DAVID A. KADEN

Matthew, Paul, and the Anthropology of Law

Wissenschaftliche Untersuchungen zum Neuen Testament 2. Reihe 424

Mohr Siebeck

Wissenschaftliche Untersuchungen
zum Neuen Testament · 2. Reihe

424

David A. Kaden

Matthew, Paul, and the Anthropology of Law

Mohr Siebeck

David A. Kaden, born 1977; PhD from the Department for the Study of Religion at the University of Toronto; taught at the University of Toronto and St. Olaf College, and currently Senior Minister at First Congrgational Church, United Church of Christ in Ithaca, NY.

e-ISBN PDF 978-3-16-154077-6
ISBN 978-3-16-154076-9
ISSN 0340-9570 (Wissenschaftliche Untersuchungen zum Neuen Testament, 2. Reihe)

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available on the Internet at *http://dnb.dnb.de*.

The book was printed by Laupp & Göbel in Gomaringen on non-aging paper and bound by Buchbinderei Nädele in Nehren.

Printed in Germany.

For Jacquie

Preface

This book is a slightly revised version of my dissertation, which I completed at the University of Toronto's Department for the Study of Religion in 2014. The only difference between the dissertation and the book before you is my continued engagment with recently published materials in the ever-expanding industries of Matthean and Pauline scholarship on law. Even as I write this, new monographs have appeared in both fields. Nevertheless, my argument has remained essentially the same in spite of these more recent publications.

Before thanking specific people, I would like to express my gratitude to Mohr Siebeck for accepting this project for publication. I have communicated primarily over email with members of the publication committee, and their responses have been gracious, timely, and always helpful.

In terms of thanking specific people, pride of place must go to my dissertation supervisor John S. Kloppenborg. John is a brilliant scholar, who is exceptionally good at envisioning the forest of a project before dealing with the specific trees. It was John who said to me during one of our meetings, after reading several of my clumsily written chapters, "I think the problem you are really getting at in this project is, Why law?" I was stunned. It took me several weeks of subsequent work to realize that he had managed to summarize the entire project in just two words. That conversation occurred in August of 2013. I spent the next six months rewriting four chapters with that specific question in mind, and working to fill in the details – the trees – that this two-word question had now framed as a forest. During our many conversations over the course of my doctoral studies, John has helped to transform a graduate student into a scholar. I don't think a greater complement can be made about one's supervisor.

I wish to also thank the other members of my dissertation committee for their suggestions that helped to bring this project to completion. John Marshall and Terry Donaldson for their expert insights that sharpened my understanding of Paul. Joe Bryant for originally suggesting several years ago that looking into the field of legal anthropology might be useful to me. And to my external examiner, Laura Nasrallah, whose careful, critical eye helped to focus my thinking in various ways.

Let me also express my gratitude to the Jackman Humanities Institute (JHI) and to its fellows, in particular Oisín Keohane, for helping me to consider how my work might appeal to a wider academic audience than simply

Christian Origins people. The Chancellor Jackman Graduate Fellowship in the Humanities at the JHI allowed me to complete this project in much less time than I otherwise would have. Special thanks go to Pamela Klassen and Ruth Marshall, who helped to shape the theoretical vision of this project. I am indebted to Ruth for correcting my structuralist fallacies, and for helping me to think more intentionally as a Foucauldian. Ruth and I have become friends after our many conversations, and that is much more rewarding to me in the long run than whether we've gotten Foucault right.

Among my colleagues in the Department for the Study of Religion, I wish to especially thank Rick Last, Sarah Rollins, Ian Brown, Brigidda Bell, Callie Callon, Felipe Ribeiro, Ronald Charles, Tim Langille, Rebekka King, John Parrish, and all the members of the Colloquium for Religions of Mediterranean Antiquity who helped me improve this project. To Nick S., R.I.P. I regret that you weren't around long enough to see how our many conversations about J. Z. Smith planted the seeds that became this project. To Rick and Ian, in particular, thank you for bantering with me about Paul and the law over beers. We didn't quite drain The Duke of its kegs, but we made a valiant attempt, and this project certainly benefited from our efforts.

I want to thank my parents for their unfailing support. Completing a dissertation saps you emotionally, physically, and intellectually. Their words of encouragement evoked my college baseball years when I could hear them yelling from the stands as I was pitching in the latter innings of a game with a sore arm and men on base, struggling to hang on to our team's lead. I don't remember how I fared back then on the mound – bad memories tend to fade over time – but our many chats on the phone helped me to finish this project. To my brothers, each of you has been remarkably successful in your various careers; your successes have driven me to push myself harder to keep up.

Lastly, I want to thank my wife and kids. Children, by virtue of being children, pull your head out of the scholarly clouds and remind you of what actually matters in life: laughing, playing board games, watching movies, chilling on the couch, reading *Harry Potter* together, going out to eat, etc. etc. etc. And kids don't care about daddy the scholar; they love daddy the daddy, and that is refreshing. Finally, to my longsuffering wife. You are the rock of our family, and the anchor of my life. I would never have accomplished what I have thus far accomplished in this short life were it not for you. Words cannot possibly do justice. I love you and I thank you. This book is dedicated to you; it's as much yours as it is mine.

