

Chapter 7

***Navigating the Anomalous:
Non-Jews at the Intersection of
Early Rabbinic Law and Narrative***

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I. Introduction

Rabbinic legal writings are preoccupied not simply with defining categories and sorting their contents, but with navigating the brackish waters among them—the anomalous areas where boundaries either overlap or leave gaps. Such human discourse shares in the divine work of separation, or *havdalah*, by which the world was created. What is more important, it facilitates the necessary yet anxious commerce across the permeability of such categorical boundaries: between holy and profane, pure and impure, male and female, land of Israel and the Diaspora, people of Israel and the nations. Here I wish to focus on the last pair, in particular on the problem of the adjudication of civil claims between Jew and gentile, each of whom inhabits a different but intersecting nomian world.¹ Even more particularly, I shall examine the "double standard" by which the gentile's goring ox and his lost or robbed property are treated when they fall within the Jewish *nomos*. To those who might think that I have whittled down my topic too much, let me quote Maimonides, who, in commenting on just one Mishnaic passage central to this subtopic, says, "Discussion of this subject would require a separate book." Indeed, the volume of traditional treatment of this topic is so great that I will have to omit from consideration not only most of what Maimonides has to say but also many of the Babylonian Talmudic texts and the subsequent history of commentary and codification. Here I shall focus my attention on the

earlier, formative Palestinian rabbinic texts that lie at the base of that subsequent legal history of interpretation.²

Although a convenient excuse, space constraints alone do not dictate my strategy of concentrating on the earlier texts. Past treatments have tended to subsume these earlier formulations under later, more systematic codifications for two interconnected reasons. First, the earlier formulations often appear incommensurate with one another, being more ambivalent in their treatment of the gentile and hence more difficult to domesticate to a unified Jewish view of the non-Jew, or even to a linear progression toward the same. Second, many of these earlier formulations, in their "discriminatory" treatment of the gentile, are embarrassingly foreign to the more "liberal" sensibilities of later interpreters. We must attend to this polysemic and problematic navigation of the anomalous position of the non-Jew in Jewish law in its own historical and ideational right.³

Legal discourse is not simply the linear application of fixed rules to changing cases and circumstances but is the dynamic interplay of intersecting lines of categorical identity and difference that continually reconfigure a culture's sense of solidarity with itself and separation from others. To begin with, Israel is uniquely circumscribed by its reception and practice of the divinely authorized, if not authored, rules of Torah, whereby it is set apart from other peoples. The internal government of Israel's collective life by the words of Torah aligns it with a sacred historical scheme to which other peoples are ancillary at best. According to this conception, Israel inhabits a nomian world exclusive of other peoples.

But the divine author of Israel's *nomos* is also the creator and governor of the nations among whom Israel dwells and to whom Israel is destined to be, by virtue of its distinctive life of Torah, a sharer of light and blessing. According to this conception, Israel and the nations inhabit a shared nomian world, or at least interlocking nomian worlds that share, ultimately at least, a common governor. In the more immediate historical interim, however, Israel is governed by the rules and rulers of other peoples, whether *de jure* or *de facto*. According to this reality, Israel's nomian life depends on and may be threatened by a gentile *nomos* whose authority it must acknowledge but whose religious legitimacy it must oppose in order to preserve its own sense of nomian solidarity and separation.

Navigating these intersecting and interfering concepts and realities requires a variety of discursive strategies. Therefore, while

our topic is legal (halakhic), several of our texts will be narrative (aggadic). Although Jewish studies, both traditional and academic, have suffered a bifurcation of interest in rabbinic halakhic and aggadic literary formations, the two are closely interconnected and interdependent in rabbinic textual practice.⁴ The enunciation of rules and the telling of stories *together* contribute, albeit in very different ways, to the rhetorical construction of a Jewish nomian world in which the anomalous may be safely, if not simply, navigated. In order to highlight this diversity and interdependence of navigational textual practices, we shall examine them according to their documentary settings.

II. Ruling and Crossing Categorical Lines: Mishnah and Tosefta

The following passage from the Mishnah is the locus classicus for discussion of the "double standard" applied to the non-Jew in Jewish law.

1. *Mishnah Baba Qamma* 4:3:

(A) If an ox of an Israelite gored an ox dedicated to the Temple, or an ox dedicated to the Temple gored an ox of an Israelite, neither owner is culpable, as it is said, "[When a man's ox injures] the ox of his neighbor (*rē'ēhū*) [and it dies, they shall sell the live ox and divide its price; they shall also divide the dead animal]" (Exod. 21:35).

(B) If an ox of an Israelite gored an ox of a gentile, the owner is not culpable. But if an ox of a gentile gored an ox of an Israelite, regardless whether it is harmless (*tām*) or an attested danger (*mū'ād*), the owner pays full damage.⁵

The biblical law of an ox goring another ox makes a single distinction between two types of goring oxen: If the goring ox was not previously known to be a danger, the owners share the loss equally, each one receiving half the price of the sold goring ox and half the carcass of the dead gored ox (Exod. 21:35). If, however, the goring ox was previously known to be a danger and its owner had been forewarned to restrain it, the owner of the goring ox is culpable for

the loss, making payment to the owner of the gored ox for the full value thereof, but receiving its carcass (Exod. 21:36).

The Mishnah, in understanding the biblical word "his neighbor" (Exod. 21:35) to denote two Israelites of similar status, enunciates other possible distinctions between the owners, thereby introducing two anomalous situations that it treats in strikingly different ways. In the first example (A), "his neighbor" is taken to exclude from the biblical rule cases in which one ox has been dedicated (presumably by an Israelite) to the temple, and hence is now owned formally by the temple, while the other ox is owned by an Israelite. Even if the goring ox is a known danger (*mû'ād*), its owner bears no culpability for injury done by his ox to the other. The two cases of this rule are symmetrical: Regardless of whether the temple ox or the Israelite ox did the goring, there is no culpability. However, in the two cases where one of the owners is a gentile (B), only when the owner of the gored ox is a gentile does the owner of the goring ox (a Jew) bear no culpability. Conversely, if the owner of the goring ox is a gentile, he is culpable for full damage, even if his ox is a first-time offender (*tām*) and the owner has not been forewarned to restrain him.

