LEGAL REALISM AND THE FASHIONING OF SECTARIANS IN JEWISH ANTIQUITY

Christine Hayes

No single factor can account for the sectarianism (or perhaps “varieties of Judaism”) characteristic of the late Second Temple and rabbinic period for surely there were many points of difference around which groups in antiquity coalesced. Here I propose to examine a point of difference that has not been adequately explored to date—divergent theories of law (or more precisely, legal epistemologies)—and then to point out the way in which this difference became the basis for the literary fashioning or characterization of the “heretic” in rabbinic texts. (I use heretic as a translation for “min” and “tsadoq” for lack of a better term, though I recognize that the term heretic implies a difference in belief; in due course I will provide a more nuanced portrait of the rabbinic perception of a “heretic.”)

To state my conclusions up front: sectarian writings of the Second Temple period evince a legal realism according to which law conforms to and may be confirmed by divinely revealed or empirically tested knowledge of “the way things really are.” Rabbinic sources retain a memory of this legal realism in depictions of sectarians as either ridiculing or refusing to accept laws that diverge from “the way things really are.” This historically grounded depiction became the basis for more developed literary characterizations of heretics in rabbinic sources as antinomian scoffers. In the rabbinic imaginaire, the sectarian’s/heretic’s repudiation of individual laws as absurd becomes a repudiation of the law in general, the authority of those who expound the law (the rabbis themselves) and ultimately the Scriptures from which they derived their authority.

Daniel Schwartz and Jeffrey Rubenstein

In a 1992 article Daniel Schwartz suggested that the Qumran sectarians and the Sadducees espoused a realist view of the nature of law typical of those with a priestly orientation; by contrast, he asserted,
rabbinic literature is manifestly nominalist in its approach to law.¹ He defines realism in this context as the view that God’s law forbids what is intrinsically and really wrong and declares impure what is intrinsically and really impure. Nominalism, on the other hand, is the view that something is wrong or something is impure because it is declared so by the law, but not because it is intrinsically wrong or impure. Schwartz argued that some of the disputes that motivated the withdrawal of the Qumran covenancers from Jerusalem may be accounted for on the basis of this difference in legal theory.

In a 1999 article Jeffrey Rubenstein responded directly to Schwartz’s claims, arguing that rabbinic law is not uniformly nominalist but heavily realist, and that many of the disputes isolated by Schwartz are due to differences in exegesis rather than differences in legal theory.² While there are indeed points of weakness in Schwartz’s article, many of Rubenstein’s criticisms are misplaced. Sorting out this controversy—and the virtues and weaknesses of both articles—will help us identify more precisely divergent theories of law in Jewish antiquity. Part 1 of this paper is devoted to that goal. We will then be in a position to determine the degree to which these very real divergent legal theories may have played a role in the fashioning of the heretic (for our purposes, the ṭsadoqi and the min) in later rabbinic literature. This will be the focus of Part 2 of the paper. Thus, while Part 1 will look at how a group identifies itself, Part 2 will examine how that group is identified and characterized by others and will argue that the latter may have a strong footing in the former.

I. Sectarian Realism and Rabbinic Nominalism

Rubenstein objects to Schwartz’s use of the terms realism and nominalism on the grounds that they are philosophical terms that relate

¹ Daniel Schwartz, ‘Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law’, in Dead Sea Scrolls: Forty Years of Research, ed. Deborah Dimant and Uriel Rappaport (Leiden and New York: Brill, 1992), pp. 229–240. Schwartz recognizes that the best examples of rabbinic nominalism are post-destruction. However, the chronological distance between the Qumranic and rabbinic evidence is not critical for him because Schwartz is interested in pursuing a phenomenological comparison.