Law and Society in the Dead Sea Scrolls: Preliminary Remarks*

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1. Terms and Context

Any examination of the legal material in the Dead Sea Scrolls inevitably necessitates conjectures on two methodological concerns of contextualization. First, whether an archaeological discovery of texts, overburdened by fortuitous circumstances of various sorts, is sufficient to constitute a corpus; and second, if it is a corpus, how does the legal material of the scrolls relate to other postbiblical material, either Jewish or Christian, and how should one approach the task of comparing these separate corpora.

Regarding the first concern, I deem the archaeological circumstances insufficient, which is why I try to avoid declinations of “Qumran” as adjectives or adverbs. The cache of texts is indeed “Qumranic,” but the sect reflected in it, their views, and practices were certainly never Qumranic, since that name for the location would not have come into existence at that point. This is not to detach the sect from the site, as some have proposed.1 Jodi Magness has persuasively and accessibly made the argument that such a detachment is not only wrong when reading the textual and material evidence, but methodologically

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unsound, since the scrolls are, first and foremost, an archeological discovery and artifact. In order to demonstrate the problems associated with assuming a corpus based on the find, we may consider the various expansions, retellings of, or allusions to Genesis found in Qumran. 4Q201 and 4Q226 are considered fragments of the original Aramaic and Hebrew versions of pseudepigraphic works (1 Enoch and Jubilees respectively) that were preserved in the Ethiopic canon. The Genesis Apocryphon of cave 1 or the commentary on Genesis known as 4Q252 were not preserved in churches (and no evidence of such translations has been found), and, thus, are not categorized as “Pseudepigrapha,” but as material peculiar to the scrolls. If, by chance of history, the Genesis Apocryphon would have been translated into Greek and then into Ge'ez and Jubilees was not, then these labels would have been reversed. In sum, there is nothing inherent in any of those texts to define them as particularly “Qumranic” or “Pseudepigraphic.” Hence the mere discovery of legal material in the same place is insufficient to define these texts as one corpus.

Nevertheless, the legal material itself, in the content of the laws, their presuppositions, and the rhetoric employed to justify and constitute the law as well as admonish its subjects, does allow us to treat most of the legal texts found at Qumran as belonging to the same milieu. The Community Rule, Damascus Document, 4QMMT, War Scroll, as well as the sect described by Josephus, reflect – for the most part – a shared tradition. As many have noticed, the Temple Scroll is a marked exception. This is not to ignore or undermine the significance of those studies that emphasize the differences and even contradictions between these texts and traditions, most notably in the works of


Baumgarten and Regev. These differences, however, can and did exist within a society that upheld some shared tenets. This society, group, or ideological milieu is probably still best described as “Essene.” Yahad is clearly too specific, labeling the ostensibly celibate group living in Qumran. “The Community of the Renewed Covenant,” as Talmon insisted on calling the sectarians, is somewhat too long for scholarly purposes, and is slightly problematic in light of the fact that it is not preserved in the Community Rule.

I choose to re-employ the label “Essenes” in reference to the more extensive aspects of the sect, including the shared legal traditions as reflected in the


6 John J. Collins has beautifully summarized the scholarly debates concerning the identification of the Essenes described in Josephus with the sect reflected in the scrolls. See his recent Beyond the Qumran Community: The Sectarian Movement of the Dead Sea Scrolls (Grand Rapids, MI: Eerdmans, 2010), 122-65.


9 This can be counter-argued by reading בָּאוּ הַבְּרִית (1QS 2.18) as an abbreviated reference to the Damascus Document epithet בָּאוּ הַבְּרִית הַדְּמָשְׁקִית, with the implication that the author of 1QS was familiar with the Damascus Document and perhaps even assumed this familiarity for his audience.
aforementioned texts. By doing so, I recognize the significance of two parallel, scholarly endeavors: emphasizing the idiosyncrasies of each of the factions of the sect, but also recognizing its contemporaneous perception as one group. This label also serves to denote the strand of analysis that supplements Josephus and Philo as sources of information to the texts found in Qumran.

In particular, this label recalls that Josephus testifies to the diversity of Essene communities by reporting, first, that they are not concentrated in one town, but rather are numerous in every town (Μία δ᾽ οὐκ ἔστιν αὐτῶν πόλις ἀλλ᾽ ἐν ἑκάστῃ μετοικοῦσιν πολλοί; Jewish War 2.8.4); and, second, that “there is yet another order of Essenes” (Ἔστιν δὲ καὶ ἕτερον Ἐσσηνῶν τάγμα; Jewish War 2.8.13) who do not practice celibacy. Regardless of the partially lost self-designations employed by the sectarians to refer to specific groups, to the sect as a whole, and perhaps to a distinction between those who marry and those who do not, it is telling that Josephus sees no problem in labeling them all, despite the diversity, as “Essenes.” Admittedly, the etymology of the word is obscure, and it is not documented in the scrolls. Furthermore, it is clear that Josephus is an outsider in relation to the Essenes, and that he is presenting this information to an audience that is presumably more remote from the Essenes than he is. These are quite sufficient circumstances to plausibly account for any misrepresentations. Nevertheless, the fact remains that it seemed reasonable
to him to group these factions under one label, and that is what I seek to call to mind when reverting to the somewhat outdated, considerably contested, but hopefully renewed label of “the Essenes.”

The second concern of contextualization bears on the relation of the Essene legal material to other postbiblical sources, namely early Christian sources and rabbinic sources. It is commonly agreed that some caution is required when proceeding with a comparison of either. The preliminary excitement over the discovery of the scrolls and their implication for the study of Christian origins has subdued in recent years, replacing the quest for historical figures at Qumran with explorations of shared traditions of exegesis and comparable communal practices. At the same time, the interest in comparisons between

and thus render Mason’s suggestion that Josephus “invented the marrying kind of Essenes out of whole cloth” (448) rather dubious. See also his “Essenes and Lurking Spartans in Josephus’ Judean War: From Story to History,” in Making History: Josephus and Historical Method, ed. Zuleika Rodgers (Leiden: Brill, 2007), 219-61. Specific responses to Mason’s arguments were offered by Kenneth Atkinson and Jodi Magness, “Josephus’s Essenes and the Qumran Community,” JBL 129.2 (2010): 317-42.