Rabbinic commentators from the Talmuds on have recognized the asymmetry of this rule, and its departure from the biblical model, and have sought to justify it with various logical and exegetical arguments, some of which we will meet below.⁶ Here we may simply note that the Tosefta (*Baba Qamma* 4:2), in dealing with the case of two gentile ox owners who desire to be judged according to Israelite law, requires full-damage payment regardless of whose ox does the goring and regardless of whether the goring ox has gored before, since "there is neither *tām* nor *mû'ād* [as categories] in gentile laws of damages."⁷ Although the gentiles desire to be judged according to the rules of the Jewish *nomos*, in which full damages are only paid by the ox owner who failed to restrain his previously attested goring ox (*mû'ād*), they are judged even by Jewish judges according to the rules of their own *nomos*, wherein this allowance is not made.

Thus, in the anomalous cases of either two Israelite oxen of different status or two gentile oxen of (presumably) similar status that come before an Israelite court, a single principle can be applied regardless of whose ox has done the goring: in the first no culpability, in the second full culpability. But in the cases of damages between an Israelite and a gentile ox, which principle is applied depends on whose ox has done the goring. These cases are more deeply anomalous than the others because the two parties belong to

entirely different nomian worlds that must now be crisscrossed. Can a Jew be held legally culpable for damages to a non-Jew according to a rule that is understood to govern intranomian Israelite relations? Conversely, can a non-Jew expect favorable treatment within the Jewish *nomos* if he has not accepted, and is understood to have rejected, its norms?⁸ If the non-Jews' legal status cannot be predicated on their acceptance of the terms of the Jewish *nomos*, perhaps they might be thought to inhabit a *nomos* of their own whose religious legitimacy could be acknowledged in its own right. This brings us to the rabbinic idea of a separate, but interlocking, *nomos* of the descendants of Noah.

2. Tosefta 'Abodah Zarah 8(9): 4-5:

Concerning seven commandments were the descendants of Noah commanded: concerning adjudication, and concerning idolatry, and concerning blasphemy, and concerning sexual immorality, and concerning bloodshed, and concerning robbery, and concerning a limb torn from a living animal. . . . Concerning bloodshed, how so? A gentile against a gentile or a gentile against an Israelite is culpable (*ḥayyāb*), [whereas] an Israelite against a gentile is exempt (*pātār*). Concerning robbery, whether stealing or robbing, or taking a beautiful woman captive (Deut. 21:11), or the like: a gentile against a gentile or a gentile against an Israelite is prohibited (*'āsūr*), [whereas] an Israelite against a gentile is permitted (*mūtār*).⁹

Since both the Jewish *nomos* (the Torah) and the gentile *nomos* (the seven Noahide laws) prohibit robbery and bloodshed, the members of each are prohibited from such acts against their fellow members and would be presumed to be tried for such by their respective courts.¹⁰ However, what happens when the boundary between these two nomian worlds is crossed? We may presume that a gentile who so acts against a Jew could be found guilty in a Jewish court since he has been prohibited from such actions by the seven Noahide laws, which are also binding upon, and hence adjudicable by, Jews.¹¹ But the converse case—a Jew so acting against a gentile—does not necessarily follow. Although our text does not provide an explanation, we may infer one from other texts to be considered below. Since the gentile has not accepted the norms of the Jewish *nomos*, or Torah, he is not entitled to its protection. Similarly, since gentile courts do not rule according to the norms of that Jewish *nomos*, they could not hold a Jew legally culpable according to the

terms of the Torah. As the Mekilta, in the name of R. Eleazar b. Azariah, interprets Exod. 21:1, "You may judge theirs, but they may not judge yours."¹² Before we become too disturbed by the moral implications of this juridical asymmetry, let us look at another passage from the Tosefta, which stakes out a very different position.

3. *Tosefta Baba Qamma* 10:15:

One who robs from a gentile is liable to return [what he robbed]. Robbing from a gentile is viewed more strictly than robbing from an Israelite . . . because of profanation of the divine name.¹³

If the argument here strikes us as contradicting that of the preceding passage, we need to recognize that it is set on an entirely different foundation: Jewish behavior toward and before the gentiles can result in their commendation or condemnation of the Jewish *nomos* and its divine governor. Although the Jewish *nomos* is, in one sense, exclusive of the gentile who lives outside its norms and bounds, it is in view of and responsive to the reaction of the gentile, especially at those points at which Jewish behavior directly intersects that of the gentile. Jewish practice, especially beyond what is juridically required, that occasions gentile praise of the Jewish *nomos* is deemed sanctification of God's name, whereas the opposite is deemed profanation of God's name. The former is to be encouraged, the latter to be discouraged, but either is difficult to legislate.¹⁴

III. Reconfiguring Scriptural Rules: Midrash Halakhah

The Tosefta is not alone, however, in combining seemingly incommensurate representations of the status of non-Jews in Jewish law. The Sifra, the earliest rabbinic commentary to the Book of Leviticus, similarly enunciates two colliding tacks through the anomalous waters of Jewish-gentile legal relations. It orients both to the words of Scripture:

1. *Sifra Wayyiqra' pereg* 22:1:

["When a person sins and commits a trespass against the Lord by dealing deceitfully with his fellow (*'āmitō*) with regard to a deposit or a pledge, or robbery, or by defrauding his fellow, or by finding

something lost and lying about it; if he swears falsely regarding any one of the various things that one may do and sin thereby—when he has thus sinned and realized his guilt, he shall restore that which he got through robbery or fraud, or the deposit that was entrusted to him, or the lost thing that he found, or anything else about which he swore falsely. He shall repay the principal amount and add a fifth part to it. He shall pay it to its owner when he realizes his guilt" (Lev. 5:21–24): What does Scripture signify by "his fellow" "his fellow" [two times]? The first "his fellow" comes to exclude the Most High (*haggābōah*). The second "his fellow" comes to exclude others (*'āhērīm*) [non-Jews].¹⁵