December 2015 David A. Kaden

Table of Contents

List of Abbreviations

AA	*American Anthropologist*
ABD	*Anchor Bible Dictionary*. Edited by D. N. Freedman. 6 vols. New York, 1992
AcT	*Acta theologica*
Aen.	*Aeneid*
A.J.	*Antiquitates judaicae*
AJCL	*American Journal of Comparative Law*
AnBib	Analecta biblica
Ann.	*Annales*
ANRW	Aufstieg und Niedergang der römischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung. Edited by H. Temporini and W. Haase. Berlin, 1972–
ANTC	Abingdon New Testament Commentaries
Aphr.	*Aphrodisias and Rome*
ARA	*Annual Review of Anthropology*
AThANT	Abhandlungen zur Theologie des Alten und Neuen Testaments
AUSTR	American University Studies in Theology and Religion
BA	*Biblical Archaeologist*
BAGD	Bauer, W., W. F. Arndt, F. W. Gingrich, and F. W. Danker. Greek-English Lexicon of the New Testament and Other Early Christian Literature. 3d ed. Chicago, 2000
BDSJC	Bible in Dialogue: Studies in Judaism and Christianity
BECNT	Baker Exegetical Commentary on the New Testament
BETL	Bibliotheca ephemeridum theologicarum lovaniensium
BEvT	Beiträge zur evangelischen Theologie
B.J.	*Bellum judaicum*
BJS	Brown Judaic Studies
BMW	Bible in the Modern World
BNTC	Black's New Testament Commentaries
BTB	*Biblical Theological Bulletin*
BZ	*Biblische Zeitschrift*
CA	*Classical Antiquity*
C. Ap.	*Contra Apionem*
Caes.	*Caesar*
CBQ	*Catholic Bible Quarterly*
CCWJCW	Cambridge Commentaries on Writings of the Jewish and Christian World 200 BC to AD 200
CNT	Commentaire du Nouveau Testament
ConBNT	Coniectanea neotestamentica or Coniectanea biblica: New Testament Series
CPJ	Corpus papyrorum judaicorum. Edited by V. Tcherikover. 3 vols. Cambridge, 1957–1964
CSCS	Cambridge Studies in Cultural Systems
Dial.	*Dialogi*

Dig.	*Digesta*
Dio	Dio Cassius, *Historia romana*
Diodorus	Diodorus Siculus, *Bibliotheca historica*
DJD	Discoveries in the Judaean Desert
EKKNT	Evangelisch-katholischer Kommentar zum Neuen Testament
Ep. Tra.	*Epistulae ad Trajanum*
ERS	*Ethnicity and Racial Studies*
FAT	Forschungen zum Alten Testament
FB	Forschung zur Bibel
Flacc.	*In Flaccum*
FRLANT	Forschungen zur Religion und Literatur des Alten und Neuen Testaments
GC	*Greek Constitutions of Early Emperors*
GCT	Gender, Culture, Theory
Geogr.	*Geographica*
Hist.	*Historiae*
HTR	*Harvard Theological Review*
HTS	*HTS Teologiese Studies/Theological Studies*
HUCA	*Hebrew Union College Annual*
HvTSt	*Hervormde teologiese studies*
HW	History of Warfare
ICC	International Critical Commentary
ICLQ	*International and Comparative Law Quarterly*
Inst.	*Institutiones*
ISSSA	International Studies in Sociology and Social Anthropology
JAJSup	Journal of Ancient Judaism: Supplement Series
JBL	*Journal of Biblical Literature*
JEA	*Journal of Egyptian Archaeology*
JL	Jerome Lectures
JLASup	Jewish Law Annual: Supplement Series
JQR	*Jewish Quarterly Review*
JRS	*The Journal of Roman Studies*
JRSM	Journal of Roman Studies Monographs
JSJ	*Journal for the Study of Judaism*
JSJSup	Journal for the Study of Judaism: Supplement Series
JSNT	*Journal for the Study of the New Testament*
JSNTSup	Journal for the Study of the New Testament: Supplement Series
JSOTSup	Journal for the Study of the Old Testament: Supplement Series
JSP	*Journal for the Study of the Pseudepigrapha*
JTS	*Journal of Theological Studies*
Jul.	*Divus Julius*
LCL	Loeb Classical Library
Legat.	*Legatio ad Gaium*
Let. Aris.	*Letter of Aristeas*
LHR	Law and History Review
LNTS	Library of New Testament Studies
LSR	*Law and Society Review*
LXX	Septuagint
Migr.	*De migratione Abrahami*
MLR	*Michigan Law Review*
Mos.	*De vita Mosis*