Essene legal texts and the earliest sources of rabbinic halakhah is flourishing.\textsuperscript{17} Several reviews have commented that this increase in interest might be coming at the expense of necessary caution.\textsuperscript{18} The similarities and relationships between the texts affirm what scholars knew long before the scrolls were discovered: that tannaitic material preserves debates and concerns that were part of the intellectual life during the times of the Second Temple,\textsuperscript{19} and not merely

\textsuperscript{17} In addition to the early studies on the topic, such as Joseph M. Baumgarten, \textit{Studies in Qumran Law} (Leiden: Brill, 1977); Lawrence H. Schiffman, \textit{The Halakhah at Qumran} (Leiden: Brill, 1975), and \textit{idem, Sectarian Law in the Dead Sea Scrolls: Courts, Testimony and the Penal Code} (Chico, CA: Scholars Press, 1983), I will only mention the most notable books on the topic, as articles on individual topics are indeed abundant in the past five years: Steven D. Fraade, Aharon Shemesh, and Ruth A. Clements, eds., \textit{Rabbinic Perspectives: Rabbinic Literature and the Dead Sea Scrolls} (Leiden: Brill, 2006); Aharon Shemesh, \textit{Halakhah in the Making: The Development of Jewish Law from Qumran to the Rabbis} (Berkeley: University of California Press, 2009); Vered Noam, \textit{From Qumran to the Rabbinic Revolution: Conceptions of Impurity} (Jerusalem: Ben Zvi, 2010) (Hebrew); Steven D. Fraade, \textit{Legal Fictions: Studies of Law and Narrative in the Discursive Worlds of Ancient Jewish Sectarians and Sages} (Leiden: Brill, 2011); Cana Werman and Aharon Shemesh, \textit{Revealing the Hidden: Exegesis and Halakha in the Qumran Scrolls} (Jerusalem: Bialik, 2011) (Hebrew). For a survey of issues, see Cana Werman and Aharon Shemesh, “The Halakhah in the Dead Sea Scrolls,” in \textit{Qumran Scrolls and Their World}, ed. Menahem Kister (Jerusalem: Ben Zvi, 2009), 2:409-33.


\textsuperscript{19} Naturally, the discovery rekindled the debate, providing further cases and considerations, but the historical kernel was not changed by the discovery of the scrolls. On Second Temple history from within rabbinic sources, see Lee I. Levine, “The Political Struggle between Pharisees and Sadducees in the Hasmonean Period,” in \textit{Jerusalem in the Second Temple Period}, ed. Aharon Oppenheimer, Uriel Rappaport,
scholarly debates after the rise of rabbinic Judaism following the destruction of the Temple. Yet the discovery of the scrolls allowed a peephole, however fragmentary, to the other side of the debate, one that was not preserved with adequate representation in the rabbinic sources.

One drawback to this endeavor has been an encumbrance on the study of Essene law with the use of terminology that is either anachronistic or irrelevant to the corpus. The term “halakhah” is the primary example of this methodological flaw. As noted, it is not mentioned once in the scrolls, conspicuously absent in the legal texts. The suggestion that the derogatory epithet דורשי חלקות is a play on דורשי הלכות might even indicate that the term had a negative connotation in Essene circles. But even more troubling than the mere use of a term that would not necessarily be used by the sect itself, is the application of this term in the creation of categories that are irrelevant for the study of Essene law. In studying law from Qumran, a tendency to distinguish halakhic from non-halakhic law entails an imposition of rabbinic categories.


21 The phrase appears in 1QHa 10.32; 4Q169 frg. 3-4 col. i, 2, 7, col. ii, 3-4, 2, 4, col. iii, 6-7 and reconstructed in 1QHa 10.15; 4Q163 23, ii 10; 4Q177 9.4. See also 4QDa 2, i, 4: הלוחה מצוותוולהולהלחמתה והולכים דרך. See Shani Tzoref (as Shani L. Berrin), The Pesher Nahum Scroll from Qumran: An Exegetical Study of 4Q169 (Leiden: Brill, 2004), 91-99; James C. VanderKam, “Those Who Look for Smooth Things, Pharisees and Oral Law,” in Emanuel: Studies in Hebrew Bible, Septuagint and Dead Sea Scrolls in Honor of Emanuel Tov, ed. Shalom M. Paul et al. (Leiden: Brill, 2003), 465-77; Matthew A. Collins, The Use of Sobriquets in the Qumran Dead Sea Scrolls (London: T & T Clark, 2009), 186-90. If the term is deriding הלוחה, one might ask if also derided here. It is interesting to note that if halakot is a corruption of והלכה it is not corrupting the word halakot, and that unlike halakot, the term והלכה appears in positive contexts of study and interpretation: 1QS 6.24, 8.15, 26; 4Q258 i, 1, 4Q270 7, ii, 15. Meier insists that there is no documentation for a regular use of the plural form in the times of the Second Temple, proscribing the rise of such a pun (op. cit. 155).
that are indistinguishable through the language of the surviving texts. It is quite probable that the Essenes were aware that their law could be divided into various categories, including laws that were under debate with other contemporaneous factions and laws that were relevant only to the members of the sect. But one cannot deduce that these laws had different significances for the Essenes, no more than the fact that tannaitic law includes both laws that are exegesis and direct references to laws of the Pentateuch, and other laws that are not documented in Judaism prior to the Mishnah. The only reason that they are all considered “halakhah” is because rather than using the Pentateuch as the measure of delineation of rabbinic law, we address rabbinic law on its own terms, acknowledging its canonization.  

Similarly, I argue, any law found within the corpus of Essene law is law, regardless of the existence of rabbinic parallels or lack thereof.

As a final example of the lack of much-required caution when examining Essene law in light of rabbinic law, I will mention the application of the categories קולא and חומרא (leniency and stringency) to Essene law. Once more, these terms reflect a rabbinic concept, which is unattested in any of the legal texts of Qumran, nor provided as a consideration in lawmaking in any text. There is no evidence that these were relevant categories for the Essenes. While Regev and Noam allude to a clearly sectarian text (4Q171) that uses the cognate word קלות, it is significant that it is not a legal text per se, and that the context prohibits us from translating קלות as directly corresponding to the rabbinic notion of leniency. The sect may well have viewed its adversaries as too lenient, but that in itself is insufficient as proof that they viewed themselves as stringent,


24 For my criticism in this study it is especially relevant that after surveying the various suggestions for translation, Regev, “Reconstructing Qumranic,” 99, concludes with a preference for the “Mishnaic Hebrew connotation.” Thus the argument becomes tautological: the interpretation of an Essene text relies on rabbinic sources, and as a result further connections between “Qumranic law” and rabbinic law are made.
or that they viewed stringency as an ideal. The fundamental approach reflected in Essene law would actually point in the other direction: they did not consider themselves strict, but rather as the correct interpreters and practitioners of divine law and divine will. There is no reason to assume that the sectarians viewed themselves as adding extra safeguards of stringency unrequired by God. The entire debate concerning stringency in Qumran encapsulates the imposition of irrelevant categories, imported from a separate and later corpus, thus obfuscating our understanding of Essene law on its own terms.