The commentary understands the repetition of "his fellow" to emphasize that Scripture is legislating behavior between "fellows" of a shared *nomos*, excluding thereby the obligation to restore and pay a penalty for that which has been wrongfully obtained or misused of God (involving property dedicated to the temple) or non-Jews. For our present purposes, we may presume that the Sifra's exclusions of culpability apply to robbery and the retaining of lost property, as scripturally specified. Note that the two excluded classes of owners are the same as in *Mishnah Baba Qamma* 4:3, with reference to a goring ox: property dedicated to the temple and property of a gentile. The Sifra passage, however, is more consistent in applying its exclusionary principle, since it is only dealing with the Israelite behavior toward the Other and not, as in the Mishnaic passage, with the behavior of the Other toward the Israelite.¹⁶ In striking contrast to this exclusionary exegesis, let us now consider the following inclusionary interpretation of another verse from Leviticus:

2. *Sifra Behar pereg* 9:2–3:

["If a resident alien among you has prospered, and your brother, being in straits, comes under his authority and gives himself over to the resident alien among you . . . , after he has been sold he shall have the right of redemption. One of his brothers shall redeem him . . . ; or, if he prospers, he shall redeem himself. He shall compute with his purchaser the total from the year he gave himself over to him until the jubilee year. . . . If he has not been redeemed by any of those ways, he shall go forth in the jubilee year, he and his children with him" (Lev. 25:47–55)]: R. Simeon says: From whence can we derive that the robbery of a gentile is [indeed] robbery? Scripture teaches, "after he has been sold." Is it possible that he [the Israelite] shall [forcibly] seize him in order

that he shall go forth? Scripture teaches, "he shall have the right of redemption (*gē'ûlâ*)" [for money].¹⁷ Is it possible that he [the Israelite] shall set an arbitrary [low] price for him? Scripture teaches, "he shall compute with his purchaser." He shall reckon precisely with him. But perhaps this only speaks of a gentile who is not subject to your authority? And if so, what can you do with him [but reckon with him precisely]? When it says "he shall go forth in the jubilee year, he and his children with him," behold, Scripture speaks of a gentile who is subject to your authority.¹⁸ If Scripture speaks thus of [redeeming through precise payment] a gentile who is indeed subject to your authority, how much more so with regard to a gentile who is not subject to your authority. If the Torah has thus ruled strictly concerning the robbed property of a gentile [that it is forbidden], how much more so concerning the robbed property of an Israelite.¹⁹

The commentary places the biblical legislation in a setting in which the non-Israelite to whom the Israelite has been sold in servitude lives under Israelite jurisdiction. If so, it is presumed that the Israelite could have forced the non-Israelite to release his Israelite brother from servitude. The fact that Scripture requires the Israelite to reckon exactly the time remaining until the jubilee so as to pay the non-Israelite justly, without taking advantage of his weaker position, is understood to imply a prohibition of Israelite robbery of a gentile in all cases. This exegesis comes, therefore, to a diametrically opposite conclusion regarding the Israelite robbing of a gentile than does the previously cited passage of the Sifra that excluded Israelite culpability for robbing a gentile since the latter is not his "fellow." However, lest we think that our present passage is totally nondiscriminatory, we should note that underlying its final a fortiori argument is the assumption that robbing an Israelite is still more severe than robbing a gentile, in contrast to *Tosefta Baba Qamma* 10:15, which stated the opposite.²⁰

IV. Reconfiguring Scriptural Narratives: Midrash Aggadah

For legal discourse to be rhetorically effective in configuring Israel's self-understanding vis-à-vis the non-Jewish nations, it must intersect the narrative accounts of Israel's life among those nations, both biblical and postbiblical. The following passage, from the earliest rabbinic commentary to the Book of Deuteronomy, comments on a

biblical passage that is rabbinically understood to denote God's favoring of Israel at the time of His giving of the Torah to them at Mount Sinai, but now exegetically juxtaposed to a narrative of an encounter between rabbinic and Roman authorities of a much later time:

1. *Sifre to Deuteronomy 344*

Another interpretation: "Lover, indeed, of the people(s)" (Deut. 33:3): This teaches that the Holy One, blessed be He, did not dispense love to the nations of the world as He did to Israel. Know that this is so since they [the sages] have said: "The robbed property of a gentile is permitted, while the robbed property of an Israelite is forbidden." It once happened that the government [of Rome] sent two officers, instructing them as follows: "Go and disguise yourselves as converts,²¹ and find out what is the nature of Israel's Torah." They went to Rabban Gamaliel at Usha,²² where they recited Scripture and studied Mishnah: Midrash, Halakot, and Aggadot.²³ As they were taking their leave, they said, "All of the Torah is pleasing and praiseworthy, except for one thing, and that is your saying, 'The robbed property of a gentile is permitted, while the robbed property of an Israelite is forbidden,' but we will not report this to the government."²⁴

The cited clause from Deut. 33:3 is understood to signify God's favored relationship with Israel. As proof of this, the rule is cited whereby a different standard is applied to the robbed property of a gentile than to that of an Israelite.²⁵ A story is then related to exemplify this rule and to recount an instance of gentile reaction to it. The Roman officials who come to study with Rabban Gamaliel are particularly bothered by this discriminatory rule and do not hesitate to say so to their rabbinic hosts. But they are so impressed with the totality of Israel's (rabbinic) Torah that they choose not to report this unfavorable rule to their superiors. Since the story in its present form can be presumed to be fictional,²⁶ it may be argued that its rabbinic "authors" have projected onto the non-Jewish officials their own countervoice of discomfort with the rule permitting robbed gentile property. But they have also projected what they would like to hear from non-Jews about their *nomos*: (1) It is in sum pleasing and praiseworthy. (2) Its expression of God's unique love for Israel, to the disadvantage of the non-Jews, would not be so bothersome to the non-Jews if they would only cross the boundary

into that *nomos* to experience it from within. This version of the story (we shall next see a different one), while expressing rabbinic ambivalence toward the disfavored status of gentiles in Jewish law, manages to decenter that ambivalence.

V. Interlacing Rabbinic Rules and Narratives with Scripture: Palestinian Talmud

In the ~~the~~ continuing career of this narrative, that ambivalence becomes stronger again, as we shall see in the following reworked version of the story in the Palestinian Talmud, now commenting not on Scripture but on the Mishnaic passage with which we began (*Baba Qamma* 4:3). The Talmudic unit juxtaposes several of the formulations we have seen expressed separately in the antecedent rabbinic corpora.

1. Palestinian Talmud *Baba Qamma* 4:3 (4b):

(A) Rab said: "[God] looked and loosened the nations" (Hab. 3:6): He loosened [permitted] the property of the nations of the world.