MTSR	*Method and Theory in the Study of Religion*
NA^{27}	Novum Testamentum Graece, Nestle-Aland, 27th ed.
NA^{28}	Novum Testamentum Graece, Nestle-Aland, 28th ed.
Nat.	*Naturalis historia*
NIB	*The New Interpreter's Bible*
NICNT	New International Commentary on the New Testament
NIGC	New International Greek Commentaries
NovT	*Novum Testamentum*
NRSV	New Revised Standard Version
NSBT	New Studies in Biblical Theology
NTAbh	Neutestamentliche Abhandlungen
NTM	New Testament Monographs
NTOA	Novum Testamentum et Orbis Antiquus
NTS	*New Testament Studies*
PCC	Paul in Critical Contexts
PCNT	Paideia Commentaries on the New Testament
PG	Philosophie und Geschichte
PNTC	Pelican New Testament Commentaries
RB	*Revue biblique*
RDGE	*Roman Documents in the Greek East*
Res gest.	
divi Aug.	*Res gestae divi Augusti*
RGE	*Rome and the Greek East*
RPT	Religion in Philosophy and Theology
RUSCH	Rutgers University Studies in Classical Humanities
SAG	Studien zur Alten Geschichte
SBEC	Studies in the Bible and Early Christianity
SBLDS	Society of Biblical Literature Dissertation Series
SBLGPS	Society of Biblical Literature Global Perspectives on Scholarship
SBM	Stuttgarter biblische Monographien
SEG	*Supplementum Epigraphicum Graecum*
SFUSHJ	South Florida University Studies in the History of Judaism
SJLA	Studies in Judaism in Late Antiquity
SNTSMS	Society for New Testament Studies Monograph Series
SNTW	Studies of the New Testament and its World
Somn.	*De somniis*
SPAMA	Studies in Philo of Alexandria and Mediterranean Antiquity
Spec.	*De specialibus legibus*
SPhilo	*Studia philonica*
STDJ	Studies on the Texts of the Desert of Judah
SUNT	Studien zur Umwelt des Neuen Testament
TA	Theologische Arbeiten
TB	*Tyndale Bulletin*
TDGR	Translated Documents of Greece and Rome
TDNT	Theological Dictionary of the New Testament. Edited by G. Kittel and G. Friedrich. Translated by G. W. Bromiley. 10 vols. Grand Rapids, 1964–1976
Tib.	*Tiberius*
TSAJ	Texte und Studien zum antiken Judentum
USQR	*Union Seminary Quarterly Review*
Vesp.	*Vespasianus*

WBC	Word Bible Commentary
WMANT	Wissenschaftliche Monographien zum Alten und Neuen Testament
WUNT	Wissenschaftliche Untersuchungen zum Neuen Testament
YLJ	*The Yale Law Journal*
ZNW	*Zeitschrift für die neutestamentliche Wissenschaft und die Kunde der älteren Kirche*

Chapter 1

Foucault, Smith, and Comparison

"What [St. Paul] wanted was power." ~Nietzsche, *The Antichrist*, #42

1.1 Problem, Method, and Theory

1.1.1 Overview

M. Foucault observed that since the beginning of the eighteenth century there has been a "discursive explosion" – a "proliferation of discourses" – around the objects of sex and sexuality, and that certain "power mechanisms" made these discourses "essential."[1] In this project, I borrow Foucault's insight and apply it to the proliferation of discourses on law in the Second Temple period of early Judaism – the period when the Priestly source was completed and the Torah took its final form, halakhic debate became the mechanism for the segmentation of groups within Judaism, and those precepts that are used to demarcate the boundaries of Judaism (e.g. circumcision, Sabbath observance, kashrut) became objects of more intense focus. That the law becomes a topic of greater interest during this period is not new to scholars.[2] The question I am raising, however, is one that is rarely asked: why law? Or, in more explicitly Foucauldian language: why does law emerge as an object of discourse in this period?

I will address this question comparatively by probing the ways in which relations of power in a variety of cultural[3] contexts generate discussions of law

---

[1] Michel Foucault, *The History of Sexuality Volume I: An Introduction* (trans. Robert Hurley; New York: Vintage Books, 1990), 17–18, 23.

[2] E.g. Seth Schwartz, *Imperialism and Jewish Society, 200 B.C.E. to 640 C.E.* (Princeton: Princeton University Press, 2001), esp. part 1; Hindy Najman, *Seconding Sinai: The Development of Mosaic Discourse in Second Temple Judaism* (JSJSup 77; Leiden: Brill, 2003).

[3] I recognize that terms such as "culture" and "cultural" are difficult to define. My views of culture are essentially Weberian, and are summed up nicely by Clifford Geertz, who wrote, "[t]he concept of culture I espouse … is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning"; in

among social groups. I examine a selection of textual materials from the later Second Temple period in chs. 4 and 5 (portions of Philo and Josephus, the Gospel of Matthew, and selections from the letters of Paul) and compare them cross-culturally with ethnographic studies from the field of the anthropology of law. My goal is to remedy some of the specific problems that I see in Matthean and Pauline scholarship on law, which I will detail briefly below and more fully in ch. 3. My main argument is that intergroup – or, macro – forces of power in each of the cultural situations that I study have begun to engage and even clash with intragroup – or, micro – relations of power within the social groups; and in the space of this interaction, discourses on law have begun to multiply. Since the indigenous groups in the ethnographic contexts are nonliterate, "law" is not formed as a codified object but as a set of practices that have become more frequent in the space of this macro-micro friction – a dynamic that I will describe in ch. 2. In each of the cultural situations that I investigate, certain laws or cultural practices have become problematic in the interaction between the macro and micro relations of power, and it is the perpetuity of these laws and practices in particular that is most at stake for the respective social groups.[4]

Before outlining the method I will use, and before I survey the specific problems that I see in Matthean and Pauline scholarship on law, I want to distinguish between the focus of this project and that of the tangential field of comparative law in antiquity.[5] On the one hand, I am completely in agreement with B. Jackson's observation that "[t]he best legal history is rarely achieved by scholars immersed in a single legal system."[6] One criticism that

---

"Thick Description: Toward an Interpretive Theory of Culture," in Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 3–30, here, 5.

[4] By focusing on power relations, I see confluence between this project and recent work in the academic study of religion; see William E. Arnal and Russell T. McCutcheon, *The Sacred is the Profane: The Political Nature of "Religion"* (Oxford: Oxford University Press, 2013): "Only by self-consciously [and] … continually anchoring human action in the mundane, historical world of interests and contests, will we ensure that our scholarship continually steers clear of unreflectively reproducing participant interests and self-understandings; after all, for scholars of the social, there is nothing religious about religion. The sacred *is* the profane" (pp. 130–131).

