

*MEGILLATH ESTHER* AND THE RULE OF LAW:  
DISOBEDIENCE AND OBLIGATION

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Strange is *Megillath Esther*, the *Scroll of Esther*. It mentions God not once, yet it is second only to the Torah, the Five Books of Moses, for its wealth of rabbinic commentary.<sup>1</sup> It recounts part of the sacred history of the Jews, yet it is set in Persia. It emphasizes the obligation of Jews to observe the holiday of Purim, yet it emphasizes at the same time the importance of violating legal obligations. Perhaps no other book of the Bible offers such a mix of plotting and ironic reversals, of mass partying and mass killing, of folly and deadly earnest.

All the same, perhaps no other book of the Bible offers wisdom on the legal order of more importance to contemporary America. The *Scroll of Esther*—the *Megillah*<sup>2</sup>—supports a fundamental rule of law while observing that some laws may be foolish and more honored in the breach. If America has become a land where it may be expected that the typical resident commits three felonies a day,<sup>3</sup> and where the Executive Branch uses prosecutorial discretion as a dispensing power,<sup>4</sup> it may welcome a

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<sup>1</sup> LEWIS BAYLES PATON, A CRITICAL AND EXEGETICAL COMMENTARY ON THE BOOK OF ESTHER vii (1908). It should be noted that the lack of the mention of God does not suggest that He is absent from the story of *Esther*. *Esther* recounts “a dizzying confluence of unexpected events and seemingly remarkable coincidences, resulting in an undeniably miraculous turnabout of fortunes,” its “course of events bears the unmistakable imprint of Divine Providence,” and it teaches that “ultimately it is the seemingly hidden ways of God that guide the course of history.” Samuel J. Levine, *Reflections on Responsibilities in the Public Square, Through a Perspective of Jewish Tradition: A Brief Biblical Survey*, 56 CATH. U. L. REV. 1203, 1218 (2007). For a contrary interpretation that sees *Esther* as a guide to Jewish life when God distances Himself from human affairs, consult YORAM HAZONY, THE DAWN: POLITICAL TEACHINGS OF THE BOOK OF ESTHER (rev. ed. 2000). “The term ‘God’ appears nowhere, and one is hard-pressed to find any trace of theology amid the hairpin turns of the tale.” *Id.* at 1.

<sup>2</sup> *Megillah* is Hebrew for “scroll” (and *megillath* is Hebrew for “the scroll of”) but traditionally “the *Megillah*” refers to one scroll specifically, *Megillath Esther*.

<sup>3</sup> See HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxvi (2011) (noting that citizens, in the eyes of prosecutors, may be committing three felonies a day); cf. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 785–91, 793–95 (2012) (describing the vast problem of over criminalization); Craig A. Stern, *Crimes in America: Too Much of a Good Thing*, 7 CHRISTIAN L. 13, 14 (Spring 2011) (same).

<sup>4</sup> See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Luna, *supra* note 3; Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN. L. & POL’Y REV. 633 (2011); Vijay Sekhon, *Highly Uncertain Times: An Analysis of the Executive Branch’s Decision to Not*

lesson on how the rule of law might endure such a time. Perhaps the *Megillah* was written “for such a time as this.”<sup>5</sup>

The *Megillah* exists to commemorate both God’s deliverance of the Jews and also the annual celebration of that deliverance, Purim. The record of the Jewish community’s taking upon itself the obligation to keep the festival of Purim culminates the *Megillah*. That obligation is one of law. But the story of the *Megillah* turns repeatedly upon instances when the heroes of the story disobey law, sometimes without penalty, and sometimes even with great advantage. And so arises the biggest irony in a work noted for its ironies: The *Megillah* imposes the obligation to obey a law founded indirectly upon disobedience to laws. To do so successfully requires that it distinguish between laws to be kept and laws not to be kept. Furthermore, it must make the distinction clear and authoritative enough that the two categories marked by the distinction do not bleed into one another. This distinction is essential to the *Megillah*. It also is essential to the health of a legal system of the sort now to be found in America.