As a response to these hindrances, I offer an approach that is based on contemporary legal theory in an attempt to treat Essene law as a corpus of its own. Unsurprisingly, this choice is not without its own set of problems. First of all, my choice to examine Essene law through the prism of “Law and Society” requires a response to the necessity of the second element: is not all law engaged in society?

In his seminal work, *The Authority of Law*, Joseph Raz asserts quite plainly that law is a social system, because in “one obvious sense” it is in force in a certain community; and, in another way, because of its relation to the origin of the law, i.e., certain social institutions that legislate and enforce it:

> The view of law as a social fact, as a method of organization and regulation of social life, stands or falls with the two theses mentioned. At its core lie the theses that (1) the existence of a legal system is a function of its social efficacy, and that (2) every law has a source. The obvious importance of the first thesis should not obscure the equal importance of the second.25

While law is a product of a social system that shapes it as much as it is shaped by it, it has nevertheless been treated as an entity of its own, both in scholarship and in the popular conceptualization of law. Roger Cotterrell explains this “apparent isolation” as a result of the intimidating nature of the law and its encounters with individuals, as well as a product of the professional autonomy sought by lawyers (understood here in the broadest sense of all those who make the law, including legislators and judges).26


Various trends of “Law and...” scholarship testify to sincere attempts to contest and breach this isolation, and likely also point to another cause for this isolation, at least in scholarship: the tendency toward categorization and firm disciplinary boundaries characteristic of modern scholarship. “Law and...” would then, in turn, be viewed as a scholarly byproduct of postmodern currents of interdisciplinarianism.

The pendulum has begun its swing back in the other direction, as demonstrated in a recent criticism against the various “Law and...” movements. My article, with its betraying title, is admittedly part of an interdisciplinary trend, and even calls for more of it, as I advocate a stronger reliance on legal theory among those studying the legal texts of the Dead Sea Scrolls.

There is, however, one further important sense in which I seek to study “Law and Society” in the Dead Sea Scrolls, which is not part of the “Law and Society” movement in the general realm of the study of law: Cotterrell did not define his interest as “Law and Society,” but rather the “Sociology of Law.” As such, he insisted that the discipline requires empirical research and data that will inform the study of the “Living Law.” As this is impossible with Essene law, the title “Law and Society” seeks to underscore its interest in the “Living Law” of the Essenes, inasmuch as it is possible to unravel the living law and extract it from the remaining documents. It also reaffirms the evident political aspect of Essene law, since, contrary to the claims made in these texts, the law is not divine, nor is it a straightforward interpretation of the laws of the Torah. It is, ultimately, a social product.

In his Basic Concepts of Legal Thought, legal theorist George Fletcher begins his outline by describing the legal system, and then proceeds to describe its “Ultimate Values”: Justice, Desert, Consent, and Equality. My discussion begins with Ultimate Values, partially because the full nature of the legal system of the Essenes remains unavailable, and partially because these values


serve as the foundation on which that system rests. However, as is the case with all values, Essene values are founded on certain ontological beliefs that in this context are of a legal substance just as much as they are philosophical. To return to the values outlined by Fletcher, it is clear that their acceptance assumes certain ontological and historical beliefs. A rejection of the belief that all humans are created equal, for example, discredits the merit of upholding a legal system established on the value of equality. The following will describe the ontological and ethical beliefs presupposed by Essene law as their premises. After describing these basic tenets, which are Nature and Creation, Authority and Obligation, I will examine some specific cases in which these tenets inform actual laws that shape the community. These include laws of initiation, exclusion, social structure and offices, and, finally, social conduct within the sect. In some of these cases I will examine not only particular laws, but also the rhetoric of justification embedded in the law.

2. Premises of Essene Law

The premises of Essene law are not listed in an explicit manner. In order to reconstruct the worldview and presumptions that are assumed as given in the wording of the law, one must extrapolate them from various excerpts of rhetoric, admonition, and justification, as well as closely examine the laws themselves. The most significant contribution to this exploration lies in a series of articles

30 Conversely, Fletcher’s choice of order recalls a standard method of inquiry by legal theorists, which discloses a degree of formalism even amongst its opponents: the outset requires a definition of law prior to the exploration of its purported pre-existing values. In addition to Raz’s Authority of Law mentioned above, many other works in legal theory can be cited as following this mode of discussion, but suffice it to note the following classics: Hans Kelsen, Pure Theory of Law, trans. Max Knight (Berkeley: University of California Press, 1967); H. L. A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961); and Ronald Dworkin, Law’s Empire (Cambridge: Belknap Press of Harvard University Press, 1986). An interesting, if unsurprising, divergence from this tendency is seen in the structure of Lon L. Fuller’s The Morality of Law (New Haven: Yale University Press, 1964), which begins with a definition of morality before proceeding to a definition of law.
by Daniel R. Schwartz, who, following Yohanan Silman, hypothesized the “realism/nominalism” paradigm, claiming that priestly Sadducean law was realist, while rabbinic Pharisaic law was nominalist. Various components of Schwartz’s paradigm have been criticized by some and upheld by others, and the debate it has stirred continues to be a sign of its significance.