[5] I am specifying "antiquity," because there is a large and growing body of literature on modern comparative law. See for example the *American Journal of Comparative Law* published by the American Society of Comparative Law.

[6] Bernard S. Jackson, *Essays in Jewish and Comparative Legal History* (SJLA 10; Leiden: Brill, 1975), 7; cf. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon, 1987), 2, who delineate the method of comparative law by the term "internationalism," which implies that comparison is conducted beyond the intra-muros discussions of a single stream of legal tradition. More recently, Giorgio Agamben's work on the oath has engaged a variety of cultural archives to underscore the

I have of Matthean and Pauline scholarship on law is its tendency to treat matters of law as a Jewish/Christian phenomenon without seriously investigating how law operates in different cultural contexts. By incorporating cultural materials from the anthropology of law, my project is in line with Jackson's observation about the importance of examining multiple legal systems.[7] On the other hand, I am not comparing disparate legal systems with each other, or comparing specific precepts from different legal systems; that is, I am not comparing, for example, the cultural customs of the Dou Donggo in Indonesia with Matthew's views of the Sabbath. I suppose such a study could be undertaken, but I am not confident that it would produce useful results. There is nevertheless a rich tradition in Jewish Studies of comparing rabbinic and Roman legal systems, and also ancient and modern forms of law within Judaism. The work of B. Jackson has engaged both types of comparison;[8] and C. Hezser[9] has more recently edited a collection of articles on wide-ranging topics that compare *inter alia* rabbinic and Roman legal conceptions of dispute settlement,[10] legal fiction,[11] slavery,[12] households,[13] marriage,[14] and

---

point that the operation of oaths and maledictions as linguistic phenomena logically precedes both "*religio* and *ius*"; see *The Sacrament of Language: An Archaeology of the Oath (Homo Sacer II, 3)* (trans. Adam Kotsko; Stanford: Stanford University Press, 2011), 70.

[7] Henry S. Maine's classic study (*Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* [Tucson: University of Arizona Press, 1986]) is an older exemplar of this approach despite its grounding in the evolutionary assumptions of the nineteenth century. For example, when surveying the development of law from its unwritten stage to its written stage typified in the codified Roman Twelve Tables, Maine remarked "there is no such thing as unwritten law in the world" (p. 12); "a barbarous society practice[es] a body of customs" (p. 17); and, reflecting the orientalist tenor of the age, "[w]e are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but this much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny" (p. 19); cf. the discussion in Jackson, *Essays*, 8. Such assumptions about the development of law are built on the twin specters of "euro-centrism" and "orientalism"; see, for example, Teemu Ruskola, "Legal Orientalism," *MLR* 101/1 (2003): 179–234.

[8] See the collection of articles in Bernard S. Jackson, *Jewish Law in Legal History and the Modern World* (JLASup 2; Leiden: Brill, 1980); also Jackson, *Essays*, esp. ch. 1.

[9] Catherine Hezser, ed., *Rabbinic Law in its Roman and Near Eastern Context* (TSAJ 97; Tübingen: Mohr Siebeck, 2003).

[10] Jill Harries, "Creating Legal Space: Settling Disputes in the Roman Empire," in Hezser, *Rabbinic Law*, 63–81.

[11] Leib Moscovitz, "Legal Fictions in Rabbinic Law and Roman Law: Some Comparative Observations," in Hezser, *Rabbinic Law*, 105–132.

[12] Catherine Hezser, "Slaves and Slavery in Rabbinic and Roman Law," in Hezser, *Rabbinic Law*, 133–176.

[13] Hayim Lapin, "Maintenance of Wives and Children in Early Rabbinic and Documentary Texts from Roman Palestine," in Hezser, *Rabbinic Law*, 177–198.

the status of children in intermarriages.[15] Such studies have been made possible because of the groundbreaking investigations beginning in the early part of the twentieth century, which explored the relationship between rabbinic and Greco-Roman legal traditions.[16] B. Cohen's two-volume study[17] can be situated in this stream of secondary literature, especially since it hints at parallel developments in both the Talmud and Justinian's *Digest*,[18] and also the possible influence of the codified Twelve Tables on the compilation of the Mishnah.[19]

My intention is not to criticize such approaches – though comparativists themselves have raised questions about whether tracing "influences" from one legal system to another is a useful object of investigation[20] – but merely to show that such studies are being conducted by scholars who specialize in comparative law, and to underscore that comparing legal systems and individual precepts is not my primary focus. I am instead interested in power. More specifically, I compare relations of power in various cultural contexts, and observe how these relations operate to form law as an object. Accordingly, I am not treating law (or unwritten customs or rules in the case of the ethnographies) as a ready-made object – comprised of an essential group of traits – that exists apart from the discursive processes and social relations that make its emergence possible.[21] The primary question I am trying to answer,

---

[14] Yaakov Elman, "Marriage and Marital Property in Rabbinic and Sasanian Law," in Hezser, *Rabbinic Law*, 227–276.

[15] Ranon Katzoff, "Children of Intermarriage: Roman and Jewish Conceptions," in Hezser, *Rabbinic Law*, 277–286.