This article explores the jurisprudence of the *Megillah*, focusing on the question of obedience and the rule of law. Part I summarizes the story of Esther. Part II takes a closer look at how law figures in the story. Part III poses the tension between law in the *Megillah* and the very purposes of the *Megillah*. Part IV explains how the *Megillah* resolves that tension in its teaching on legal obligation. Part V concludes with reflections on the significance of that teaching for the rule of law. This article presents the jurisprudence of the *Megillah* as a fundamental lesson of this book of the Bible.

## I. THE MEGILLAH

This, in brief, is the story of the *Megillah*:<sup>6</sup>

King Ahasuerus reigns over the vast Persian Empire. At the second of two grand feasts—the first having lasted half a year—he summons Queen Vashti to appear before his guests. He

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*Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553 (2010).

<sup>5</sup> *Esther* 4:14 (English Standard Version, and so throughout unless otherwise noted).

<sup>6</sup> Rather than reading this précis, far better to read, as they say, “the whole *Megillah*.”

intends to flaunt her beauty. Vashti refuses to appear. The enraged (and perhaps flummoxed) Ahasuerus consults his learned counselors for advice on what to do with his wife—according to law. On that advice, he degrades Vashti.

Sometime later, Ahasuerus goes about replacing Vashti. He orders his officers throughout the empire to collect all the beautiful virgins and send them to his harem to be prepared to spend the night with the king. The one who pleases him shall be his new queen.

One of the virgins so collected is Esther, an orphan Jewess having been adopted by her cousin Mordecai and now living with him in the capital. Esther keeps her Jewish identity secret, as Mordecai has commanded. She finds favor with the eunuch in charge. Well treated and well advised by the eunuch, Esther spends her night with Ahasuerus. Ahasuerus is delighted, crowns Esther queen, and celebrates.

Two other of the king's eunuchs plot against him. Mordecai finds out and relays the information to Esther, who notifies the king on Mordecai's behalf. After investigation, the eunuchs are hanged and the affair finds a place in the royal chronicles.

Now enters the villain. Haman, member of a tribe of ancestral enemies of the Jews, receives promotion from Ahasuerus to the highest office. The king commands all to prostrate themselves before Haman. Mordecai refuses as a Jew. Haman, enraged at Mordecai's refusal, determines to destroy all the Jews. He depicts them to the king as nonconforming and unprofitable to tolerate, and offers the king a huge sum to have them destroyed. The king agrees and invests Haman with the power to have the Jews destroyed. Haman has an edict go forth throughout the Persian Empire in the name of Ahasuerus, ordering the total annihilation of the Jews eleven months later and the plundering of their goods.

Mordecai learns of the edict. He and the other Jews that learn of it openly lament. When Esther's servants tell her of Mordecai's lamentation, she sets about discovering from him the reason and is told that her people are to be destroyed. Mordecai sends word to command her to appeal to Ahasuerus.

Instead Esther sends word to Mordecai that it is death to approach the king uninvited, and that she has not been summoned to her husband in a month. Mordecai warns Esther against imagining that she would escape the edict. Esther agrees to approach the king and orders Mordecai to have the Jews in the

capital join her and her attendants in a three-day fast of preparation.

On the third day Esther approaches Ahasuerus. The king forgives the intrusion, welcomes her, and invites her to request anything she should desire. Esther asks that Ahasuerus and Haman join her that day in a feast she has prepared. At the feast, the king renews his invitation to Esther that she make a request. She requests that he and Haman again join her in another feast the following day.

On the way home from the first feast, Haman sees Mordecai at the king's gate once again refusing to prostrate himself at his passing. At home, he vents his hatred of Mordecai before his wife and friends. They advise him to erect a gallows seventy-five feet high and to ask the king to order Mordecai hanged upon it. Haman builds the gallows.

Ahasuerus has trouble sleeping that night so he orders that the book of chronicles be read to him. It happens that the record of Mordecai's report of the conspiracy against the king is read. Ahasuerus asks what reward Mordecai has received for this service and is told that Mordecai has received nothing. The king then asks who is present in his court. Haman just then has arrived to ask the king to have Mordecai hanged. The king summons Haman and asks him to describe what should be done to the man the king chooses to honor. Haman, sure the king's question refers to what is to be done to himself, describes the honoree vested in royal garments and paraded by a high official of the king. The king orders Haman himself to do this very thing immediately to Mordecai, and so he does. Afterwards, Haman hurries home and tells this episode to his wife and friends. They predict his fall before Mordecai. Ahasuerus's eunuchs interrupt and rush Haman off to Esther's second feast.