(B) Hezekiah said: "and [God] showed himself from Mt. Paran" (Deut. 33:2): He showed his face against the nations of the world.

(C) R. Yose b. Hanina said: He lowered them from their property.

(D) R. Abbahu said in the name of R. Yoḥanan: [The Mishnah] is in accord with [the gentiles'] laws [according to which it matters not whether the ox was an attested danger].

(E) R. Hela said: [The previous statement] was not said with regard to this [Mishnah] but with regard to what R. Hiyya taught: If the ox of one gentile gored the ox of another gentile, his fellow, even if he elected to be judged according to the laws of Israel, whether [the ox was] harmless or an attested danger he pays full damage.²⁷ It is with regard to this [*barayta*] that R. Abbahu said in the name of R. Yoḥanan: It is in accord with their laws.

(F) It once happened that the wicked government [of Rome] sent two officers to learn Torah from Rabban Gamaliel. They learned from him Scripture [and] Mishnah: Talmud and Aggadah.²⁸ At the end they said to him: "All of your Torah is pleasing and praise-

worthy, except for these two things that you say: 'An Israelite woman cannot serve as a midwife to an gentile woman but a gentile woman can serve as a midwife to an Israelite woman, and an Israelite woman cannot nurse the child of a gentile woman but a gentile woman can nurse [the child of] an Israelite woman.'²⁹ [Secondly,]³⁰ 'the robbed property of an Israelite is prohibited while the robbed property of a gentile is permitted.'" At that moment, Rabban Gamaliel decreed that the robbed property of a gentile be forbidden because of profanation of the divine name. "If an ox of an Israelite gored an ox of a gentile, [the Israelite owner] is not culpable.' Concerning these matters we will not inform the government."³¹ Even so, they did not get so far as the Ladder of Tyre when they forgot all of it.³²

The first three statements (A-C), by third-century sages, seek to justify the unequal treatment accorded the gentile ox owner of the Mishnah. Their citation and interpretation of Hab. 3:6 and Deut. 33:2 allude to aggadic traditions spelled out more fully elsewhere.³³ When God is about to reveal the Torah at Mount Sinai, he surveys the nations, offering them the Torah in terms of the Noahide laws that they previously were commanded and accepted, but now reject. These include the prohibition of stealing/robbing, which is rejected by the descendants of Ishmael, associated with Paran (Gen. 21:21). Rebuffed by the nations, who now renege on their previous acceptance of the minimal Noahide laws, but welcomed by Israel who accept the entire Torah unconditionally, God turns from Paran to Sinai, from the nations to Israel. Since the nations' behavior has shown disregard for the property of others (their denial of the Noahide law against robbery), God loosens (through a word-play on *wayyattēr* of Hab. 3:6) their legal claims to their own property.

R. Abbahu, in the name of R. Yoḥanan (D), takes a juridical rather than exegetical tack: The nations should be judged according to their own laws of damages, which draw no distinction between previously harmless and harmful oxen. But R. Hela (E) sees the danger that lies before this tack: If we predicate the Mishnah on the principle of applying gentile law to damages between Israelites and gentiles, how is it possible to absolve totally the Israelite of culpability when his ox gores that of a gentile? So instead, he applies R. Abbahu's statement to the *barayta* (*Tosefta Baba Qamma* 4:2) concerning the case of two gentiles who come before a Jewish court, who are judged irrespective of the categories *tām* and *mū'ād*, without either being absolved of culpability.

This discomfort with the discriminatory aspect of the Mishnah is now (F) given more poignant expression through a subtly yet significantly different version of the story of the two Roman officials who visit the court or school of Rabban Gamaliel. Two other discriminatory rules are added to the protest of the officers (one being that of the Mishnah being commented upon). However, it is that of the robbed property of a gentile that is the most offensive of all since it alone is now abrogated by Rabban Gamaliel so as to prevent profanation of God's name in the eyes of the non-Jews.³⁴ Once again, the officers promise not to reveal the remaining discriminatory rules to their superiors, but even so they forget them on their return route, leaving them nothing negative to report (or recall).³⁵ They cross over to their own *nomos* with only positive impressions of their sojourn within the Jewish *nomos*. The problematic rules regarding the crossing of boundaries between Jewish and gentile nomian worlds remain safely contained within the Jewish *nomos*, except for the most problematic of them, which has been abrogated in response to the objection of gentiles who crossed that boundary.³⁶

However, we should not presume that now at last we can expect rabbinic unanimity regarding the status of the robbed property of the gentile. Our final passage, once again a web of *nomos* and narrative, suggests otherwise.

2. *Palestinian Talmud Baba Meši'a* 2:5 (8c):

Simeon b. Shetaḥ labored in flax. His disciples said to him, "Rabbi, rid yourself [of this work] and we shall buy you an ass so you will not have to work so hard. They went and bought him an ass from a certain Sarkean [Ishmaelite]. Hanging on it was a pearl. They came to him and told him, "From now on you do not have to work any more." He said to them, "Why?" They told him, "We bought you an ass from one of the Sarkeans and hanging from it was a pearl." He said to them, "Did its master know about it?" They said, "No." He said to them, "Go and return it." But did not R. Ḥuna say: R. Bibi bar Gozlon, in the name of Rab, stated: They replied before Rabbi, "Even in the view of one who says, 'the robbed property of a gentile is forbidden,' all parties agree that his lost property is permitted [to be retained]?" [He replied to them:] "Do you think that Simeon b. Shetaḥ is a barbarian? Simeon b. Shetaḥ prefers the pronouncement [from a gentile], 'Blessed be the God of the Jews' above all the wealth of this world."³⁷

Although the sages disagree whether the robbed property of a gentile must be restored, they all agree that there is no such legal obligation to restore the lost property of a gentile. Simeon b. Shetaḥ does not dispute this seeming legal consensus, but rather argues in terms of the metalegal principle (although he does not enunciate it by name) of *qiddush hashem* ("sanctification of the divine name"). Crossing the boundary between Jewish and gentile nomian worlds for the sake of a purchase, governed by the shared laws of the market, is one thing, but crossing it again to restore a lost property entails a degree of risk from and confers a degree of nomian legitimacy (or comparability) upon the other. But such boundary crossing also presents a metalegal opportunity, one that cannot be measured in purely legal terms, of winning gentile praise for the Jewish *nomos* and its divine governor.