[16] E.g. Saul Lieberman, "Roman Legal Institutions in Early Rabbinics and the Acta Martyrum," *JQR* 35/1 (1944): 1–57; Jacob Rabinowitz, *Jewish Law: Its Influence on the Development of Legal Institutions* (New York: Bloch, 1956).

[17] Boaz Cohen, *Jewish and Roman Law: A Comparative Study* (New York: Jewish Theological Seminary of America, 1966).

[18] Cohen, *Jewish and Roman Law*, 15.

[19] Cohen, *Jewish and Roman Law*, 18–22.

[20] See, for example, Catherine Hezser's comments: "the question of 'influence' must be considered inappropriate [in the current postmodern context of legal theory]. Whether a particular Roman legal text actually influenced a particular rabbinic utterance can neither be fully determined nor is it of great relevance. What is much more important is to investigate the ways in which rabbinic legal thinking participated in ancient legal thinking at large"; see introduction to *Rabbinic Law*, 1–16, here, 13.

[21] See Michel Foucault, *The Archaeology of Knowledge and the Discourse of Language* (trans. Alan Sheridan; New York: Pantheon Books, 1972), 45: "the object does not await in limbo the order that will free it and enable it to become embodied in a visible and prolix objectivity; it does not preexist itself, held back by some obstacle at the first edges of light. It exists under the positive conditions of a complex group of relations."

therefore, is not *what* is said about law in various cultural contexts, but rather the Foucauldian question of what enables law as an object to appear?[22]

I have chosen to focus specifically on law in the Gospel of Matthew and letters of Paul for two reasons. First, both sets of texts contain comparatively more numerous and denser discussions of law than their contemporaries in the early Jesus movement, which, in my opinion, invites a Foucauldian approach that explores how power relations make possible these discussions. Foucault saw the exercise of power as instrumental in the proliferation of discourses on sex, arguing that since the eighteenth century these discourses "did not multiply apart from or against power, but in the very space and as the means of its exercise."[23] I will describe Foucault's perspective of power in greater detail below. Second, while the history of scholarship on these two sets of texts is plentiful and rigorous, both fields are fractious, and there are few points of agreement among scholars. The lack of consensus suggests to me that the time has come to reassess the approaches that are routinely deployed by scholars in both fields.

Here I will only summarize my conclusions from ch. 3. Scholars in both fields over the past fifty years have tended to explore what Matthew and Paul say about the law in order to compare their findings with "Jewish" views of the law, or with an aspect of Judaism, or simply with Judaism itself.[24] At stake in these studies is determining whether Matthew and Paul are still part of first century C.E. Judaism, which implicates a series of derivative issues of concern to scholars, including, for example, deciphering the identities of Matthew and Paul,[25] pinpointing the beginning of the so-called "parting of the ways" between Judaism and Christianity,[26] and extrapolating from the analy-

---

[22] Cf. Foucault, *Archaeology of Knowledge*, 45. Legal scholars have mined Foucault's writings to assess his views of law; see for example, Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994); and more recently, Ben Golder and Peter Fitzpatrick, *Foucault's Law* (New York: Routledge, 2009). My intention in this project is not to identify a Foucauldian perspective of law, but to draw from Foucault's views of power and the formation of objects to examine how law becomes an object of discourse.

[23] Foucault, *History of Sexuality*, 32.

[24] There has been a very recent move to situate Paul's views of law in a Roman imperial context, which I welcome for reasons that will become clearer as my argument develops.

[25] E.g. Paul Foster, *Community, Law, and Mission in Matthew's Gospel* (WUNT 2/177; Tübingen: Mohr Siebeck, 2004), 141.

[26] The name that is most closely associated with the phrase "parting of the ways" is of course James D. G. Dunn; however, his particular views of Paul and the law are constructed in reaction to those of E. P. Sanders, who sees a more overt distinction between the "Christian" Paul and Judaism; see the discussion in ch. 3 below; see also Dunn's "The Question of Anti-Semitism in the New Testament Writings of the Period," in *Jews and Christians: The Parting of the Ways A.D. 70–135* (ed. James D. G. Dunn; WUNT

sis of law in Matthew and Paul in order to address ecumenical issues such as improving relations between Jews and Christians after the horrors of World War II.[27] These are laudable goals; yet the many detailed studies of law in both fields have not yielded results that scholars can agree on. Indeed, the argument I make in my literature review in ch. 3 is that both fields are at an impasse with respect to situating Matthew and Paul among their contemporaries in first century Judaism. Two examples will suffice at this point to demonstrate this, one from each field. G. Stanton has argued that Matthew's views of the law and his polemical language signify that his group has separated from Judaism and no longer observes certain precepts of the law, such as the Sabbath.[28] A. Saldarini comes to the opposite conclusion. He argues that Matthew is still within Judaism, that Matthew should be situated among other post-destruction (i.e. post-70 C.E.) Jewish texts, and that Matthew's group is fully law observant.[29] Among Pauline scholars, M. Nanos insists that Paul should be located "within or for or representing Judaism," and that Paul remained a law observant Jew his entire life.[30] S. Westerholm draws a different conclusion from Paul's statements about the law. He argues that Paul sees the law as fundamentally flawed in that it cannot rectify humanity's core problem of "captivity to sin,"[31] which indicates that for Paul "the Sinaitic economy" is "*temporary by design*," playing a "role [that is] negative and preparatory."[32]

These scholars are representative of the opposing camps that have emerged in both fields of scholarship over the fundamental issue at stake in these studies: where are Matthew and Paul to be situated vis-à-vis first century C.E.