The feast now over, Ahasuerus repeats yet again his invitation for Esther's request. Esther now pleads that her life, and the lives of her people be spared from the destruction for which they have been sold. The king asks her to name the one who has worked this evil. She names Haman. The king walks out in a rage and soon returns to find Haman falling on Esther's couch to beg for his life. The king is all the more enraged. Haman is removed and the king has him hanged on the gallows he built for Mordecai.

Ahasuerus gives Esther Haman's house and invests Mordecai with his own signet ring, previously worn by Haman. Esther then appeals to the king for revocation of the edict Haman

has procured for the destruction of the Jews. Ahasuerus allows Esther and Mordecai to issue an edict in his name. The edict, sent throughout the empire, permits the Jews to defend themselves against attack on the day set by Haman's edict, and to destroy and plunder their enemies. The Jews rejoice at the edict and many Gentiles profess to be Jews.

On the appointed day, the Jews destroy their enemies. The king's officials assist for fear of Mordecai. Though they do not plunder, the Jews kill about 76,000, including three hundred on a second day in the capital. On the days that follow, the Jews celebrate.

Mordecai then sends letters to the Jews throughout the Empire. He establishes the yearly anniversary of the celebrations as a holiday for the Jews to keep every year. The Jews bind themselves to this observance, Purim. Esther and Mordecai send yet another letter to confirm the holiday. A short final chapter of the *Megillah* acclaims Mordecai as second only to Ahasuerus and as benefactor of the Jews.<sup>7</sup>

So runs the bare story of the *Megillah*, regrettably pared of much of its celebrated drama, irony, and brilliance. In part because it is so well crafted, the *Megillah* has had its historicity doubted.<sup>8</sup> It also has had the form of its text doubted. First, the *Megillah* comes in three versions.<sup>9</sup> To these three versions

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<sup>7</sup> See *Esther* for the story given in text.

<sup>8</sup> See, e.g., ADELE BERLIN, *THE JPS BIBLE COMMENTARY: ESTHER xvii–xix* (2001) (likening the *Megillah* to a historical novel and farce); ANDRÉ LACOCQUE, *ESTHER REGINA: A BAKHTINIAN READING* 32 (2008) (“The book of Esther reports a set of events that never occurred . . . . In fact, the inner chronology of the book indicates quite clearly that we are dealing with fiction.”). *But see* THE MEGILLAH: THE BOOK OF ESTHER x (Meir Zlotowitz trans., 2d ed. 1976) (“It is no way the intention of this book to demonstrate the legitimacy or historicity of Esther or Mordecai to non-believers or doubters. Belief in the authenticity of every book of the Torah [here taken in the sense to include the *Megillah*] is basic to Jewish faith, and we proceed from there.” (emphasis omitted)).

<sup>9</sup> KRISTIN DE TROYER, *THE END OF THE ALPHA TEXT OF ESTHER 1* (2000) (“Besides the Masoretic Text (MT), students of Esther have two other versions at their disposal: A Septuagint translation (LXX) and a second Greek text (AT).” (footnote omitted)); see also BERLIN, *supra* note 8, at xvi (“In the Greek versions of Esther, which de-emphasize Purim, the comic elements are diminished.”); LACOCQUE, *note* 8, at 103–07 (discussing the Greek versions of the *Megillah*); Nicole Hochner, *Imagining Esther in Early Modern France*, 41 *SIXTEENTH CENTURY J.* 757, 760 (2010) (comparing how diverse versions cast the role played by Esther). For an analysis of disobedience to the law relying upon the Greek versions of the *Megillah* see Karol Jackowski, *Holy Disobedience in Esther*, 45 *THEOLOGY TODAY* 403 (1989).

Josephus adds his own.<sup>10</sup> And the inclusion of the *Megillah* in the canon of the Holy Scriptures appeared no sure thing.<sup>11</sup> Although the *Megillah* has had its detractors among Christian authorities,<sup>12</sup> among Jews its authority may be second only to the Torah itself.<sup>13</sup>

Whatever its historicity and authority, the *Megillah* speaks both profoundly and sensitively on the nature of law and on obedience to law. It is essentially a commentary of sorts on the obligation to obey law. As such it commands the attention of this article.