For the purposes of this study, I am setting aside the points of criticism raised against Schwartz’s paradigm, including the question of identification or relation of Sadducees to the Essenes (or to the “Qumranites,” as those who do not wish to identify them with the Essenes might put it), the relation of the rabbis to the Pharisees, and the justification of labeling rabbinic law as essentially nominalist. Rather, I contend that through this series of articles, Schwartz has persuasively shown that Essene law has a deep strand of “realism,” which I prefer to call henceforth as the Essene version of natural law, following Rubenstein. In one of Schwartz’s more recent responses to his critics, he


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has noted that despite the fact that some Essene laws seem to contradict his argument, they do not occur in points of contention. There is an important nuance here that needs to be emphasized: no legal system is an emblem of philosophical consistency. By their very nature, legal systems tend to be the result of compromises between various political forces, ideological motivations, and unpredicted circumstances, which in their summation constitute the law. The more elaborate a legal system becomes, the less consistent it is, and if we had Essene proceedings of jurisprudence in addition to their documents of legislation, we indubitably would have been even more perplexed by the apparent contradictions between the written law and its application. Even the brief report by Josephus notes that the laws of excommunication are not observed in full, and are often reverted. The penal code in the Community Rule, however, does not give any clue that the legal practices were more lenient than its own decrees.

Following close readings of the texts of Essene law, I argue that the version of natural law reflected in these texts is comprised of the following: the law is divine in origin and everything else derives from this. The legislator is also the creator, and therefore laws concerning time or place reflect natural phenomena and attributes that the creator imbued in them. As a result, any transgression of the law entails a disruption of balance in the world, and causes a physical reality. Schwartz aptly likens this to drinking poison: whether or not a person is aware of consuming the poisonous substance, the results will be the same.36 Similarly, the strict version of natural law by the Essenes extends beyond the views that law is pre-existing and that it is the duty of humans to reveal it, and actually conceptualizes law as strongly involved in the course of nature,

Hayes raises, namely the exact substance and content of the debate, but favor the legal terms precisely because my aim is to emphasize the legal nature of these texts. Hayes is correct in arguing that Schwartz is addressing the ontological and epistemological views reflected in these texts, but the ontological stances reflected in these texts appear only in a presupposed form in the context of lawmaking. The existence of such presuppositions underlying the text does not preclude the texts from the realm of law, and the scholarly framework used to analyze them should strive to restore them back to this context.


concomitantly governing nature and dominated by it.\(^{37}\) The prime example of the polemic over the calendar\(^ {38}\) demonstrates this: the seasons and the annual cycle of the sun are conceived as operating by a preordained law of the creator, and, in doing so, stipulate certain behavior and rituals to be followed in the same diligence and order in which the sun rises.\(^ {39}\)

This view of law places a tremendous significance on authority. The primary authority is that of the text, the biblical law that is allegedly followed to the letter. However, since many of the laws of the sect are either interpretations of biblical laws or entirely new inventions not founded on the Pentateuch at all, authority denotes also the power to those who are responsible for the correct interpretation, application, and enforcement of the law, namely, the leaders of the sect.\(^ {40}\)

37 Of course, it is precisely these foundations that make natural law a concept that permeates many aspects of Judaism, as can be seen in David Novak’s *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998). The majority of the discussion extends beyond anything that would have been known to the Essenes, but see pp. 27-61 for the biblical background of the notion.


39 See 1QS 9.26-10.10.

40 Thus the law is effectively legislated by those with the authority to interpret previous laws, which ironically is quite a rabbinic notion, one that supposedly would have
The significance of authority implies a strong sense of obligation, expected of all members of the sect, towards the laws of God and those responsible for its interpretation. While this obligation is supposedly required as a premise of the law, I shall argue below that this is one of the elements fortified in the societal relations of the sect through the law, not only substantiating the law, but actually guarded by it, too.41


Before concluding my overview of the premises of Essene law, I should note that these are not obvious components at all. Respect for the legal authorities is superficially reminiscent of law-obedience in modern, democratic societies. However, democracies rely on very different premises, primarily on the ideas of human rights, freedom, and equality, as stated above. Duty of obedience to officials granted with the authority of interpretation and legislation are merely necessary instruments devised to protect foundational values. In Essene law we find no trace of ideas about human rights or freedom, and the idea of equality is explicitly contradicted through the notion of an ancestry-based hierarchy. In contemporary legal and ethical theory, obligation to the law is often dependent on the adequacy of the law to maintain and preserve those rights. This is not the case in Essene law where the law is conceived as the true manifestation of the will of God, part and parcel of the natural order. Authority and obligation are not political constructions devised to maintain social order, but rather naturally and divinely ordained requirements, necessary for the proper conduct of the universe and of history.

3. The Impossible Paradox of Voluntary Association and Fate

Having described my methodological approach to the study of Essene law, as well as the major foundations of this law, I now turn to explore the relations between law and society as reflected in these texts. This exploration is by no means comprehensive. I begin, in fact, by glossing over a very important aspect that has been treated sufficiently by others, primarily by Steven Fraade, namely that the community itself is constituted through law, legislating an elaborate procedure of admission and culminating with a ceremonial rite of


passage and admission. Not all communities require an admission process, and this initial step profoundly expresses the decisive role law plays in the life of the sect, and the manifold ways in which it administers and constructs societal relations.

It should also be clear, however, that the deterministic view of the sect prevents us from viewing this initiation process as entirely voluntary. Those admitted to the sect have chosen to live righteously, but it is nevertheless understood that they do so because their fate has destined them to be among the Sons of Light. The tension between choice and volition on the one hand and between fate and destiny on the other is evident in the recurring vocabulary and rhetoric of both these notions. An excerpt from column 1 of 1QS will serve as an example:

3b

אشرح שלשה ואחר כל אשר אמר לעמח מכלל בין

הלברכ וכל מעשי טוב ו_FRONT_ באמות ומדוד ומפשע

בארץ לעצוה שלשה ואחר יالجزת את כל הנדיבים وكل מעשה אהל

בכרת חסלה עליה בצעת את הלחותך לפני טמי כל

הנגלות למועדי תועדות ואיש בן אחיש

כנרהל בצעת את השלונה כל בני טושר איש נשפיטה


3b and to love all
4 that he has chosen and to hate everything that he has rejected,
and to stay away from all evil
5 and to cling to all deeds of goodness, and to do truth and righ-
teousness and justice
6 on earth and to walk no longer in the stubbornness of the heart,
in guilt, and in the eyes of harlotry
7 doing all that is evil, and to bring all those who willfully dedicate
themselves to do the laws of El48
8 into a covenant of grace, to yahadize49 in the counsel of El, and to
walk before him perfectly (in accordance with) all
9 the revealed (laws) of their appointed times, and to love all the
Sons of Light, each one
10 according to his fate in the counsel of El, and to hate all the Sons
of Darkness, each one according to his guilt

