has been written . . . but I say unto

<sup>30</sup> *Ibid.*, 234, 240 (the second passage is repeated at 1266; see also 1278–79) (emphasis in original).

<sup>31</sup> *Ibid.*, 237–38.

<sup>32</sup> *Ibid.*, 239.

<sup>33</sup> Robert A. Yelle, *Sovereignty and the Sacred: Secularism and the Political Economy of Religion* (Chicago: University of Chicago Press, 2019), ch. 2.

TABLE 7.2 *Sovereignty vs. law and related oppositions (after Agamben)*

SOURCE OF OPPOSITION	“SOVEREIGNTY”	“LEGALITY”
Ancient Rome	<i>Auctoritas</i>	<i>Potestas</i>
Christian scholastic idea of God’s two powers	Absolute Power ( <i>potentia/potestas dei absoluta</i> )	Ordained Power ( <i>potentia ordinata</i> )
Christianity (Paul, Romans)	Grace ( <i>charis</i> )	Law ( <i>nomos</i> )
Max Weber	Charismatic Authority	Legal/ Bureaucratic Authority

you . . .”<sup>34</sup> (Weber quoted Jesus’s statement from the Gospels twice as an illustration of charisma.) He argued further that charisma has declined in an increasingly bureaucratic modernity. Schmitt pointed out that such views echoed the radical Protestant attack on miracles, which coordinated with the prohibition of absolute sovereignty. Weber’s account was not a neutral history, but a partisan “political theology.”

There is, according to Weber and Schmitt, not only a structural opposition between sovereignty and law, but also an historical divide, according to which sovereignty has declined or been repressed in an increasingly rule-governed modernity. This historical process is what we call “secularization” or “disenchantment.” Scrutinizing this process as it relates to law will help us further along the road to understanding the relationship between law and religion.

#### IV THE FOURTH CUT: THE DISENCHANTMENT OF LAW

In *Economy and Society*, Weber sketched a compelling account of the evolution of legal traditions away from the supposedly *ad hoc* justice imposed by dictators, khadis, prophets, and other charismatic figures. The early stage of society involved decision by fiat. The chieftain would pronounce a verdict without having to explain the reasons. This resembled very closely what we refer to in other contexts as divine command.<sup>35</sup> Oracles and ordeals were examples of the judicial processes appropriate to this stage. Weber explicitly invoked William Blackstone’s eighteenth-century description of English common law judges as “oracles” to illustrate the traces of charisma in that legal tradition. Blackstone meant to laud their wisdom and discretion as interpreters or even deliverers of the inspired judgments of a divine justice. These verdicts were singular and independent; they were made on a case-by-case basis, through the judge’s personal authority and not necessarily in strict reliance on prior judicial precedent. Such verdicts therefore appeared as a form of quasi-magic,

<sup>34</sup> Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 115; see also 243. See also Bernard Jackson, “The Prophet and the Law in Early Judaism and the New Testament,” in *Essays on Halakhah in the New Testament* (Leiden: Brill, 2008), 13–31 at 21.

<sup>35</sup> See discussion in Yelle, *Sovereignty and the Sacred*, *supra* note 33, ch. 2.

also as having pragmatic effect, much in the manner in which the ritual pronouncements of the Catholic Church worked *ex opere operato* to bring a new state into being. As we would now say, they were “speech acts.”

The onward rationalization of the law involved shedding such vestiges of judicial charisma, although obliterating every trace of this was and remains impossible. This progressive disenchantment of the law formed the background of Schmitt’s argument for bringing back an irruptive sovereignty. Schmitt’s polemic depended on at least two arguments: first, that the disenchantment of sovereignty (charisma, miracle, divine command) was a choice or a dogmatic position taken by certain Protestant theologians, which could therefore be dismissed as a partisan “political theology”; and second, that sovereignty could not really be excluded in any case, as there would always be a need for an ultimate authority capable of making, suspending, or changing the law.<sup>36</sup>

Schmitt’s opponents included the legal positivists, such as Hans Kelsen, who were the spiritual descendants of Jeremy Bentham. Bentham had already staked out a position, in its own way as extreme as Schmitt’s, and at the opposite pole from his. Where Schmitt was all about the exception, Bentham did his best to exclude this, through the elaboration of a comprehensive, plain-language code (the “Pannomion”) that would supposedly neither require nor allow any interpretation or discretion on the part of the individual judge.<sup>37</sup> Directly attacking Blackstone’s idea that judges were “oracles,” Bentham sought to remove the taint of arbitrary discretion from the common law by a thorough rationalization of its statutory basis. In this project he followed directly in the footsteps of certain Deists, such as Matthew Tindal, who had earlier attacked miracles, divine commands, and similar states of exception to natural law.