1/66; Tübingen: Mohr Siebeck, 1992), 177–212, esp. 181 fn. 21. For a critique of Dunn's approach, see especially Paula Fredriksen, "What 'Parting of the Ways'?: Jews, Gentiles, and the Ancient Mediterranean City," in *The Ways that Never Parted: Jews and Christians in Late Antiquity and the Early Middle Ages* (ed. Adam H. Becker and Annette Yoshiko Reed; Minneapolis: Fortress, 2007), 35–64, esp. 35 fn. 1.

[27] E.g. Lloyd Gaston, *Paul and the Torah* (Vancouver: University of British Columbia Press, 1987), 34, who mentions "the agonized concern of many in the post-Auschwitz situation." See also John G. Gager, *Reinventing Paul* (Oxford: Oxford University Press, 2000), 150–151: "my sense is that the Nazi Holocaust, together with the founding of the state of Israel, account for the possibility of reading Paul in a new way."

[28] Graham N. Stanton, *Gospel for a New People: Studies in Matthew* (Edinburgh: T&T Clark, 1992), 114, 205.

[29] Anthony J. Saldarini, *Matthew's Christian-Jewish Community* (Chicago: University of Chicago Press, 1994), 1.

[30] Mark D. Nanos, "Paul and Judaism: Why Not Paul's Judaism?," in *Paul Unbound: Other Perspectives on the Apostle* (ed. Mark D. Given; Peabody, Mass.: Hendrickson, 2010): 117–160, here, 159.

[31] Stephen Westerholm, *Perspectives Old and New on Paul: The "Lutheran" Paul and His Critics* (Grand Rapids: Eerdmans, 2004), 381; also pp. 382–383.

[32] Westerholm, *Perspectives Old and New on Paul*, 300; italics original.

Judaism? One reason why scholars have had difficulties agreeing on an answer to this question is that they do not agree on the related question: what do Matthew and Paul say about the law? Since most studies use Matthew's or Paul's views of the law to gauge the two writers' proximity to Judaism, the lack of agreement on what these views are leads to a lack of agreement on the question of proximity. Another reason why scholars do not agree on where to situate Matthew and Paul vis-à-vis Judaism is that they cannot agree on a definition of "Judaism." Scholars use a variety of terms to demarcate first century C.E. Judaism – synagogue Judaism, post-destruction Judaism, common Judaism, Pharisaic Judaism, formative Judaism, or some similar designation – but because each category is a construct, the degree of correlation between the category and the actual Judaism encountered (or practiced) by Matthew or Paul cannot be determined with certainty.

My primary interest in this project is different from this approach in that I focus less on *what* Matthew and Paul say about law, and *where* this situates them vis-à-vis their contemporaries in Judaism, than on what makes possible the two writers' discussions of law. In particular, I raise the question of why law emerges as an object of discourse for Matthew and Paul, which is to raise the Foucauldian question of power. As I will demonstrate further below, Foucault sees relations of power as instrumental in forming objects for investigation,[33] which means that it is the exercise of power and not some essential feature or trait that accounts for the emergence of law as an object of discourse. In Matthean and Pauline scholarship on law, however, there is an assumption that law is an essentially *Jewish* thing, which implies that the Jewish/Christian cultural context provides the only relevant setting for investigating the topic of law in Matthew and Paul.[34] I reject this assumption, and explore how law (or unwritten cultural rules and customs) *emerges* or *becomes* an object in a variety of cultural contexts, not only from the Jewish context in the ancient Roman world, but also from more recent ethnographic studies in the field of the anthropology of law. Over the past century, ethnographers have gathered abundant cross-cultural materials from various indigenous contexts,[35] something to which theorists of comparative law in antiquity have generally paid little attention, and scholars of Christian origins who specialize

---

[33] Foucault, *History of Sexuality*, 98.

[34] A similar observation has been made by Niko Huttunen, *Paul and Epictetus on Law: A Comparison* (LNTS 45; New York: T&T Clark, 2009), 1.

[35] Primogenitors in the field of legal anthropology are Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: Harcourt, Brace & Co., 1926), and Karl N. Llewellyn, and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, (Norman, Okla.: University of Oklahoma Press, 1967). Llewellyn and Hoebel are widely regarded to have made the most important initial foray into this field.

in law have ignored entirely.[36] Anthropologists have observed that "law" is not necessarily something codified in these contexts, but is something culturally specific, an aspect of "local knowledge";[37] it is a feature of human culture that "gains force *inter alia* through a number of social mechanisms."[38] In this project I examine ethnographic materials from Indonesia, Mexico, the Philippines, and Hawaii with the goal of using such materials analogously to defamiliarize[39] the well-worn fields of Matthean and Pauline scholarship on law, and thus to reframe in broader cultural terms how law is discussed in both fields of scholarship.

---

[36] Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), 78–79, makes a passing reference to legal anthropology, as does Robert A. Kugler, "Halakic Interpretative Strategies at Qumran: A Case Study," in *Legal Texts and Legal Issues: Proceedings of the Second Meeting of the National Organization for Qumran Studies, Cambridge 1995* (ed. Moshe Bernstein et al.; STDJ 23; Leiden: Brill, 1997), 131–140, esp. 131–132; see also Ari Z. Bryen, "Judging Empire: Courts and Culture in Rome's Eastern Provinces," *LHR* 30/3 (2012): 771–811, esp. 775. A scholar who productively incorporates insights from the anthropology of law is Jay W. Marshall, *Israel and the Book of the Covenant: An Anthropological Approach to Biblical Law* (SBLDS 140; Atlanta: Scholars Press, 1993), esp. ch 2. Marshall criticizes scholarly investigations of biblical law for not reaching "consensus," and for simply "reshuffling . . . the same evidence so that new insights seldom appear" (p. 1). While he recognizes the value of many of these explorations, he sees them as "ultimately limited" because they have not paid enough attention to "cultural factors." For a recent contribution to Paul studies that incorporates elements of cultural anthropology around the concept of gift, see John M. G. Barclay, *Paul and the Gift* (Grand Rapids: Eerdmans, 2015), esp. ch. 1.