The voluntary choice to follow the laws (7) and join the Yaḥad (8) is further
reflected in words of action (“to love” – 3; “to cling” – 5, “to walk” – 6, 8),
emphasizing that man directs his own actions out of volition and choice. In
the same brief passage, however, choice and election is explicitly and strongly
associated with the decree of God concerning what is good and what is evil
(4), in addition to language of “fate” (10) and “appointed” (9), diminishing for

48 “El” seems to be used in 1QS as a proper noun, possibly as a means of avoiding
the Tetragrammaton. As such, it is inaccurate to translate it as “God,” which
commonly renders אלהים in biblical translations.
49 The awkward translation I offer here is intended to stress that the authors who
decided to use יחד as a verb in the niphal were themselves playing on the name
of the community, and it should therefore not be translated as merely “uniting”
(Wise, Abegg and Cook, Dead Sea Scrolls, 139; cf. DSSSE 1:71, Collins, Beyond the
Qumran Community, 71), “enrolling” (DSSSE 1:83), “joined” (Wise, Abegg and Cook,
Dead Sea Scrolls, 127), “to make common cause” (Wise, Abegg and Cook, Dead Sea
Scrolls, 133), or “coming together.” In all three occurrences of this infinitive (1QS
1.8; 5.20; 9.6) it denotes the formation of the community. Thus, García Martínez
and Tigchelaar aptly render it, “form a... community” for 1QS 9.6 (DSSSE 1:91).
I accept this interpretation, but want to add to it the sense of a verbization of a
proper noun, which was surely the way it sounded when read by a member of
the Yahad. On the rhetorical use of יחד see Carol A. Newsom, The Self as Symbolic
all practical purposes the role of human volition. The similarities between
the language here and the language in the Damascus Document have long
been noted, and provide a further example to the shared ideas and the larger
framework addressed in this study as “Essene law.”

Another tension that arises is the tension between exclusion and inclusion.
The sect simultaneously fashions itself as a select group of people, the Sons
of Light, separate and better than the rest of the people. At the same time,
they manifest not only their disdain for their compatriots, but also a sincere
concern and an attempt to change their ways. An illustrious example of this
tension rests in the mere existence of 4QMMT, when read as copies of an
originally authentic epistle. While stressing their separateness, the authors of
4QMMT nevertheless show true concern for the misconduct of the addressee,

50 CD A 2.14-18, partially preserved in 4QD³ 2 ii.
51 Sarianna Metso, “The Relationship between the Damascus Covenant and the
M. Baumgarten, Esther Glickler Chazon, and Avital Pinnick (Leiden: Brill, 2000),
85-93. However, as already noted, several scholars focus on the differences between
these branches. In addition to aforementioned studies, see also Himmelfarb,
A Kingdom of Priests: Ancestry and Merit in Ancient Judaism, 115-42.
52 For further discussion on this nuance from a different perspective, see Gudrun
bibliography there. See also Adiel Schremer, “Seclusion and Exclusion: The
Rhetoric of Separation in Qumran and Tannaitic Literature,” in Rabbinic Perspectives:
Rabbinic Literature and the Dead Sea Scrolls, ed. Steven D. Fraade, Aharon Shemesh,
53 This is disputed by many. For a survey of views, see Hanne von Weissenberg,
4QMMT: Reevaluating the Text, the Function, and the Meaning of the Epilogue (Leiden:
Brill, 2009), 144-67. Grossman’s response to Fraade’s groundbreaking essay on the
issue accentuates the multiple possible uses of the text and serves as an important
point to keep in mind when considering the purpose of several copies archived
in Qumran. See Steven D. Fraade, “To Whom It May Concern: 4QMMT and Its
4QMMT: Genre and History,” RevQ 20.1 (2001): 3-22. However, that its initial
purpose was as an epistle with a specific addressee in mind seems to me evident
from its rhetoric, as well as the extant laws, which do not include any laws that
would be of exclusive concern to the inner circle of the sect. See Menahem Kister,
“Studies in 4QMiqqt Ma’ase Ha-Torah and Related Texts: Law, Theology, Language
and Calendar,” Tarbiz 68.3 (1999): 317-71 (Hebrew).
54 I am referring here to the famous proclamation: (“that we have
separated ourselves from the multitudes of the people”) in 4QMMT (4Q397)
14-21, 7 [Composite Text: MMT C, 7].
and by implication disclose an assessment that they do believe there is hope for change. These tensions once again evoke the lack of consistency revealed when examining an ideology against the realities of its practiced life. It calls us to proceed with more caution when examining inconsistencies between the texts, and to consider not only the factual contradictions, but also the context and possible causes for these contradictions.

Some will argue that joining 4QMMT and 1QS into one discussion is a methodological flaw, especially since the historical circumstances and the social milieu in which and for which 4QMMT was authored are so disputed. I therefore reiterate that my methodological stance is to analyze these texts as “Essene law,” recognizing that “Essene” denotes various factions operating over a considerable time period, and, therefore, differences and opposing views are not surprising. It is the shared elements that concern me. Both 4QMMT (Composite Text C, 76-80) and 1QS (9.5-7) express a clear distinction of hierarchy between priesthood and laity, which must be maintained as part of religious life and the socio-legal reality. Within 1QS the concerns would have been for the structure of the sect itself. But the concern extends beyond the conduct of the sect itself, reflecting precisely the tension I am addressing here, between exclusion and inclusion. The sect does not suffice with mandating hierarchical constructions for itself but is concerned with maintaining this hierarchy outside of its circles. Following the readings of 4QMMT by Fraade and Grossman, I note that the existence of several copies testify to a continuing interest in this text, even if it did belong to an earlier stage of the sect, as some have argued. Whether studied by novices or by all sectarians, their study inculcates a sense of responsibility for the temple in Jerusalem, even if the members have withdrawn from it. The existence of the texts, thus, reveals to us that a sincere concern for erring outsiders, as well as a scathing admonition to them, remained a vital element of this secluded sect.