Both Bentham and Schmitt were extremists. Neither position was tenable. We still need both law and sovereignty. Yet the apparent fact that neither seemed quite willing to allow this suggests that modernity has reached a condition of polarization with respect to these two qualities. We have already seen echoes of this polarization or “breakdown” in both Strenski and Agamben, each of whom has diagnosed the collapse of the (formerly functioning) dynamic tension between *auctoritas* and *potestas*. The original lament of this sort arguably came from Weber, who described modernity not only as “disenchanted” and “rationalized,” but also as an “iron cage” (*stahlhartes Gehäuse*).<sup>38</sup> Applied to law, this would represent the condition in which legal norms have lost all charismatic authority and, with this, their legitimacy and power to command obedience.

<sup>36</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 1985).

<sup>37</sup> Robert A. Yelle, “Bentham’s Fictions: Canon and Idolatry in the Genealogy of Law,” *Yale Journal of Law & the Humanities* 17 (2005): 151–79.

<sup>38</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York: Charles Scribner’s Sons, 1958), 181.

Whereas Weber's opposition between charisma and law now appears to capture rather precisely part of the modern condition, it is important to recognize and acknowledge what Schmitt already pointed out: namely, that the stark opposition between charisma and law itself represents a particular perspective that may with some justice be attributed to the Protestant exacerbation of the Pauline divide between *charis* and *nomos*.<sup>39</sup> As described in Section I of the present chapter, this is a dichotomy that appears indebted, on the one hand to Christian anti-Jewish polemics, on the other to Protestant anti-Catholic polemics. Both of these polemics insist that *charis* is not *nomos* – that grace has nothing to do with law. It is widely known that Weber's own framing of this dichotomy was influenced by Rudolph Sohm, the Protestant theologian who described the downfall in the early Christian community as having occurred when the original mode of charismatic leadership was replaced by a legally defined process of the election of bishops.<sup>40</sup> At that point, the Gospel was corrupted into the Roman Catholic Church. That Sohm's account was just a latter-day version of the Protestant trope that miracles ceased in the early church has been ignored by most scholars, certainly by those who still regard Weber's theory as scientific and "value neutral."

Is it really true that charisma is the antithesis of law? To begin to answer this question, I turn now to reflect upon the historical context out of which such categories emerged – namely, Hebrew biblical law – and specifically, to the question of what *charis* might have meant originally in the Gospels.

## V THE FIFTH CUT: CHARIS VERSUS NOMOS, OR "JUSTICE AND RIGHTEOUSNESS"?

In a series of erudite and incisive essays, Bernard Jackson argues that law as depicted in the Hebrew Bible originally was not separate from charisma, but was dependent on the personal authority of the judge, who was regarded as the embodiment of justice.<sup>41</sup> The Pauline valorization of the "spirit" of the law over its "letter" still reflected a situation in which judgments were thought to be delivered through

<sup>39</sup> Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, trans. Michael Hoelzl and Graham Ward (Malden, MA: Polity Press, 2008), 66–67, 74.

<sup>40</sup> See Robert A. Yelle, "An Age of Miracles': Disenchantment as a Secularized Theological Narrative," in Robert A. Yelle and Lorenz Trein, eds., *Narratives of Disenchantment and Secularization: Critiquing Max Weber's Idea of Modernity* (London: Bloomsbury, 2021), 129–48 at 141–45.

<sup>41</sup> I have drawn on very helpful comments from, as well as on the following essays by Bernard Jackson: "The Prophet and the Law," *supra* note 34; "Legalism and Spirituality: Historical, Philosophical and Semiotic Notes on Legislators, Adjudicators, and Subjects," in *Religion and Law, Biblical-Judaic and Islamic Perspectives*, ed. E. B. Firmage, B. G. Weiss and J. W. Welch (Winona Lake: Eisenbrauns, 1990), 243–61; "Constructing a Theory of Halakhah" (published in 2012 on <http://jewishlawassociation.org/resources.htm>); "Historical Observations on the Relationship between Letter and Spirit," typescript; *Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1–22:16* (Oxford: Oxford University Press, 2006); "Justice and Righteousness in the Bible: Rule of Law or Royal Paternalism?" *Zeitschrift für Altorientalische und Biblische Rechtsgeschichte* IV (1998): 218–62.