[37] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, Inc., 1983), ch. 8. Geertz argues that law is part of "local knowledge; local not just as to place, time, class, and variety of issue, but as to accent – vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stores about events cast in imagery about principles, that I have been calling a legal sensibility" (p. 215); "law is local knowledge not placeless principle and … it is constructive of social life not reflective" (p. 218).

[38] Thomas Scheffer, "Comparability on Shifting Grounds: How Legal Ethnography Differs from Comparative Law," in *Thick Comparison: Reviving the Ethnographic Aspiration* (ed. Thomas Scheffer and Jörg Niewöhner; ISSSA 114; Leiden: Brill, 2010), 17–42, here, 17. Scheffer refers to the object of his investigation as "law-in-action" (p. 17).

[39] Jonathan Z. Smith, introduction to *Imagining Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1982), xi-xiii, esp. xiii, where Smith cites Victor Shklovsky, "Art as Technique," in *Russian Formalist Criticism: Four Essays* (ed. Lee T. Lemon and Marion J. Reis; Lincoln, Nebr.: University of Nebraska Press, 1965), 3–24: "the historian of religion, like the anthropologist, will … gain insight from the study of materials and cultures which, at first glance, appear uncommon or remote. For there is extraordinary cognitive power in … 'defamiliarization' – making the familiar seem strange *in order to enhance our perceptions of the familiar*."

1.1.2 Method

Undertaking a comparison of this sort that examines such disparate cultural materials requires careful thought about method. Comparison is more complicated than simply juxtaposing two or more aspects of culture and then drawing conclusions. It requires disciplined thought about what exactly is being compared and for what reasons, and why particular cultural materials have been selected as objects of investigation.[40] Scholars of comparative law have grappled with the issue of method, especially as it relates to comparing legal systems or specific precepts from two or more legal systems.[41] I have already noted that this sort of comparison is not my primary focus in this project. For my purposes, the comparative method of J. Z. Smith from the study of religion is most useful. This is because Smith has frequently drawn from ethnographic materials in his body of work, which provides a methodological template for my use of these materials in this project.

1.1.2a

Smith argues that "the enterprise of comparison" is tied to the individual scholar's intellectual program. It is the scholar who decides what should be juxtaposed and for what reasons. This means for Smith that there are in principle no ontological reasons why two or more items or features of culture should be compared; there is nothing inherent in the cultural materials themselves that requires their being compared:

---

[40] This is of course quite complicated. E. E. Evans-Pritchard wrote, "'[t]here is only one method in social anthropology, the comparative method – and that is impossible'"; quoted in Niewöhner and Scheffer, "Thickening Comparison: On the Multiple Facets of Comparability," in Scheffer and Niewöhner, *Thick Comparison*, 1–15, here, 8.

[41] E.g. Maurice Adams and John Griffiths, "Against 'Comparative Method': Explaining Similarities and Differences," in *Practice and Theory in Comparative Law* (ed. Maurice Adams and Jacco Bomhoff; Cambridge: Cambridge University Press, 2012), 279–301, esp. 280–281; also Vernon Valentine Palmer, "From Lerotholi to Lando: Some Examples of Comparative Law Methodology," *AJCL* 53/1 (2005): 261–290, esp. 266; cf. Catherine Valcke, "Reflections on Comparative Law Methodology: Getting Inside Contract Law," in Adams and Bomhoff, *Practice and Theory*, 22–48. It is worth pointing out that scholars of comparative law have become more self-critical in their analysis, and cognizant both of the positivist strands in comparative law as a field, and of "the lack of full knowledge" of the cultures being studied; see Anne Peters and Heiner Schwenke, "Comparative Law Beyond Post-Modernism," *ICLQ* 49/4 (2000): 800–834, esp. 832. Peters and Schwenke argue that "[c]omparative legal studies are an operator of critique, because they help to create a critical intellectual distance from one's legal system, forcing us into sympathetic yet critical knowledge of law in another context, disrupting our settled understandings, and provoking new judgments" (p. 830); cf. Koen Lemmens, "Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship," in Adams and Bomhoff, *Practice and Theory*, 302–326.