However laudatory is Simeon ben b. Shetaḥ's example, it does not become the legal norm, or *required* behavior. Rather, the negatively stated version of the same principle, as attributed to the *tanna* R. Pinḥas ben Ya'ir, eventually assumes that position: "In a place where there is [the possibility of] profanation of the divine name, even the lost property of a gentile is forbidden."³⁸ In other words, a Jew *may* retain the stolen property of a gentile, *except* where by so doing, he would bring disrepute to the Jewish *nomos*. Legally, the gentile's lost property falls outside the scriptural obligation to return the lost property of one's "brother" (Deut. 22:3), but metalegally, under certain circumstances (which cannot be fully predetermined), it should be treated as if within.

VI. Conclusions

Rabbinic rules that treat non-Jewish Others other than they treat their own have troubled interpreters of rabbinic thought from early rabbinic times until the present. From medieval until most recent times, such troubled interpreters have sought to explain away these embarrassing rules: (1) They represent a merely *theoretical* position that was never accepted in practice. (2) They represent a *minority* view but not the halakhah (as first expressed in medieval codes). (3) They represent a necessary short-term response to gentile economic or political oppression of the Jews at a very specific time and place in history.³⁹ These reductive explanations, whatever their apologetic advantages, fail to engage the diversity and complexity of early

rabbinic constructions of our problematic: the anomalous place of the gentile within the Jewish *nomos*.

That complexity may be denoted as three intersecting, and sometimes contradicting, trajectories in the early rabbinic navigation of that anomaly:

1. The gentiles have *no* juridical status within the Jewish *nomos* since they are not parties to its contractual terms. Not having accepted its obligations they have no claim to its protections.

2. To be sure, the gentiles have their laws, and therefore may be said to inhabit a *nomos* of their own, but their laws are not divinely revealed or commanded—the very foundation of the Jewish *nomos*. What happens, however, when two such incommensurate nomian worlds overlap and require mediation, as in a case of damages between a Jew and a gentile? In such a case, social and political contingencies may require a Jewish court to acknowledge gentile laws and gentile claims under Jewish laws, but without granting them any constitutive bearing on the Jewish *nomos*.

3. Since gentiles, like all creatures, are subjects of the single deity who is the originary source of the Jewish *nomos* and is acknowledged as such by its inhabitants, they too should be brought to a recognition of His beneficent governance of the Jewish *nomos* at the points at which they intersect it.

The first trajectory denotes the axis of complete exclusivity and self-sufficiency of the Jewish *nomos*. It heightens the distinctiveness of Jewish self-understanding but does not allow for the reality of interlocking nomian worlds. We saw it narratively enunciated through the story of the nations' rejection of God's laws at the very moment Israel accepted them, thereby sealing the boundary between Israel and the nations.

The third trajectory denotes the opposite axis of drawing the nations to (and eventually into) the Jewish *nomos*. It heightens the attractiveness of Jewish self-understanding but risks the blurring of Jewish nomian boundaries. We saw it narratively enunciated in a story of supererogatory rabbinic behavior of sanctification of the divine name.

The middle trajectory denotes the no-less-risky, yet historically necessary, dialectical course between the two: self-confirming boundaries, which may in places be pierced or stretched to facilitate commerce with the Other. We saw this narratively enunciated in the Palestinian Talmud's story of the visit of two Roman officers to Rabban Gamaliel's school and his selective bending of the Jewish *nomos* to accommodate their complaint.

Finally, we have seen that each of these perilous tacks through the Scylla and Charybdis of adjudicating contact with the nomian Other employs *multiple* modes of discourse: rule making and story telling, and the interpretation of words of Torah that joins them within a *single*, divinely governed yet humanly constructed nomian world.

NOTES

1. For my use of "nomos" and "nomian world" here and in what follows, I am indebted to Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97, 1 (November 1983): 4–68.
2. For a treatment of Maimonides on our general topic, see Dov I. Frimer, "Israel, the Noahide Laws, and Maimonides: Jewish-Gentile Legal Relations in Maimonidean Thought," in *Jewish Law Association Studies II: The Jerusalem Conference Volume*, ed. B. S. Jackson (Atlanta: Scholars Press, 1986), 89–102. There are surprisingly few critical treatments of the topic of Jewish attitudes to non-Jews in ancient times. For recent literature, in some cases with respect to the conversion of non-Jews to Judaism, see Naomi G. Cohen, "Taryag and the Noahide Commandments," *Journal of Jewish Studies* 43 (1992): 46–57; Shaye J. D. Cohen, "Crossing the Boundary and Becoming a Jew," *Harvard Theological Review* 82 (1989): 13–33; S. D. Fraade, *From Tradition to Commentary: Torah and Its Interpretation in the Midrash Sifre to Deuteronomy* (Albany: State University of New York Press, 1991), 25–68; Martin Goodman, "Proselytising in Rabbinic Judaism," *Journal of Jewish Studies* 40 (1989): 175–85; Aaron Lichtenstein, *The Seven Laws of Noah*, 2d ed. (New York: Rabbi Jacob Joseph School Press, 1986); David Novak, *The Image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws* (New York: Edwin Mellen Press, 1983); Gary G. Porton, *Goyim: Gentiles and Israelites in Mishnah-Tosefta* (Atlanta: Scholars Press, 1988); idem, *The Stranger within Your Gates: Converts and Conversion in Rabbinic Literature* (Chicago: University of Chicago Press, 1994); Nahum Rakover, *Hammišpat ke'erek univesali: dinim bibne noah* (Jerusalem: Ministry of Justice, 1987); idem, "The 'Law' and the Noahides," *Jewish Law Association Studies IV: The Boston Conference Volume*, ed. B. S. Jackson (Atlanta: Scholars Press, 1990), 169–80.
3. For examples of attempts at explaining away this embarrassing otherness, see below, n. 39.
4. For rabbinic statements on the unity and interdependency of halakhah and aggadah, and admonitions not to abandon one for the other, see, for example, *Sifre Deuteronomy* 48, 306, 317 (ed. L. Finkelstein, 113, 339,