divine inspiration. Originally, there was no contradiction between law and prophecy, such as was retrospectively (and anachronistically) projected onto the Hebrew Bible, especially by Christians. Prophets, like kings and other judges, were capable of delivering legal judgments, but also of suspending or changing the law. Law was seen as something more than a decision rule that was foreordained and meant to be applied strictly. Indeed, at first the law was not even written down; and even after it was committed to writing, such written rules were neither co-extensive with, nor exhaustive of, the whole of the law. Only gradually was the codified law applied more strictly and the prophetic dimension marginalized, as illustrated by the later Rabbinic story of Akhnai's oven, which expressed the exclusion of miraculous authority in favor of democratic decision by the rabbis. This development, as Jackson notes, appears to represent a defensive response to Jesus's prophetic message, which had placed charismatic authority in starker opposition to the law.<sup>42</sup> It was reinforced by the idea that prophecy had ceased, an idea that existed in Judaism before it was deployed by certain Church fathers against Christian heretics and, later, resuscitated by Protestants as a weapon against the Roman Catholic Church as well as enthusiasts within their own ranks.

Jackson invokes Weber's account of charisma and its institutionalization in the course of his account.<sup>43</sup> Both agree that charisma represents a sovereign power to suspend the legal norm in a particular instance, also by appeal to miracles and consultation with oracles.<sup>44</sup> Yet where Weber described a dichotomy between charismatic and legal authority, Jackson argues that the original form of authority in ancient Israel was "monistic," meaning that it combined charisma and law.<sup>45</sup> Only after prophetic charisma had been excluded as a source of justice, partly in response to the challenge posed by Christianity to the Law, did a "dualistic" system arise in Judaism, in which a written statute was interpreted by rabbis qualified through ordination (*semikhah*). Ordination itself had earlier been charismatic, but came to be conferred "as a result of qualification in the *yeshivah*."<sup>46</sup> This ancient history closely parallels Sohm's account of the institutionalization of authority in the early Christian community, which was adapted by Weber in framing the opposition between charismatic authority and legal/bureaucratic authority, or "office charisma" (*Amtscharisma*). Yet where Jackson describes this as a relatively late development that replaced an earlier "monistic" system, Weber (and, *a fortiori*, Sohm)

<sup>42</sup> Jackson, "The Prophet and the Law," *supra* note 34, 29–30. Joseph Weiler explains Jesus's trial and condemnation as the Jewish community's response to his claim to suspend and rewrite the Law. The relevant biblical law according to Weiler is Deuteronomy 13:1–5. See Joseph H. H. Weiler, "The Trial of Jesus," *First Things* (June 2010), available at [www.firstthings.com/article/2010/06/the-trial-of-jesus](http://www.firstthings.com/article/2010/06/the-trial-of-jesus). Cf. Jackson, "The Prophet and the Law," 17.

<sup>43</sup> Jackson, "Legalism and Spirituality," *supra* note 41, 253; "Constructing a Theory of Halakhah," *supra* note 39, 15.

<sup>44</sup> Jackson, "Justice and Righteousness," *supra* note 41.

<sup>45</sup> Jackson, "Constructing a Theory of Halakhah," *supra* note 41, 12.

<sup>46</sup> *Ibid.* See also Jackson, "Historical Observations," *supra* note 41, 5–6.



described a permanent struggle between charisma and law that was illustrated already by the conflict between prophets and priests in the Hebrew Bible.<sup>47</sup>

The starkness of Weber's dichotomy reflects its theological origins. As Agamben (and Carl Schmitt and John Potts, among others) pointed out, the original, theological source for Weber's notion of charismatic authority was Paul's distinction between *charis* or grace and *nomos* or law, as employed in Romans, which paralleled some other Pauline oppositions, such as that between spirit and flesh, or spirit and letter.<sup>48</sup> This distinction has been fateful for the subsequent history of Christian-Jewish relations, as well as for the European Christian understanding of the relationship between law and religion as a disjunction and rigid dichotomy. But where does it come from?

Several points might lead us to expect that this opposition had an origin in law. One is Paul's claim to have been a student of Rabbi Gamaliel, an expert in Torah or law; another is the fact that Paul evidences a familiarity with legal concepts and forensic rhetoric; a third is that the term *nomos* had by this time become the standard word in Hellenistic Greek for "law"; a fourth is that, as used by Paul, *nomos* appears to be a designation for the Torah or the Mosaic law.<sup>49</sup> Weighing against this expectation is the traditional theological interpretation of *charis* as divine grace, which stands as a positive hindrance, if not an insurmountable obstacle. The theological perspective is that grace has literally nothing to do with law, that it comes out of the blue, *ex nihilo*, or as an uncaused cause. (This is, indeed, the source of the dichotomy.) We must attempt to get behind this perspective in order to appreciate what *charis* might have meant, precisely in relation to its original, Hebrew context.