## II. LAW IN THE MEGILLAH

Law makes its explicit appearance in the *Megillah* within the first ten verses and the oddity of this appearance signals that law will play an unusual role in the story.<sup>14</sup> Regarding the second of the king's feasts, the one only a week long and for the locals of his capital, the text remarks:

Drinks were served in golden vessels, vessels of different kinds, and the royal wine was lavished according to the bounty of the king. And drinking

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<sup>10</sup> See Flavius Josephus, *The Antiquities of the Jews*, in THE WORKS OF JOSEPHUS: COMPLETE AND UNABRIDGED 298–305 (William Whiston trans., 1987). What could be called yet another version is the Hebrew text supplemented by the voluminous rabbinic commentary that includes midrashim fleshing out, if not altering, the Masoretic text. See THE MEGILLAH: THE BOOK OF ESTHER, *supra* note 8.

<sup>11</sup> See FREDERIC W. BUSH, WORD BIBLICAL COMMENTARY: RUTH, ESTHER 273–77 (1996) (discussing both Jewish and Christian controversies on the canonicity of the *Megillah*); CAREY A. MOORE, ESTHER xxi–xxxi (1971) (same).

<sup>12</sup> See D.J.A. CLINES, EZRA, NEHEMIAH, ESTHER 255 (1984) (noting commentators' hostility towards the book); Hochen, *supra* note 9, at 760 (same).

<sup>13</sup> See LACOCQUE, *supra* note 8, at 137 n.21 (stating that Maimonides considered Esther second only to the Torah); PATON, *supra* note 1, at vii; cf. LACOCQUE, *supra* note 8, at 166 n.54 (“Characteristically, when Judaism became a diaspora religion, Rabbi Joshua ben Karchah, writing in the second century C.E., said there were weightier reasons to celebrate Purim than there were to celebrate Passover.” (citation omitted)); THE MEGILLAH: THE BOOK OF ESTHER, *supra* note 8, at xv (epigraph quoting Hebrew wordplay used rabbinically to find an allusion to Esther in *Deuteronomy*).

<sup>14</sup> See *Esther* 1:1–10. Law makes its implicit appearance in the very first verse: “Now in the days of Ahasuerus, the Ahasuerus who reigned from India to Ethiopia over 127 provinces . . .” *Esther* 1:1. Law is what establishes a reign and provinces. Law, at least in the eyes of a lawyer, stands behind most social practices. But our treatment of the law in the *Megillah* traces it for the most part only as it comes to the fore by explicit mention in the text.

was according to this edict: “There is no compulsion.” For the king had given orders to all the staff of his palace to do as each man desired.<sup>15</sup>

It seems there needed to be a law for drinking to be free from law.<sup>16</sup> And this new law by special edict therefore worked a change in the law, a sort of change the text will repeatedly observe as contrary to the Persian constitution.<sup>17</sup>

Law next makes its appearance when Queen Vashti refuses to come when summoned and King Ahasuerus must decide what to do. Vashti has notoriously disobeyed the command of the king, her husband.<sup>18</sup> The autocrat of the vast Persian Empire consults his wise men to determine how to deal with his wife:

Then the king said to the wise men who knew the times (for this was the king's procedure toward all who were versed in law and judgment, the men next to him being Carshena, Shethar, Admatha, Tarshish, Meres, Marsena, and Memucan, the seven princes of Persia and Media, who saw the king's face, and sat first in the kingdom): “According to the law, what is to be done to Queen Vashti, because she has not performed the command of King Ahasuerus

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<sup>15</sup> *Esther* 1:7–8.

<sup>16</sup> See PATON, *supra* note 1, at 142.