- 359); *Abot deR. Natan* 8 (ed. S. Schechter, 18a–b). Of course, such admonitions must reflect the opposite tendency among some to favor, and hence attend to, one at the expense of the other. Note, for example, the story recounted in *Babylonian Talmud Soṭah* 40a, about two sages, a teacher of halakhah and a teacher of aggadah, who come to a town and compete with each other for the people's attention (which goes to the latter). For a modern essay on the interconnections between halakhah and aggadah, see Hayyim Nahman Bialik, *Law and Legend; or, Halakah and Aggadah*, trans. Julius L. Siegel (New York: Bloch, 1923). See also Judah Goldin, "The Freedom and Restraint of Haggadah," in *Midrash and Literature*, ed. Geoffrey H. Hartman and Sanford Budick (New Haven, Conn.: Yale University, 1986), 57–59.
5. This rabbinical distinction derives from Exod. 21:29: "and warning has been given (*wēhū'ad*) to its owner."
 6. Note in particular the critique of this inconsistency, narratively projected into the mouths of gentiles, in *Babylonian Talmud Baba Qamma* 38a: "his neighbor" cannot be differently understood depending on whose ox is doing the goring, exempting from culpability in one case but not in the other.
 7. For the text, see *The Tosefta according to Codex Vienna, with Variants from Codex Erfurt, MS. Schocken and Editio Princeps* (Venice, 1521): *The Order of Nezikin*, ed. Saul Lieberman (New York: Jewish Theological Seminary of America, 1988), 14. For discussion of the text and its variants, see Saul Lieberman, *Tosefta Ki-Fshuṭah: A Comprehensive Commentary on the Tosefta; Part IX: Order Nezikin* (New York: Jewish Theological Seminary of America, 1988), 35–36. The same passage is cited as a *barayta* in *Palestinian Talmud Baba Qamma* 4:3 (4b).
 8. For an exegetical attempt at grounding this internomian anomaly, see *Mekilta Mishpaṭim* 12 (ed. H. S. Horovitz and I. A. Rabin, 290), where *rē'ēhū* of Exod. 21:35 is interpreted to *exclude* the gentile as the owner of the gored ox, while *īš* (person) of the same verse is interpreted to *include* non-Jews as the owners of the goring ox. Hence, a gentile owner of a goring ox is culpable for damages done by his ox to that of a Jew, but not vice versa. But this exegetical argument is not sufficient to determine that the gentile must pay full damage to a Jew whose ox his has gored, regardless of whether the gentile's ox was *tām* or *mū'ad*. For an extreme justification, see Maimonides' commentary ad loc: "Do not find this matter difficult in your eyes and do not be surprised by it, just as you should not be surprised by the slaughter of animals even though they have not done any wrong. For whoever lacks the human qualities is not a true person, and his purpose is only to serve the true person."
 9. *Tosefta Based on the Erfurt and Vienna Codices*, ed. M. S. Zuckerman, with a supplement by Saul Lieberman (Jerusalem, 1937; repr. Jerusalem: Wahrman, 1970), 473. This tradition is also cited and

- discussed in *Babylonian Talmud Sanhedrin* 56a–57a, where the difference in language between exemption from culpability with respect to bloodshed and permission (to retain property) with respect to robbery is noted.
10. For a comprehensive treatment of the seven Noahide laws of the gentiles, see Novak, *Image of the Non-Jew in Judaism*, as well as other treatments referred to above, n. 2. For the Torah's prohibition of robbery between Israelites, see Lev. 19:11, 13, where the words "fellow" and "neighbor" are used.
 11. For the possibility, whether real or hypothetical, of claims between Jews and gentiles being tried in a Jewish court, according to the rules of whichever *nomos* would favor the Jew, see *Sifre Deuteronomy* 16 (ed. L. Finkelstein, 26–27), as well as the following: *Babylonian Talmud Baba Qamma* 113a (but note R. Akiba's demurrals); *Midrash Haggadol* Exod. 23:6; Maimonides' commentary to *Mishnah Baba Qamma* 4:3. On the relation of Noahide laws to Sinaitic revelation, see Novak, *Image of the Non-Jew in Judaism*, 53–74. On the question of overlapping jurisdictions between Jewish and Roman civil legal systems in Palestine during the first two centuries, see Bernard S. Jackson, "On the Problem of Roman Influence on the Halakha and Normative Self-Definition in Judaism," in *Aspects of Judaism in the Graeco-Roman Period*, vol. 2 of *Jewish and Christian Self-Definition*, ed. E. P. Sanders, et al. (Philadelphia: Fortress, 1981), 159–72; and more generally and less critically, Shemuel Safrai, "Jewish Self-Government," in *The Jewish People in the First Century*, *Compendia Rerum Iudaicarum ad Novum Testamentum*, sec. 1, vol. 1, ed. S. Safrai and M. Stern (Assen: Van Gorcum; Philadelphia: Fortress, 1974), 404–12.
 12. *Mekilta Mishpaṭim* 1 (ed. H. S. Horovitz and I. A. Rabin, 246).
 13. For the omitted text, also omitted in MS Erfurt, see *The Tosefta . . . : Order Nezikin*, ed. S. Lieberman, 53, and Lieberman's discussion of this passage and its variants in *Tosefta Ki-Fshuṭah; Part IX: Order Nezikin*, 121–22.
 14. For this concept, see Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs*, trans. Israel Abrahams (Jerusalem: Magnes, 1979), 356–60, 842–44. In addition to the texts cited below, see *Babylonian Talmud Baba Qamma* 113a–b. Compare *Damascus Document* 12:6–8: "No one shall stretch out his hand to shed the blood of any of the gentiles for the sake of property and gain. Nor shall he carry off anything of their property, lest they blaspheme, unless by the counsel of the company of Israel." For discussion, see Lawrence H. Schiffman, "Legislation concerning Relations with Non-Jews in the *Zadokite Fragments* and in Tannaitic Literature," *Revue de Qumran* 11 (1983): 382–84.⁵
 15. *Sifra on Leviticus*, vol. 2, ed. Louis Finkelstein (New York: Jewish Theological Seminary of America, 1983), 211. For *ṭhērim* as non-Jews, see Saul Lieberman, *Tosefta Ki-Fshuṭah; Part III: Order Mo'ed* (New