This concern for hierarchical boundaries is markedly related to Schwartz’s point concerning “realism,” or to the Essene view of natural law. Hierarchies are a result of natural phenomena (such as age, gender, lineage) and thus are part of the natural order and movement of the world, preordained by God. The errors of the priests contaminate the temple and the holy city, and separating from the multitudes would have probably been viewed as insufficient for purposes of purification, and, ultimately, salvation.
4. Two Types of Exclusion

In addition to the sect’s separation from the multitudes of the people and the inherent tensions in such an act of exclusion, there are also the exclusionary practices within the sect itself. Here we encounter two major types of exclusion: a fixed purity exclusion and a fluctuating punitive exclusion. The first category reflects those who are permanently prohibited from partaking in the congregation. Such lists of prohibited individuals appear in the Damascus Document (CD 15.15-18; cf. 4QDa 8 i), the Rule of the Congregation (1QS a 2.3-9), and the War Scroll (1QM 7.3-7). These three lists are once more an example for the usefulness of labeling these texts “Essene” and pointing to their shared tradition, worldview, and laws. The differences between the lists are definitely important, as well as the separate circumstances they imagine. The eschatological war envisioned in the War Scroll requires laws of purity as if it were a ritual event, but nevertheless it is understood as ahistorical: it does not depict a past event, and its author, who quite certainly was familiar with the Damascus Document and the Community Rule (and plausibly other sectarian texts, such as the Hodayot), did not expect the war to be a recurring event of routine as those described in the Damascus Document and the Rule of Congregation. But it is precisely these differences that emphasize all the more the shared rationale provided in all three texts for the exclusion of deformed

55 I began by referring to these two types of exclusion as “static-purity” and “dynamic-punitive,” but chose to substitute those adjectives in order to avoid confusion with Regev’s distinction of static and dynamic holiness (in his “Reconstructing Qumranic and Rabbinic Worldviews: Dynamic Holiness vs. Static Holiness,” as cited above, n. 23). Regev’s distinction is another response to Schwartz’s Realism/Nominalism hypothesis, and, like Schwartz, he posits a distinction between the two that is founded on an ontological difference. For the “Qumranites,” writes Regev, “Impurity is a virtual entity” (91), following the Priestly Code in the Pentateuch, whereas for the Pharisees and the rabbis, “the whole cultic system of priests-Temple-sacrifices…lacks an inner meaning” (103). The distinction I offer here between two types of exclusion is of a different nature, but in a way serves to reinforce Rubenstein’s original criticism of Schwartz’s hypothesis: differences exist not only between Essene law and rabbinic law, but even within each of those systems we can find contradictory approaches. A full appraisal of a legal system requires an acknowledgement of the diverse circumstances it seeks to regulate, and as a result, of its multivalent composition.

56 For comparison of the War Scroll and the Rule of Congregation, see Brian Schultz, Conquering the World: The War Scroll (1QM) Reconsidered (Leiden: Brill, 2009), 327-65.
people, as noted already by Shemesh,57 Wassen,58 and Dorman59: the presence of these deformed people would be offensive to the angels. Wassen suggests that in addition to concerns of purity, this practice also reflects a fear of evil forces, namely demons. The language in any of these texts does not allow us to equate impurity with sin, let alone evil, although it should be agreed that there is a correlation between the degree of concern for impurity in a certain group and the possibility of conflation between the dichotomy of pure\impure and the dichotomy of good\evil.

From a societal analysis perspective, two aspects of this exclusion should be noted: it is purity-based, which is the cause for its implementation, and it is fixed, which states the manner of its implementation. All people who manifest the listed deformations are excluded, with no possibility to appeal and with no change throughout the course of their lives. Their exclusion from the sect is not a matter on which the members of the sect can judge or change their minds, and it actually becomes one of the markers defining the sect as a societal construct. Regardless of their own justifications (namely, the presence of the angels), the Essene congregations are defined, among other things, as homogeneous communities that are not comprised of the full range of humans; they do not include mentally or physically deformed people.

Two exceptions to this statement are perhaps self-evident but should be noted for the sake of comprehensiveness: the child is, by nature, an exclusionary category that can change through life. It is fixed in the sense that so long as he is a child the prohibition applies. Second, deformations can occur through the course of life. One may be born seeing and become blind. This is the inverse case of the child: so long as the affliction has not occurred, the law does not apply to him. The moment it has, the law applies and remains fixed from that point on.

59 Johanna Dorman, The Blemished Body: Deformity and Disability in the Qumran Scrolls (Groningen: Rijksuniversiteit, 2007). Full text of this dissertation can be found online at http://irs.ub.rug.nl/ppn/303227966.
Exclusion also serves as a disciplinary measure. The existence of such a punishment attests to the points stressed above: by transgressing, a member reveals himself to be of a separate group, namely under the dominion of Belial, and thus his fate cannot account among the Sons of Light. In practice, the community may well have been in a constant state of selection and evolution, while its rhetoric claimed to be a static condition ordained by God. Some would not have accepted this fate: Josephus tells us that upon expulsion, members would reach the verge of starvation, refusing to consume impurities of external people. At this point, the sect would accept “many of them” back on account of their sufferings \(\beta\acute{a}\mu\alpha\upsilon\upsilon\omicron\) brought on by their transgressions \(\tau\iota\iota\zeta\ \acute{a}m\alpha\tau\acute{t}h\acute{m}a\omicron\sigma\iota\ \alpha\upsilon\tau\omicron\omicron\nu\) \(^{60}\). Thus, the punitive exclusion is defined as fluctuating since it could be modified and retracted, and serves as another example for the disparity between the written law and the practiced law in real life. We correctly imagine that this would only be the case for the punitive type of exclusion, not for the fixed exclusion of the impure. \(^{61}\)

The fluctuating nature of the punitive exclusion is apparent not only through Josephus’ report of its being retracted, but already in the penal codes of CD 9-14 and 1QS 6-7 that list various punitive exclusions, ranging from the probation expulsion to the ultimate banishment or excommunication. \(^{62}\) Various degrees and terms of exclusion are unimaginable for the purity exclusion, and demonstrate the complexity of defining the rationale, presuppositions, and purpose of exclusionary practices. On the one hand, these two separate types of exclusion correlate with the categories of sin and impurity, and thus may join to corroborate the view that sin was not conceptualized as producing

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\(^{61}\) In addition to aforementioned studies by Shemesh, Wassen, and Dorman, see Hannah K. Harrington, “Keeping Outsiders Out: Impurity at Qumran,” in *Defining Identities: We, You, and the Other in the Dead Sea Scrolls. Proceedings of the Fifth Meeting of the IOQS in Groningen*, ed. Florentino García Martínez and Mladen Popović (Leiden: Brill, 2007), 187-203.