A perusal of Strong's Concordance suggests that *charis* (grace, gift, credit, or thanks) was used by Paul in several instances specifically to denote the character or motivation of an action that exceeded what was required by the law.<sup>50</sup> For example, Romans 4:4 (NKJV) states: "Now to him who works the wages are not counted as grace [*charis*], but as debt." This usage parallels that in the Gospel of Luke.<sup>51</sup> At Luke 6:32–34 (NKJV), Jesus states:

But if you love those who love you, what credit [*charis*] is that to you? For even sinners love those who love them. And if you do good to those who do good to you, what credit [*charis*] is that to you? For even sinners do the same. And if you lend to those from whom you hope to receive back, what credit [*charis*] is that to you? For even sinners lend to sinners, to receive as much back.

<sup>47</sup> See Yelle, "An Age of Miracles," *supra* note 40.

<sup>48</sup> For discussion and references, see Yelle, *Sovereignty and the Sacred*, *supra* note 33, ch. 2.

<sup>49</sup> Jackson, "Constructing a Theory of Halakhah," *supra* note 41, 17, points out that "law" is in fact not a good translation of Torah, which means something more like "instruction" and is broader than a collection of legal rules. Point taken, but in Paul's polemic it appears that the category of law is already undergoing a devaluation that is the topic of the present discussion.

<sup>50</sup> Romans 4:4, 6:15, 11:6; Ephesians 2:8.

<sup>51</sup> Luke 6:32–34, 17:9.



*Charis* here appears to refer to a principle of justice or mercy that suspends the strict application of a legal or commercial norm, such as that pertaining to the payment of wages or the repayment of debts. It has been suggested to me that *charis* here may be translating the Hebrew term *chesed*, which is usually rendered into English as “mercy.”<sup>52</sup> This makes sense also in light of the understanding of Hebrew biblical law that Jackson has articulated, in which the application of law was not rigid but flexible, and was legitimated through the personal authority of the judge, who supposedly possessed divine inspiration. In such a system, precisely as Weber described, charismatic authority is capable of suspending otherwise valid legal norms. Jackson argues persuasively that such an expansive conception of justice was expressed by the common phrase *mishpat utsedakah*, or “justice and righteousness,” discussed also by Moshe Weinfeld: “Weinfeld sees ‘justice and righteousness’ as particular responsibilities of the king, reflected in a number of institutions whereby he liberated his subjects from economic (and other forms of) oppression.”<sup>53</sup> Such forms of liberation included the releases from servitude and debt that occurred in conjunction with the declarations of *deror* and *misharum*, which are described below. Jackson contends that in Weinfeld’s account righteousness (*tsedakah*) “becomes a kind of equity, designed to temper the strictness of law, the latter being conceived (in modern terms) as the application of legal rules by judges who have no discretion to resolve disputes in any other way.” Jackson’s main disagreement with this interpretation is that it ignores the fact that judges also had the responsibility, discretion, and latitude to be “righteous” and, when necessary, to deviate from the strict letter of the law.

What is significant, in connection with our discussion of *charis* as a possible translation of *chesed*, is that this Hebrew term also appeared sometimes in such binomial formulas, as Weinfeld notes: “During the Second Temple period, the concept of ‘justice and righteousness’ developed and deepened. Instead of the pair of concepts, justice and righteousness . . . , we find righteousness and kindness (*tsedakah* and *chesed*), which acquired a broader meaning.”<sup>54</sup> He glosses the latter term as follows: “*Chesed*, ‘kindness,’ is identical with goodness and mercy. It is not a characteristic that is congruous with strict justice, since if it were to be applied in court it would otherwise interfere with the execution of justice, which must be untempered by partiality.”<sup>55</sup>

In other words, we have evidence of the prevalence of a concept of equity in the Second Temple period that appeared to function precisely as the notion of *charis* in the New Testament examples provided above. Whether or not *charis* was translating

<sup>52</sup> This was suggested to me independently by both Bernard Jackson and Haim Shapira, personal communications.

<sup>53</sup> Jackson, “Justice and Righteousness in the Bible,” *supra* note 41. See also Moshe Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East* (Jerusalem: Magnes Press, 1995), 11ff., 17ff.; Jackson, “Constructing a Theory of Halakhah,” *supra* note 41, 11.

<sup>54</sup> Weinfeld, *Social Justice*, *supra* note 53, 19; see also 29.

<sup>55</sup> *Ibid.*, 36.