- York: Jewish Theological Seminary of America, 1962), 294 (top), as well as Rabbenu Hillel's commentary to our passage. For similar uses of 'aḥer and 'āḥērīm, see *Tosefta Baba Qamma* 4:2; *Mekilta Mishpaṭim* 12; *Midrash Haggadol* Exod. 23:6.
16. Some commentators, being uncomfortable with the *Sifra*'s exclusion of the Jew's obligation to restore wrongfully obtained or used property to a gentile, suggest that the *Sifra* is only excluding the Jew's obligation to pay the added fifth and to bring a guilt offering to the priest (Lev. 5:25). See Lieberman, *Tosefta Ki-Fschuṭah; Part IX: Order Nezikin*, 121–22; Maimonides, *Mishneh Torah Gezeleh Wa'abadah* 7:7.
 17. "Redemption" denotes being released in exchange for a payment rather than by force.
 18. The law of the jubilee year only applies to the land of Israel when it is under Israelite sovereignty.
 19. *Sipra' debe rab hu' seper torat kohanim*, ed. I. H. Weiss (Vienna, 1862; repr. New York, 1947), 110b; *Sifra or Torat Kohanim according to Codex Assemani LXVI* (Jerusalem: Makor, 1972), 206. The passage is cited in part as a *barayta* in *Babylonian Talmud Baba Qamma* 113b, where R. Simeon (bar Yoḥai) is said to attribute the interpretation to his teacher, R. Akiba, and where an ensuing debate concerns whether it applies to any gentile or only to a *gēr tōšāb* (resident alien). Our text itself makes no such distinction. Compare as well *Midrash Tanna'im ad Deut.* 20:14 (ed. D. Hoffmann, 121).
 20. For another exegetical argument against robbing from a gentile, see the interpretation of Deut. 7:16, attributed to Rab Huna, in *Babylonian Talmud Baba Qamma* 113b. For other rabbinic texts that prohibit the robbing or robbed property of a gentile, see *Seder Elishu Rabbah* 16, 26 (ed. M. Friedmann, 75, 140). More commonly, scriptural exegesis is employed to argue *against* extending the prohibition of robbery to the gentile. On the relation of exegesis to edict (*gezerah*), in this regard, see Eliezer S. Rosenthal, "Dyssoi logoi—Sheney debarim," in *Isac Leo Seeligmann Volume: Essays on the Bible and the Ancient World*, ed. Alexander Rofé and Yair Zakovitch, vol. 2 (Jerusalem: Rubinstein's, 1983), 475–76.
 21. For this reading and its significance, see my book, *From Tradition to Commentary*, 214 n. 129.
 22. There is a problem here in that Rabban Gamaliel (presumably II) was the Patriarch at Yabneh and not at Usha. For different attempts to resolve this contradiction, see my book *From Tradition to Commentary*, 214 n. 130, 214–15 n. 137.
 23. On this formulation, see my book, *From Tradition to Commentary*, 244 n. 111; Jackson, "The Problem of Roman Influence," 357 n. 50. Note that it is the full curriculum of written and oral (rabbinic) Torah that the Roman officers study and not simply the Jewish system of civil law,

- as some have presumed (see citations, *From Tradition to Commentary*, 214–15 n. 137, especially the article by Saul Lieberman).
24. *Siphre ad Deuteronomium*, ed. Louis Finkelstein (New York: Jewish Theological Seminary of America, 1969), 400–401. I have treated this passage more fully in *From Tradition to Commentary*, 51–54. For another version of the commentary, see the text published by Menahem Kahana as *Mekilta to Deuteronomy in Tarbiz* 57 (1988): 196–98, as well as *Midrash Haggadol* Deut. 33:3. The version there, however, is much closer to that in *Babylonian Talmud Baba Qamma* 38a.
 25. Although we have not yet seen exactly this formulation, compare *Tosefta 'Abodah Zarah* 8(9): 5 (passage II.2 above), in contrast to *Sifra Behar pereq* 9:2–3.
 26. Previous scholars have gone to great lengths to reconcile the details of the story with one another and with a particular historical setting on the assumption that the story is a simple historical representation rather than a rhetorical construction. For bibliography and further discussion of the question of the historicity of this story, see my book, *From Tradition to Commentary*, 214–15 n. 137; Jackson, "On the Problem of Roman Influence," 163, 358 nn. 54, 55; Catherine Hezser, "Form, Function, and Historical Significance of the Narratives in Yerushalmi Neziqin" (Ph.D. diss., Jewish Theological Seminary of America, 1992), 39–42.
 27. Cf. *Tosefta Baba Qamma* 4:2, cited above, and n. 7 above for reference to discussion of the variants thereto.
 28. MS Leiden, like the version of the story in *Sifre to Deuteronomy*, has "Halakot and Aggadot."
 29. MS Leiden adds *biršūtāh*, "with her permission" or "in her domain," as in *Mishnah 'Abodah Zarah* 2:1; *Babylonian Talmud 'Abodah Zarah* 26a. For other formulations of the rules for Israelite and gentile midwives, see *Tosefta 'Abodah Zarah* 3:3, which in the view of R. Meir maintains a symmetry of exclusion, prohibiting a gentile woman from being a midwife to an Israelite woman, but in the view of the sages permits such service so long as there are others (Israelites) in attendance. Cf. *Palestinian Talmud 'Abodah Zarah* 2:1 (40c) for other views that permit a gentile woman to be a midwife to an Israelite woman, but only under certain restrictive conditions. Finally, *Babylonian Talmud 'Abodah Zarah* 26a attributes to R. Joseph the view that an Israelite woman may serve as a midwife to a gentile woman if she does so for pay, because of fear of causing enmity between Jews and gentiles. Our text, in citing *Mishnah 'Abodah Zarah* 2:1, states the dissymmetry between Israelite and gentile women in the starkest terms. For further discussion, see Christine E. Hayes, "Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah" (Ph.D. diss., University of California, Berkeley, 1993), 39–54.