impurity under Essene law. However, if it is preposterous to imagine a suspended exclusion of someone with a sight problem who is not entirely blind, it is difficult to account for the choice to expel a member for a probationary period, when his transgression raises a doubt as to his identification as a Son of Light. Bringing the argument to the extreme, one can easily imagine how the mild transgressions should actually be those leading to immediate and permanent expulsions, since they prove a person to be a Son of Darkness professing himself to be a Son of Light, and thus a danger with a potential threat far graver than the blind or the deaf whose impurity is evident. Yet we know this is not the case: we know that the exclusion of the deformed is stricter than that of the transgressors, and we have a testimony that even after a permanent excommunication was decreed, it could be overturned. Reconciling a legal rationale with real-life practice of jurisprudence requires acknowledgement of a simple fact: only the enforceable law is enforced. The Essenes greeted deformed people with more strict exclusionary prohibitions than they offered to offenders from among their own because their detection was simpler, rendering enforcement more straightforward. Once a judiciary process began with evidence and counter-evidence presented and open to interpretation, law took on the form of life, with little being certain.

5. Community Structure and Officers

The interrelations of law and society are not restricted to the boundaries of that society through the acts of law. The society is regulated through laws, and the rules for enforcing those laws and assigning roles and authority are themselves products of legislative activity. While the Essenes conceived of the law as divine in origin and not by inspiration alone, the legacy of the Torah left a tension as to the origin of appointing officers for the practice of jurisprudence. Exod 18:13-27 famously recounts how Moses delegated his jurisprudential roles to chiefs of thousands, hundreds, fifties, and tens following the advice of his Midianite father-in-law. Num 11:14-17 suggests that God initiates the delegation of authority from Moses to seventy elders and overseers (שֵׁטֵרֵים) in response to a complaint from Moses. In either case, the establishment of legal institutions based on hierarchy and merit is said to date back to the times of Moses. The precise roles of the elders, which appear to pre-exist this

establishment, is not made explicit and while it clearly concerns legal matters, it comprises a variety of duties.64

Similarly, the Essenes do not explicitly claim their social structures to be divinely sanctioned,65 although they do claim to have access to knowledge of divine origin.66 The structure of the sect is regulated through law on two levels: first, communities are divided into tiers based on ritual roles, singling out the priests, descent (reflected in terms such as the sons of Zadok, the sons of Aaron, and the sons of Israel), and age, exemplified in the priority of elders. In addition to this hierarchy of the community as a whole, the laws assign specific


roles to individual officers, namely the priest (הכהן), the Instructor (המשליך), the examiner (הפקיד), and the overseer (המבקר). There are no clear laws as to how one is appointed to office, or even the degree of convergence between these various roles. Still, it is correctly assumed that only priests could become officers. This is a lack of what Hart called primary rules, which are the laws that govern the legal process by establishing the obligation to adhere to the laws and stipulating the manner in which laws are legislated. Their absence can be explained in various manners, such as attributing it to an underdeveloped legal system or pointing out to the Torah as a basic “Rule of Recognition” accepted by all the members of the sect, but hypotheses regarding deficiencies are ultimately confined to the realm of speculation. While the political process that entrusted the officers with authority remains unknown, it is certain that these officers play a major role in administering and enforcing the law within practically every social interaction. This “overarching organization,” as Steven Fraade has called it, does not only seek to monitor and manipulate the conduct of individuals, effectively argued in Carol Newsom’s Foucauldian reading of 1QS, but also the conduct of the community as an undivided unit.


72 Newsom, Self as Symbolic Space, 91-190.
6. Laws Regulating Social Conduct

In order to investigate the preponderate nature of law over the community, I proceed by exploring several cases in which law regulates quotidian social conduct. In 1QS 6.3-8 we read:

3b And in every place where there are ten men of the Council of the Yahad, let not lack among them a man

4 who is a priest. And each one shall sit according to his rank before him, and thus too they shall ask their counsel on every matter. And when they prepare the table for eating, or the new wine

5 for drinking, the priest will send out his hand first to bless (or: be blessed) in the first (piece and drop) the bread and the wine <for drinking, the priest will send out his hand first

73 Read: חוליפות.

74 Despite the usage of ראשית as “first fruit” (Hos 9:10) and in contrast to previous translations, it does not seem in context to refer to ראשית as such. The law is mandating conduct for every dinner on a set table, and one can hardly imagine that every dinner would include “first fruit,” bread, or wine. García Martinez and Tigchelaar suggest reading this as an interpolation of a specific law concerning first fruits, but I see no reason to see anything else but the first bite of the bread and first drop of the wine.
6 to bless (or: be blessed) in the first (piece and drop) of the bread and the wine>. And in a place where there are ten, let not lack among them a man to study the law, day and night
7 always, relieving one another. And the Many shall be watchful together (or: in the Yahad) for a third of each night of the year to read the book, and seek justice
8a and bless together (in the Yahad).

There are several issues of interest in these statutes concerning the duties of the priest in the sect. His stated prerogative to be the first to send out his hand for the bread or the new wine is not simply the privilege of the elite to choose their portions, since it is enveloped in two separate laws that do not allow him to enjoy benefits of his status, but rather impose on him duties and make demands on his time. These two laws mandate that any gathering of ten members of the sect will include a priest, and that any gathering of ten people will include a designated member who will study the law. It seems plausible that complying with these stipulations was not a challenging task, given the assumption that many members of the sect were priests. A Foucauldian reading,

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to echo Newsom once more, would consider it as yet another means of control, dispensing the policing power to the priests and thwarting any possibility of insubordination before it can take form.

Nevertheless, the formulation of the law does entail that if somehow ten people should happen to gather in one place with none of them being a priest, they would have to disband. We may imagine them wanting to have a member designated to study the law at all times, but it is just as equally possible that when members need a rest from the intense study, they would require code-words, insinuating gestures, or self-imposed initiatives of dispersing, so as not to reach the inconveniencing quorum. When taking into account the ever-existing gaps between the written law and the practiced law, which also consists of the tension between the spirit of the law and the loopholes sought to avoid it, we can and must recognize that these are possible derivatives. Imagining such considerations vivifies the predominance of Essene law on all aspects of social life as it extended far beyond the explicit concerns of the text.