<sup>17</sup> See LACOCQUE, *supra* note 8, at 30. It may be well here to remark that the Hebrew text of the *Megillah* uses several words for law and related concepts. “Edict” of verse 8 translates a word taken from Old Persian, a word that embraces a broad range of meanings from decree, to judicial sentence, to administrative decision, to incidental order, to command, to law, even the divine law of the true God, or religion. See CLINES, *supra* note 12, at 282, 296; MICHAEL V. FOX, CHARACTER AND IDEOLOGY IN THE BOOK OF ESTHER 17, 50 (1991); LACOCQUE, *supra* note 8, at 36, 148 n.13; PATON, *supra* note 1, at 146–47, 154; BARRY DOV WALFISH, ESTHER IN MEDIEVAL GARB 276 n.58 (1993). It appears frequently in the *Megillah*. But other words or combinations of words also appear in similar usage, sometimes together with this word. See, e.g., THE MEGILLAH: THE BOOK OF ESTHER, *supra* note 8, at 46, 56, 66, 108, 110, 116, 134. Consequently, whatever nuances that may attend the exact legal diction of the *Megillah* seem far less significant than the substance of the matter.

<sup>18</sup> See *Esther* 1:16–18.

delivered by the eunuchs?"<sup>19</sup>

For so grave a matter as this, Ahasuerus needs the advice of those learned in the law;<sup>20</sup> the king himself is apparently bound by law even as to how he may respond to the disobedience of his own queen.<sup>21</sup> Though the king asks what is to be done "[a]ccording to the law,"<sup>22</sup> the advice he gets—coming from the last-listed Memucan—yields instead an "ad hoc" "ridiculous overreaction."<sup>23</sup> "The wily [Memucan] insinuates that in punishing Vashti, the King will not be gratifying a private grudge, but will be consulting public welfare":<sup>24</sup>

Then Memucan said in the presence of the king and the officials, "Not only against the king has Queen Vashti done wrong, but also against all the officials and all the peoples who are in all the provinces of King Ahasuerus. For the queen's behavior will be made known to all women, causing them to look at their husbands with contempt, since they will say, 'King Ahasuerus commanded Queen Vashti to be brought before him, and she did not come.' This very day the noble women of Persia and Media who have heard of the queen's behavior will say the same to all the king's officials, and there will be contempt and wrath in plenty. If it please the king, let a royal order go out from him, and let it be written among the laws of the Persians and the Medes so that it may not be repealed, that Vashti is never again to come before King Ahasuerus. And let the king give her royal position to another who is better than she. So when the decree made by the king is proclaimed throughout all his kingdom, for it is vast, all women will give honor to their husbands, high and low

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<sup>19</sup> *Esther* 1:13–15. The word here given as "judgment" also means justice or customary law. See PATON, *supra* note 1, at 151–54.

<sup>20</sup> See PATON, *supra* note 1, at 151–53.

<sup>21</sup> See FOX, *supra* note 17, at 20–21; LACOCQUE, *supra* note 8, at 132; PATON, *supra* note 1, at 153.

<sup>22</sup> *Esther* 1:15.

<sup>23</sup> FOX, *supra* note 17, at 21.

<sup>24</sup> PATON, *supra* note 1, at 155.

alike.” This advice pleased the king and the princes, and the king did as Memucan proposed. He sent letters to all the royal provinces, to every province in its own script and to every people in its own language, that every man be master in his own household and speak according to the language of his people.<sup>25</sup>

The advice of the wily Memucan is a piece of “pragmatic instrumentalism,”<sup>26</sup> though its practicality is subject to doubt. Will the order really assure that men rule their wives, or will it simply publicize Vashti’s disobedience and embolden wives to emulate her?<sup>27</sup> “Potentate and nobles affirm the rule of law, though the laws they come up with are less than dignified and just.”<sup>28</sup> At the same time, however, the decree regarding Vashti may reflect a justice of the *lex talionis* sort.<sup>29</sup> Vashti refuses to come to the king, so Memucan counsels that she never again be allowed to come to the king.<sup>30</sup> Not wanting to be treated as a concubine, she becomes a concubine.<sup>31</sup> The Vashti affair reveals a legal system in which policy can turn a royal domestic spat into imperial law.

The Vashti affair also reveals another oddity of the Persian legal system. It appears that “a royal order . . . written among the laws of the Persians and the Medes . . . may not be repealed.”<sup>32</sup> First to note is that Persia seems “bound to an unwritten, traditional constitution (called ‘law’). This society is ruled by a legal order . . . .”<sup>33</sup> Second, within this legal order is the constitutional law prohibiting repeal—or perhaps even any

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<sup>25</sup> *Esther* 1:16–22.

<sup>26</sup> See MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING IN THE LEGAL PROFESSION 32 (2007). See generally Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) (finding that ordinary religion to be pragmatic instrumentalism).