30. For a different understanding of "two things," see Rosenthal, "Dyssoi logoi—Sheney debarim."
31. Others interpret this to mean that the Roman emissaries decided not to tell Rome the justifying reasons for this seemingly discriminatory law. But this reading cannot be sustained by the text. See the commentary *Peney Mosheh* ad loc., as well as Rashi ad *Babylonian Talmud Baba Qamma* 38a. MS Leiden has "this matter," presumably referring to the last-mentioned rule of the gentile and Israelite oxen.
32. It is unclear whether they forgot everything they learned or only the discriminatory rules to which they objected. My translation is based on MS Escorial in *Yerushalmi Neziqin*, ed. E. S. Rosenthal (Jerusalem: Israel Academy of Science and Humanities, 1983), 12, but MS Leiden concludes "all of them," presumably referring to the aforementioned rules.
33. See my book, *From Tradition to Commentary*, 28–49, 216–17 nn. 142, 143, 145; Novak, *Image of the Non-Jew in Judaism*, 257–73; Israel Lewy, *Mabo' uperush letalmud yerushalmi baba' qamma' I–VI* (Jerusalem: Kedem, 1970), 112 (reprint from *Jahresbericht des jüdisch-theologischen Seminars: Fraenckel'scher Stiftung* [Breslau, 1895–1914]).
34. For this sentence as an awkward editorial addition to the story, see Rosenthal, "Dyssoi logoi—Sheney debarim," 475 n. 48, following Lewy, *Mabo' uperush letalmud yerushalmi*, 114. This presumes that Rabban Gamaliel's edict was not necessarily an historical act but a literary accretion, no less historically significant but perhaps so for a later period in the history of the transmission of the story. In this light, Reuven Hammer's comment to the *Sifre* version of the story (*Sifre: The Tannaitic Commentary on the Book of Deuteronomy*, trans. Reuven Hammer [New Haven, Conn.: Yale University Press, 1986], 507 n. 3) is anachronistic: "It is strange that [R. Gamaliel's] prohibition is not mentioned here." The whole point of the *Sifre* version of the story, as I have argued, is that the rule permitting the robbed property of the gentile remains in place, notwithstanding gentile protest.
35. Note that in the version of the story in *Mekilta to Deuteronomy* (ed. M. Kahana, 198) and *Midrash Haggadol* (ed. S. Fisch, 756) to Deut. 33:2, their forgetting of the laws comes in response to Rabban Gamaliel's prayer, and hence appears to be divinely effected.
36. The "Ladder of Tyre" refers to a mountain range on the coastal route to Syria between Keziv (Akhziv) and Tyre. Its southern end (modern-day Rosh Haniqra) marked the northern boundary of Jewish settlement in the land of Israel on the officers' return route. Cf. 1 Macc. 11:59; Josephus, *Jewish War* 2.10.2 (§188); *Genesis Rabbah* 39:8 (ed. J. Theodor and Ch. Albeck, 371); *Tosefta Pesahim* 2:16 (1:29) (ed. S. Lieberman, 147); *Palestinian Talmud 'Abodah Zarah* 1:9 (40a); *Babylonian Talmud Shabbat* 26a; *'Erwin* 64b; *Leviticus Rabbah* 37:3 (ed. M. Margulies, 863). See Michael Avi-Yonah, *Historical Geography of the*

- Land of Israel* (Hebrew) (Jerusalem: Bialik Institute, 1951), 34; Samuel Klein in *Studies in the Geography of Eretz Israel* (Jerusalem: Mossad Harav Kook, 1965), 154 (Hebrew trans. of "Das tannaitische Grenzverzeichnis Palestinas," *Hebrew Union College Annual* 5 [1928]); idem, *'Ereš Haggalil*, rev. ed. Y. Elitzur (Jerusalem: Mossad Harav Kook, 1967), 131; Lewy, *Mabo' uperush letalmud yerushalmi*, 115; Adolphe Neubauer, *La Géographie du Talmud* (Paris, 1868; repr. Hildesheim: Olms, 1967), 39; Eshtori Haparḥi, *Caftor va-pherah* 11, ed. A. M. Luncz (Jerusalem, 1897), 247.
37. Once again, my translation follows MS Escorial, from *Yerushalmi Neziqin*, ed. E. S. Rosenthal, 48, but with the corrections suggested by Saul Lieberman in his notes to the same, 135. For parallels, see *Deuteronomy Rabbah* 3:3; *Deuteronomy Rabbah 'Eqeb* 3 (ed. S. Lieberman, 85); *Yalqut Shim'oni Mishle* 947.
38. *Midrash Tannaim* Deut. 22:3 (ed. D. Hoffmann, 134); *Babylonian Talmud Baba Qamma* 113b; *Midrash Haggadol* Deut. 22:3 (ed. S. Fisch, 486). For medieval codifications, see Maimonides, *Mishneh Torah Gezeleh Wa'abedah* 11:3; *Shulḥan Aruk Hosen Mishpat* 266.1–4. For further discussion, see Lieberman, *Tosefta Ki-Fshutah; Part IX: Order Neziqin*, 121.
39. For (1) and (2) see, for example, H. Freedman's note to his translation of *The Babylonian Talmud Seder Nezikin Baba Mezi'a* 87b (London: Soncino, 1935), 506: "The robbery of a heathen, even if permitted, is only so in theory, but in fact it is forbidden as constituting a 'hillul hashem,' profanation of the Divine Name. But the consensus of opinion is that it is biblically forbidden too, i.e., even in theory." He then cites for support significantly later medieval codifications: *Mishneh Torah Gezeleh Wa'abedah* 1:2, 6:8; *Shulḥan Aruk Hosen Mishpat* 348.2. For (3) note especially Heinrich Graetz's commonly adduced argument (*Monatsschrift für Geschichte und Wissenschaft des Judentums* 30 [1881]: 495) that any permission to retain the robbed property of a gentile was directed against the *fiscus Judaicus* imposed by Vespasian and rigorously exacted by Domitian (ca. 90). In other words, permission was granted to circumvent this oppressive Roman tax. This explanation is cited approvingly by Novak, *Image of the Non-Jew in Judaism*, 78 n. 41. Cf. H. Freedman's note to his translation of *The Babylonian Talmud Seder Nezikin Sanhedrin* 57a (London: Soncino, 1935), 389: "Not a few of these harsh utterances (where they do not reflect the old Semitic tribal law . . .) were the natural result of Jewish persecution by Romans, and must be understood in that light. In actual practice, these dicta were certainly never acted upon." Israel Lewy (*Mabo' uperush letalmud yerushalmi*, 115) states that the robbed property of a gentile was only permitted in times of war when the Jews took booty from their gentile enemies. For critiques of these historicizing attempts, see references above, n. 26.