*chesed*, a version of this concept existed prior to the Gospel revelation, and was therefore not created out of nothing. This concept denoted, at its core, the power to suspend or deviate from a strict application of the law in the quest for a higher justice that was informed by mercy. As such, it referred to what we have been calling “sovereignty” as distinguished from “law.” It would not be correct to regard *charis/chesed* as a nonlegal principle, any more than it would be correct to regard sovereignty as having nothing to do with law. I emphasize this point because many of us who come from a European, Christian background have been conditioned to regard grace as a nonlegal and specifically religious category. This understanding, I suggest, has been influenced by a particular reading of Paul, who indeed at times highlights the opposition between *charis* and *nomos* (or between the spirit and the letter of the law) to such an extent that these two principles no longer appear to belong together, as part of a comprehensive concept of justice. Paul’s emphasis on the disjunctive rather than the conjunctive aspect of this binomial shaped the later idea of a separation between religion and law, as well as Weber’s sharp bifurcation between charisma and legal authority.

#### VI THE SIXTH CUT: THE PARDON POWER AS ILLUSTRATION OF THE “RELIGIOUS” PRINCIPLE IN RELATION TO LAW

Let’s take stock of where we are in the argument. The emerging picture suggests that our ordinary, common-sense understanding that law and religion are separate or even antithetical has been conditioned by secularism and, before this, by Christian theology, which (especially in its post-Reformation manifestations) has tended to identify religion as “wholly other,” as transcendent of the mundane world. When religion comes into contact with law, it appears precisely as a zone of freedom, as a suspension of the law. Yet these very qualities are the same ones that identify what we call “religion” as a form of sovereignty, which is also characterized by the power to suspend the law, through the declaration of a state of exception.<sup>56</sup> If Christianity and secularism have introduced a “cut” between religion and law, as reflected in the dichotomy between *charis* and *nomos*, this cut performed an incision into the body of law itself, a body that was formerly unified in the person of the sovereign judge, who acted through divine inspiration. As Jackson put it, justice went from being “monistic” to “dualistic.”

But is it really the case that religion may be nothing more than a particular expression of the power of the sovereign who suspends the law? Let us test this thesis again using the example of the pardon power. The pardon power provides an especially good case for a historical reconstruction because, among other things, we can trace it from our contemporary era all the way back to ancient Mesopotamia. As we have just seen, Weinfeld notes the debt releases called *andurarum* or

<sup>56</sup> This is the central argument of my book, *Sovereignty and the Sacred*, *supra* note 33.

*misharum* as examples of the sovereign's power to do equity.<sup>57</sup> Although the evidence is equivocal, in ancient Mesopotamia such debt releases appear to have coincided with several types of events: a threat to the polity resulting from foreign armies or a famine; the first full year of a king's reign; and the Akitu or New Year's festival.<sup>58</sup> These were sovereign acts that sometimes coincided with an actual state of emergency, in the event of which there were pragmatic reasons that counseled removing the burden of debt from citizens whose attentions should be focused fully on addressing the immediate threat.<sup>59</sup> When occurring at the beginning of the first full year of a king's reign, the debt release resembled a reset or "clean slate" that also served to create gratitude for the new ruler; in this respect it paralleled the acts of *largesse* that in later European contexts also coincided with the entry into sovereignty.<sup>60</sup> In the case that such a debt release synchronized with the New Year's festival, it had the additional connotation of a cosmic renewal in which the king, who according to some accounts underwent ritual humiliation, was subsequently victorious over the forces of evil. Agamben has seen in such festivals a "state of exception" that marks a moment in the life of sovereignty.<sup>61</sup>

In the Hebrew Bible, such suspensions of the law were called *deror* – liberation – and included release from debt (*shemitta*) as well as from slavery. During the Sabbatical, every seventh year, debts were canceled and slaves were freed. Every seventh Sabbatical, thus every forty-nine or fifty years, a Jubilee was declared, on which farmland was also returned to its original owners. Although there is some evidence that the Sabbatical was practiced, the Jubilee appears to have remained a piece of utopian social legislation. The main innovation in the Hebrew Bible as compared with the ancient Near Eastern precedent was to take this power out of the hands of the king and to place the cancellation of debts on a regular schedule. What was originally a sovereign act was converted into a legal institution.<sup>62</sup> However, kings or judges could still grant pardons in individual cases.

David Daube identified the incorporation of an originally legal idea of redemption into Jewish and Christian tradition as a central metaphor for salvation, a process

<sup>57</sup> See also Jackson, "Legalism and Spirituality," *supra* note 41, 249.