<sup>27</sup> See FOX, *supra* note 17, at 24.

<sup>28</sup> *Id.* at 25.

<sup>29</sup> The *lex talionis* prescribes that offenses be met with like returns. See *Exodus* 21:22–25; *Leviticus* 24:17–22.

<sup>30</sup> FOX, *supra* note 17, at 22.

<sup>31</sup> See LA COCQUE, *supra* note 8, at 132.

<sup>32</sup> *Esther* 1:19.

<sup>33</sup> FOX, *supra* note 17, at 248.

alteration—of royal orders.<sup>34</sup> Such a constitutional law lacks evidence outside the Bible.<sup>35</sup> Perhaps no matter:

There is no extra-biblical attestation of the irrevocability of Persian law mentioned in [*Esther* 1:19;] 8:8; Dan[iel] 6:8, 12, 15—a feature that has attracted exaggerated attention, since such irrevocability is entirely predictable in a highly bureaucratized autocracy and escape clauses could easily be inserted if likely to be required. In any case, it is probable that the meaning here is that the decision should be incorporated among official decisions so that it will be strictly carried out (*‘ábar* properly means “become invalid” rather than “be altered”).<sup>36</sup>

In any event, the mention of the rule of permanence for Persian law is a “fitting symbol” of the absolutism of the regime, an absolutism that Esther and Mordecai understand to be more flexible than it appears to be, while Haman seems to take the absolutism as genuine.<sup>37</sup>

Next comes the order and edict of the king, at the suggestion of his pages, to have virgins collected for finding Vashti’s replacement.<sup>38</sup> Esther submits to the edict, and also to Mordecai’s command that she not reveal her Jewishness or her family.<sup>39</sup> There is no mention of Esther’s keeping the Jewish law or of not keeping the Jewish law, and there is division of authority

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<sup>34</sup> See *Esther* 1:19; see also JO CARRUTHERS, *ESTHER THROUGH THE CENTURIES* 88 (2008); CLINES, *supra* note 12, at 282; LACOCQUE *supra* note 8, at 35; PATON, *supra* note 1, at 72, 157.

<sup>35</sup> See FOX, *supra* note 17, at 22 (noting that the notion is found only in *Esther* and in *Daniel*, and is not attested in Persian and Greek sources); MOORE, *supra* note 11, at 11; PATON, *supra* note 1, at 72, 157. *But see* LACOCQUE, *supra* note 8, at 149 n.15 (noting that Persian “laws were immutable according to Persian patrons”). Some have claimed that even the Bible suggests that the law against alteration was not actually effective. See CARRUTHERS, *supra* note 34, at 88; *cf.* note 16 and accompanying text (noting apparent contradiction to this law within the *Megillah* itself).

<sup>36</sup> CLINES, *supra* note 12, at 282 (citation omitted).

<sup>37</sup> See LACOCQUE, *supra* note 8, at 35.

<sup>38</sup> *Esther* 2:1–4.

<sup>39</sup> *Id.* at 2:8, 2:10, 2:20.

on the question.<sup>40</sup> According to Jewish tradition, Esther keeps Jewish ceremonial laws,<sup>41</sup> but some Jewish tradition finds her committing adultery with Ahasuerus in light of an earlier marriage to Mordecai!<sup>42</sup> She apparently does keep the “regulations for the women” of the harem.<sup>43</sup>

Haman and Mordecai figure in the next operation of the law in the *Megillah*. Ahasuerus elevates Haman, apparently to the position of his vizier.<sup>44</sup> Ahasuerus commands all his servants to bow and pay homage to Haman.<sup>45</sup> Mordecai refuses to obey this command, possibly because Haman is an Agagite, and so of a royal house of the Amalekites, and Amalekites are ancestral enemies of the Jews:<sup>46</sup>

Then the king's servants who were at the king's gate said to Mordecai, “Why do you transgress the king's command?” And when they spoke to him day after day and he would not listen to them, they told Haman, in order to see whether Mordecai's words would stand, for he had told them that he was a Jew.<sup>47</sup>

Like Vashti, Mordecai disobeys the command of the king. But to this disobedience it is not the king, but Haman, who responds.