> [T]here is nothing 'natural' about the enterprise of comparison. Similarity and difference are not 'given'. They are the result of mental operations. … In the case of the study of religion, as in any disciplined inquiry, comparison, in its strongest form, brings differences together within the space of the scholar's mind for the scholar's own intellectual reasons. It is the scholar who makes their cohabitation – their 'sameness' – possible, not 'natural' affinities or processes of history.[42]

> A comparison is a disciplined exaggeration in the service of knowledge. It lifts out and strongly marks certain features within difference as being of possible intellectual significance, expressed in the rhetoric of their being 'like' in some stipulated fashion. Comparison provides the means by which we 're-vision' phenomena as our data in order to solve our theoretical problems.[43]

Strictly speaking, then, a scholar can compare any set of cultural materials that he or she finds interesting as long as it can be explained why *this* particular set of materials was selected instead of *that* set.[44] Making such a determination involves careful consideration of the similarities[45] and differences[46] of

---

[42] Jonathan Z. Smith, *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity* (Chicago: University of Chicago Press, 1990), 51. Smith writes that "the enterprise of comparison, in its strongest form, brings differences together solely within the space of the scholar's mind. It is the individual scholar, for his or her own good theoretical reasons, who imagines their cohabitation, without even requiring that they be consenting adults – not processes of history, influence, or diffusion which, all too often, have been held to be both the justification for and the result of comparison" (p. 115); cf. Jonathan Z. Smith, "The 'End' of Comparison: Redescription and Rectification," in *A Magic Still Dwells: Comparative Religion in the Postmodern Age* (ed. Kimberley C. Patton, and Benjamin C. Ray; Berkeley: University of California Press, 2000), 237–241, esp. 239.

[43] Smith, *Drudgery Divine*, 52; italics original.

[44] There is of course a sense in which any scientific study proceeds more or less on the individual scholar's "'hunch'," to borrow a term from Valcke, "Reflections on Comparative Law Methodology," 29.

[45] Jonathan Z. Smith, "ADDE PARVUM PARVO MAGNUS ACERVUS ERIT," in Jonathan Z. Smith, *Map is Not Territory: Studies in the History of Religions* (Chicago: University of Chicago Press, 1978), 240–264, here, 242: "Comparison, the existence of similarity, is the inescapable presupposition of historical research."

[46] Jonathan Z. Smith, *To Take Place: Toward Theory in Ritual* (Chicago: University of Chicago Press, 1987), 13–14: "It is axiomatic that comparison is never a matter of identity. Comparison requires the acceptance of difference as the ground of its being interesting, and a methodical manipulation of that difference to achieve some stated cognitive end. The questions of comparison are questions of judgment with respect to difference: What differences are to be maintained in the interests of comparative inquiry? What differences can be defensibly relaxed and relativized in light of the intellectual tasks at hand?" Cf. also Jonathan Z. Smith, "Differential Equations: On Constructing the Other," in Jonathan Z. Smith, *Relating Religion: Essays in the Study of Religion* (Chicago: University of Chicago Press, 2004), 230–250; "What a Difference a Difference Makes," in Smith, *Relating Religion*, 251–302, esp., 275; and "In Comparison Magic Dwells," in Smith, *Imagining Religion*, 19–35: "Comparison requires the postulation of difference as the grounds of its being interesting" (p. 35). The scholar needs to be

the materials being compared with a view to addressing the questions "'how' … 'why' and, above all, … 'so what',"[47] which is especially challenging for comparativists who draw from widely disparate cultural materials:

> There are many days when the cultural comparativist feels like the frustrated hunter of the African plains must feel when confronting the myriad of historical and ethnographic details that cross her or his desk. There is so much that it seems impossible to find significance in any one. There is so much that the comparativist spends most of the working day deciding what not to study, what facts to refuse to take up as potential data.[48]

One of the clearest examples in Smith's body of work of a step-by-step procedure for doing comparison can be found in the article "Sacred Persistence: Toward a Redescription of Canon."[49] In what follows I will detail the main features of the article (section 1.1.2b), and highlight a key aspect of it that I find troubling, namely, Smith's understanding of the category of "similarity" in the disparate cultural materials that he juxtaposes (section 1.1.2c). This will segue into a discussion of how I am incorporating Foucault's approach into this project (section 1.1.3).

1.1.2b

One advantage of the article "Sacred Persistence" is that Smith deals well with the category of "difference" in cultural materials by demonstrating the

---

careful with the category "difference," however, because he or she needs to avoid positing that particular cultural materials are "unique"; see Smith, *To Take Place*, 34–35: "Uniqueness denies the possibility of comparison and taxonomy; … absolute difference is not a category for thought but one that denies the possibility of thought."

[47] Smith, "In Comparison a Magic Dwells," 35; cf. Luther H. Martin, "Comparison," in *Guide to the Study of Religion* (ed. Willi Braun and Russell T. McCutcheon; London: Cassell, 2000), 45–56, esp. 49.

[48] Smith, "Differential Equations," 242. See similarly, Jonathan Z. Smith, "Map is Not Territory," in Smith, *Map is Not Territory*, 289–309: "the philosopher or the theologian has the possibility of exclaiming with Archimedes: 'Give me a place to stand on and I will move the world'. There is, for such a thinker, the possibility of a real beginning, even of achieving The Beginning, a standpoint from which all things flow, a standpoint from which he may gain a clear vision. The historian of religion has no such possibility. There are no places on which he might stand apart from the messiness of the given world. There is, for him, no real beginning, but only the plunge which he takes at some arbitrary point to avoid the unhappy alternatives of infinite regress or silence. . . . The historian's task is to complicate not to clarify. … Like a pilgrim, the historian is obliged to approach his subject obliquely. He must circumambulate the spot several times before making even the most fleeting contact. … The historian's manner of speech is [consequently] often halting and provisional" (pp. 289–290). Smith uses this same metaphor in "The Influence of Symbols upon Social Change: A Place on Which to Stand," in Smith, *Map is Not Territory*, 129–146.

[49] Jonathan Z. Smith, "Sacred Persistence: Toward a Redescription of Canon," in Smith, *Imagining Religion*, 36–52.