<sup>58</sup> My summary here relies on Michael Hudson and Marc Van de Mierop, *Debt and Economic Renewal in the Ancient Near East* (Bethesda: CDL Press, 2002).

<sup>59</sup> It should be noted that pardons frequently have been granted, not only following civil wars (in which case as applied to an entire class of persons they are more generally referred to as "amnesties"), but also in order to free individuals for conscription into the army in the case of a state of war. Examples may be found in more recent centuries, e.g. in the British Navy. See Willam Duker, "The President's Power to Pardon: A Constitutional History," *William and Mary Law Review* 18 (1977): 475–538 at 478.

<sup>60</sup> Jean Starobinski, *Largesse*, trans. Jane Marie Todd (Chicago: University of Chicago Press, 1997).

<sup>61</sup> Agamben, *The Omnibus Homo Sacer*, *supra* note 29, 222–29.

<sup>62</sup> Jackson, "Justice and Righteousness," *supra* note 41, in accordance with his interpretation of biblical law as including the suspending power, suggests that the *deror* was a means to give effect to legal rights, rather than something regarded as separate from the law. This would certainly be true from the standpoint of a "monistic" conception of justice as he describes; however, it still seems to me that there is analytical value in distinguishing such sovereign acts from strictly legal ones, as we have seen in the course of our analysis.

that began already in the Hebrew Bible with the institutions of the Sabbatical and Jubilee years.<sup>63</sup> Gradually, the idea of a “redeemer” (*go’el*), one who buys something back from debt, and of a future redemption that involved a literal liberation from bondage, was extended to a more general idea of salvation:

This idea [of redemption], of fundamental importance in the Old Testament and Talmud, in the gospels and all Christian doctrine, has its root in early law. It is one might justly say, an outstanding example of a legal notion being taken up and made into a religious notion by priests and prophets. . . . In the end, the notion of redemption was even more spiritualized, and God thought of as redeeming His people not only from physical slavery but also from the fetters of sin and death.<sup>64</sup>

The importance to the identity of the Israelites of the deliverance from slavery in Egypt during the Exodus and the Conquest of Canaan served to reinforce this metaphor.<sup>65</sup> Daube focused on the root of the concept as “red-emption” or buying back,<sup>66</sup> although he noted that already in the case of most places in the Hebrew Bible where the notion of redemption appears, no actual payment is implied.<sup>67</sup> Still the concrete basis of this metaphor in a legal transaction shone through.<sup>68</sup> Daube contended that “that peculiar element from the socio-legal sphere, the idea of salvation by means of ‘red-emption’, . . . occurs in no other system.”<sup>69</sup>

In some cases, indeed, the use of the idea to denote the one who redeems the blood of the victim of a murder (*go’el ha-dam*), an archaic idea connected to the *lex talionis*, continued to inform the notion of a spiritual redeemer who removes the stain of sin and death.<sup>70</sup> Daube noted the application of this idea to Jesus in the Gospels, and added that “In the Middle Ages, the legal element in the idea of redemption by God . . . At times perhaps . . . was over-emphasized: salvation, with some theologians, became almost a business transaction.”<sup>71</sup> Here he may have been referring to Anselm of Canterbury, whose explanation of the mechanism of salvation through Jesus’ death on the cross in *Cur Deus Homo* has been interpreted by some critics as based on a crude materialism resting on feudal notions of justice and the institution of *Wergeld*, or payment as compensation for a homicide.

Redemption, as Daube understood it, is a legal concept that specifies the conditions under which a debt may be canceled or repurchased. It literally meant “buying back.” The process that Daube described, namely the metaphorical extension into the religious domain of this originally legal or commercial idea, appears to represent

<sup>63</sup> Daube, “Law in the Narratives,” *supra* note 9, 39–62.

<sup>64</sup> *Ibid.*, 42.

<sup>65</sup> *Ibid.*, 52.

<sup>66</sup> *Ibid.*, 39.

<sup>67</sup> *Ibid.*, 41.

<sup>68</sup> *Ibid.*, 48.

<sup>69</sup> *Ibid.*, 60.

<sup>70</sup> *Ibid.*, 58–59.

<sup>71</sup> *Ibid.*, 61.

a key case of the sacralization of law. However, the situation is quite complex, and there are considerations that weigh against the conclusion that these ideas were ever purely legal, if by this is meant “nonreligious.” To begin with, the notion of repurchasing something that has been devoted for sacrifice is a common one in the Hebrew Bible.<sup>72</sup> While this qualifies as an economic transaction, it also pertains to a key form of ritual praxis and, as such, can hardly be termed nonreligious. Significantly, in the uses of *charis* described in the preceding section, the idea of debt (or lending) appears, but there is no mention whatsoever of a legally defined repurchase. The notion of *charis* that appears in Paul and Luke coincides with that of the pardon in its original etymology as “*par don*,” meaning by free gift rather than by obligation.