Another example pertains to social interactions, following several statutes in the Damascus Document and their counterparts in the Community Rule:

\[
\begin{align*}
\text{2b} & : \text{רשør [יקו]ו את רעהו של עצה [וזהרב] שענה התנוגשש} \\
\text{3} & : \text{שש חורשים ורשור יבר כמי} \text{רוב נגנשו אנשיס} \\
\text{4} & : \text{יוו ויהרב ביש לורישים ורשוי יבר רעהו ופורע} \\
\text{5} & : \text{ונגנש עשת ימ[אי] יברב לוריש יבשב והרב וברענ} \\
\text{6} & : \text{וזהרב עלורישים ומכגוינש עשת ימ[אי] ובראיא הנוג_Thread} \\
\text{7} & : \text{האר לו ביבעה הזורב[ים הוורמ]י[י] שבלש פאמים על מרוש[ב]אחר} \\
\text{8} & : \text{הננוש[ועשת ימ[אי] וק[יפא]הנמר[במהס נגנש שלורישים]}
\end{align*}
\]

76 Newsom, Self as Symbolic Space, 140.
77 4QDa 10 ii, 2-9. Lines 3b-9a are quoted almost verbatim in 1QS 7.9-12. Cf. also 1QS 6.10-13 for further legislation concerning speech in the Council of the Many, and 1QS 5.25-26, 4Q264a 1.6-8 for other restrictions on speech.
2b And whoever takes vengeance of his fellow outside of the council [shall be] separated for one year and punished.

3 for six months. And anyone who speaks in his mouth the words of a debased man, will be punished for twenty days and shall be separated for three months and he who shall speak within the words of his fellow and rowdily

4 [days and shall be separated] for three months and he who shall speak within the words of his fellow and rowdily

5 [shall be punished for ten ]days [and whoever lies down and ]sleeps at the session of the many or in the council

6 [shall be separated for] thirty days [and] punished for ten days. [And likewise for one who le]aves

7 Without the counsel of the many, doing so up to three times in one [session]

8 sh[all be punished] for ten days. And if [they are standing] and he leaves [the session, he shall be punished for thirty days]

9 The operative words are the repeated forms of gathering, עצרת הרבים and מושב הרבים, disclosing that these laws only regulate speech during the assembly of the council, and, as such, are an understandable measure necessary for any

78 Baumgarten and Hempel read יצחה, and translate “insult.” Following Qimron, I read יקומ. See Elisha Qimron, The Dead Sea Scrolls: The Hebrew Writings, Vol. 1 (Jerusalem: Yad Ben Zvi, 2010), 55. The sense of vengeance is not entirely clear, but might be associated with admonition or public chastisement for offences based on Lev 19:17-18. In other words, within the security of the public sphere and its regulations, the reprimand is permissible and even mandated, as הוכחה. Outside of the council, it is vengeance, and thus prohibited.

79 should be amended to שלוא. Since עצה is used for both “council” and “counsel,” the meaning is ambiguous. Baumgarten and Hempel both read this to mean “counsel” as in “[ins]ults his neighbor without conferring” (Hempel, The Laws of the Damascus Document, 142). As I explain below, the series of laws are concerned with the public sphere in which the transgressions occur, and, therefore, עצה should be understood here as the institution.

80 is unclear in this line. I provisionally follow Baumgarten’s translation, although there is a possibility of it meaning sleep, reverting to the previous law, and perhaps distinguishing between a slumber and a doze. That would suit the threefold occurrence, which might be more appropriate for a prohibition on dozing off than a prohibition on leaving without permission. However, the repetition is confusing, and thus I cannot fully endorse this proposal.
communal gathering. Similarly, the penalty for falling asleep in the Council of the Many serves to admonish the disrespect involved in such an act. However, in a sect that strives to live a moral and pure life in every moment, these basic rules of conduct could be expected to be transported into everyday life. A member who knew he could be punished for interrupting a fellow’s speech during a session of the council would be prone to develop restraint when conversing with his fellows outside of the sessions. The Community Rule includes this paragraph almost verbatim, but also additional laws concerning speech, including a hierarchy of speaking turns and a prohibition to proclaim something that would be displeasing to the many (1QS 6.10-11). Laws of rebuke and reproach (1QS 5.25-6.1) moderate disputes and ill relations outside of official gatherings. Combined, these laws reflect an elaboration on the laws concerning speech and conduct in the council as they are preserved in 4QD. Some room for caution is necessary in light of the fragmentary preservation of the Damascus Document, but the elaborations that appear in the context of immediate quotations allow us to follow the expected tendency to employ laws that originally governed the council alone into the daily lives of the sectarians. When we add to this the prescribed presence of a priest for any gathering of ten, it is evident that even the most basic social interactions of communal life were governed – perhaps even increasingly governed – by the laws that tempered the deliberations of the community in its council.

7. Conclusion

These preliminary remarks are intended to propose a framework for thinking of Essene law in general, and specifically in the context of community construction, acknowledging the decisive role law plays in this enterprise. While I focused on laws that mandate social conduct for the purpose of this study, I also tried to point to the manner in which the presuppositions that inform these laws apply equally to laws that are echoed in later rabbinic literature. It is no surprise that the sectarian laws are, by and large, peculiar to the sect and are not emulated in rabbinic texts in any way, but this does not mean that they belong to a legal stratum separate from other Essene laws or that they can be treated in isolation from one another. The entire Essene corpus should be treated as such, even by those who will consider my choice of label a misnomer. That being said, I should reiterate that I have no intention of discrediting the study of differences and nuances within the corpus. In the fields surrounding the study of the Dead Sea Scrolls it is clear that one can say “biblical,” “rabbinic,” or “early Christian” and refer to the corpus as a single mindset, while not denying the
multiple strands, the historical developments and the various voices enfolded within those corpora. The Essene corpus is no different: shared worldviews, laws, and practices resurface and are reflected in various texts of the scrolls, despite very different genres. It is imperative that scholarship addresses the unity no less than the diversity. The laws, even with their differences, reflect shared presumptions regarding the origin of the law, the authority to interpret it, and the implications of transgressions. While these presuppositions, which are practically never made explicit, are starkly different from those that furnish modern legal systems, reverting to a scholarly framework and terminology of lawyers could prove helpful when assessing “some of the acts of the law.”