More importantly, in terms of the foregoing analysis, is that the liberation achieved by the *andurarum/deror*, like individual pardons, was a sovereign act, even when performed by a judge, rather than a legal act in the narrow sense. In the *deror* of the Hebrew Bible, this act has been legalized and routinized to some extent, although its close connections with sovereignty arguably persist.<sup>73</sup> This remained the case when subsequently, in Christian traditions, redemption was theologized as an act of divine grace, an act that was itself an expression of God’s sovereignty and omnipotence. In 1300, long after the period Daube describes, the institution of the Jubilee was revived by the Popes as part of the economy of indulgences and penances that developed in the High Middle Ages. Starting from 1400, every twenty-five years (save in 1800, due to the Napoleonic wars) has witnessed a Jubilee in Rome that grants the compliant pilgrim a plenary indulgence from sin. This institution depends on the Pope’s “power of the keys” or authority to bind and loosen the fetters of sin, and to open or close the doors of heaven. Such pardon powers are traditional attributes of sovereignty.

In recent centuries, this aspect of sovereignty is sometimes called the “dispensing power,” meaning the sovereign’s ability to dispense with or suspend a legal order. Because one of the main applications of this power consists of the granting of pardons, it has also been referred to as “the royal prerogative of mercy,” which is one of the “absolute” as opposed to “ordinary prerogatives” of the king. It appears clear that this power was established through analogy to God’s omnipotence. Kathleen Moore states: “Pardon has historically been understood as an act of grace, a gift freely given from a God-like monarch to a subject.”<sup>74</sup> Daniel Franklin agrees: “Prerogative powers permitted the king to exceed the established laws of the state. This was considered permissible inasmuch as the king, as the embodiment of

<sup>72</sup> See, e.g., Leviticus 27.

<sup>73</sup> Yelle, *Sovereignty and the Sacred*, *supra* note 33, ch. 5.

<sup>74</sup> Kathleen Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989), 8–9. Moore appears to be closely paraphrasing Chief Justice John Marshall’s statement in *United States v. Wilson* (1833) that “A pardon is an act of grace, . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” 32 U.S. (7 Pet.) (1833) 150 at 159–60.

the state, was a representative of god on earth.”<sup>75</sup> In his book on the development of habeas corpus, Paul Halliday traces this power to the same source, namely the divine right of kings:<sup>76</sup> “For that is what the royal power to create sanctuary or to grant pardon was: a miracle by which the normal rules of law, which might inflict the ultimate pains on the subject’s body, were suspended.”<sup>77</sup> As Halliday notes, habeas corpus, or the power to command that the king’s subjects be brought before the Court of King’s Bench for justice, often served as the preliminary to the granting of a pardon. The concept of “equity” advanced by the King’s Bench, also in opposition to the “law” of the Court of Common Pleas, might be regarded as a lesser, related power.

Both Halliday and Franklin refer to the pardon as an example of the “absolute” as opposed to the “ordinary prerogative” of the king.<sup>78</sup> These were later names for what were called in the High Middle Ages the absolute and ordained powers, powers that were attributed originally to God and extended by analogy to human sovereigns, such as Popes and Emperors. (See Table 7.2.) Together with divine commands, the miracles in the Hebrew Bible were one of the chief sources of evidence for God’s omnipotence.<sup>79</sup> It is this older idea of divine and royal sovereignty, founded on the miracle, that Schmitt contended had been excluded by the modern ascendancy of law. The pardon power is a residue of this absolute power.

The plenary extent of the pardon power is striking. A pardon was held by numerous authorities to remove the guilt as well as the punishment attaching to an offense. In the thirteenth century, Henry Bracton stated that the pardoned “is like a new born infant and a new man, as it were.”<sup>80</sup> In the seventeenth century, Matthew Hale said that “Exemption from guilt and punishment comes properly enough under this title, viz. by pardon. . . . The king’s pardon in such cases is so strong that it takes away the guilt *in foro humano* as well as the punishment.”<sup>81</sup> In *Ex parte Garland* (1866), the US Supreme Court stated that a presidential pardon makes the pardoned “as innocent as if he had never committed the offense.”<sup>82</sup> Both the idea of being born again, and that of granting dispensation from the guilt (or *culpa*) as well as the punishment (or *pœna*) attached to an offense, were originally theological ideas

<sup>75</sup> Daniel P. Franklin, *Extraordinary Measures: The Exercise of Prerogative Powers in the United States* (Pittsburgh: University of Pittsburgh Press, 1991), 20.

<sup>76</sup> Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 1989), 66–69.

<sup>77</sup> *Ibid.*, 72.

<sup>78</sup> *Ibid.*, 68, Franklin, *Extraordinary Measures*, *supra* note 75, 21–22.

<sup>79</sup> For a general discussion, see Yelle, *Sovereignty and the Sacred*, *supra* note 33, ch. 2. For divine command in Judaism, see Jackson, “Constructing a Theory of Halakhah,” *supra* note 41, 20–21.

<sup>80</sup> Bracton, *De Legibus et Consuetudinibus Angliæ* 3: 371, trans. S. Thorne (1879), quoted in Duker, “The President’s Power,” *supra* note 59, at 534.

<sup>81</sup> Matthew Hale, *The Prerogatives of the King*, ed. D. E. C. Yale (London: Selden Society, 1976), 260. See also Duker, “The President’s Power,” *supra* note 59, at 490, quoting Francis Winnington in a case involving Charles II’s attempt to pardon before impeachment Thomas Osborne, the Earl of Danby.

<sup>82</sup> 71 U.S. 333 (1866) at 380.

applied in the case of penances and indulgences in the Roman Catholic Church. Although there are certain limits on the pardon power today, the roots of that power lie deep in the notion of absolute sovereignty formerly expressed by the divine right of kings.

Based upon the foregoing summary, we should have to conclude that the modern pardon power is not, as Daube thought, a “sacralized legal notion,” but instead, as Schmitt put it, a “secularized theological notion.” Aspects of the power arguably continue to betray its religious roots: for example, the fact that a discharge from all debts in bankruptcy occurs in the seventh year, like the Sabbatical year in the Hebrew Bible.<sup>83</sup>

## VII CONCLUSION

However, the larger conclusion is that it in fact makes no sense to speak of “sacralization” or “secularization.” These terms have significance only in the context of an understanding of what “religion” means. And the entire thrust of our analysis has been that religion (meaning “religion in general”) does not exist as something separate from a total social order that is characterized by the dynamic interplay between law and sovereignty, defined as the authority to suspend the law. Where “religion” has emerged through the assertion of an independent sovereignty (as in the case of Gelasius, or already with Jesus), or in the form of a differentiated institution (such as the Roman Catholic Church), there is nothing, objectively speaking, that permits us to identify such a sovereign as “religious” except through its contrast with another mode of sovereignty that is defined, in opposition, as “secular.” Even in this case, the doubleness (or duplicity?) of this opposition remains, since it continues to depend on the original interplay between sovereignty and legality (or *auctoritas* versus *potestas*), that is now itself reduplicated, through the Two Swords. Where Gelasius said, *Duo sunt*, Thomas Hobbes answered that the Church (*ekklesia*) was merely a political community like any other: “And therefore, a Church, such a one as is capable to command, to judge, absolve, condemn, or do any other act, is the same thing with a civil commonwealth . . . Temporal and spiritual government are but two words brought into the world to make men see double and mistake their lawful sovereign.”<sup>84</sup>

Hobbes’s reduction of religion only aimed to prevent the multiplication and confusion of overlapping sovereignties. The recognition of religion as a form of politics does not remove the need for sovereignty itself, either as the power that

<sup>83</sup> I have been unable to trace the precise source of this provision, although the discharge itself appears to go back at least to the reforms passed under Queen Anne at the beginning of the eighteenth century in England.

<sup>84</sup> Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), chap. 39, sec. 5. See discussion in Robert A. Yelle, “Hobbes the Egyptian: The Return to Pharaoh, or the Ancient Roots of Secular Politics,” in A. Azfar Moin and Alan Strathern, eds., *Sacred Kingship in World History: Between Immanence and Transcendence* (New York: Columbia University Press, in press).

superintends (and suspends) law, or as the hope for redemption, grace, or a higher form of justice. What we call “religion” has given voice to this hope, and often asserted a sovereign independence in its name.

I can no longer tell, at the end of this study, where law ends and religion begins. These two qualities appear to be intertwined, like Siamese twins or (as in the case of another metaphor deployed by Paul against the Law) Jacob and Esau, who struggled even in the womb for supremacy. Esau was entitled to rule by law, meaning the right of primogeniture. Yet he sold his birth right to Jacob, who also stole his brother’s blessing which, although acquired through trickery, could not be recalled. The story of these twins suggests again that law is not enough, since its rigid forms can be broken or defeated. The question instead is, who shall be sovereign?