Haman determines to wipe out all of Mordecai's people along with Mordecai.<sup>48</sup> Casting lots—“Purim”—daily for nearly a year, Haman finds the propitious day to approach Ahasuerus:

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<sup>40</sup> Compare HAZONY, *supra* note 1, at 2, 28 (Esther likely does not observe Jewish law), and LACOCQUE, *supra* note 8, at 157 n.50 (Esther does not observe Jewish law), with CARRUTHERS, *supra* note 34, at 128 (Esther's concealed identity enabled her to keep the Jewish law according to one rabbi).

<sup>41</sup> See CARRUTHERS, *supra* note 34, at 106.

<sup>42</sup> See THE MEGILLAH, THE BOOK OF ESTHER, *supra* note 8, at 56, 61.

<sup>43</sup> *Esther* 2:12–15.

<sup>44</sup> *See id.* at 3:1.

<sup>45</sup> *Id.* at 3:2.

<sup>46</sup> *Id.* at 3:2–5; see also *Exodus* 17:8–16; *Deuteronomy* 25:17–19; 1 *Samuel* 14:47–15:35; Jules Gleicher, *Mordecai the Exilarch: Some Thoughts on the Book of Esther*, 28 INTERPRETATION 187, 194–96 (2001). In Yoram Hazony's political interpretation of the *Megillah*, Mordecai refuses homage to Haman because Haman has become “a usurping god, a pretender to knowledge and power he did not have, an idol.” HAZONY, *supra* note 1, at 68.

<sup>47</sup> *Esther* 3:3–4.

<sup>48</sup> *See id.* at 3:6.

Then Haman said to King Ahasuerus, “There is a certain people scattered abroad and dispersed among the peoples in all the provinces of your kingdom. Their laws are different from those of every other people, and they do not keep the king's laws, so that it is not to the king's profit to tolerate them. If it please the king, let it be decreed that they be destroyed, and I will pay 10,000 talents of silver into the hands of those who have charge of the king's business, that they may put it into the king's treasuries.” So the king took his signet ring from his hand and gave it to Haman the Agagite, the son of Hammedatha, the enemy of the Jews. And the king said to Haman, “The money is given to you, the people also, to do with them as it seems good to you.”<sup>49</sup>

Haman's argument to the king holds great jurisprudential significance for commentator André LaCocque. “Haman directs his attack against the Jews at their most sensitive spot: they are a people with strange laws.”<sup>50</sup> Immutable Persian law speaks of timelessness. Jewish law has no such implication. The Jews, then, “live according to a different time. From Haman's point of view, they are asynchronous.”<sup>51</sup> Haman insists that there be only one system of law, the king's, and the one worldview to which it corresponds.<sup>52</sup> Adhering to any law other than the king's is disobedience to the king's law,<sup>53</sup> and “the king himself is the law.”<sup>54</sup> Ironically, the *Megillah* shows that Jewish law—and Jewish disobedience to Persian law—actually benefits Persia.<sup>55</sup> Another commentator notes the oddity of the phrase here translated, “so that it is not to the king's profit to tolerate them,”<sup>56</sup> a “twisted locution” that “clouds the lack of true danger.”<sup>57</sup> He

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<sup>49</sup> *Id.* at 3:8–11 (footnotes omitted).

<sup>50</sup> LACOCQUE, *supra* note 8, at 74.

<sup>51</sup> *Id.* at 101.

<sup>52</sup> *Id.* at 36; *see also id.* at 38–39.

<sup>53</sup> *Id.* at 39.

<sup>54</sup> *Id.* at 36 (footnote omitted).

<sup>55</sup> *See id.* at 131. LaCocque remarks that Persia in fact supported the authority of Jewish law for Judea. *Id.* at 38–39.

<sup>56</sup> *Esther* 3:8.

<sup>57</sup> FOX, *supra* note 17, at 50.

suspects that Haman's specious argument served only to set up what really did convince Ahasuerus to grant Haman's request—a bribe.<sup>58</sup> So, the king who was careful to consult the leading legal authorities on how to treat his wayward wife consigns a whole people to destruction without the benefit of any legal advice whatsoever.<sup>59</sup>

The next month, Haman acts to put his plan into effect:

Then the king's scribes were summoned on the thirteenth day of the first month, and an edict, according to all that Haman commanded, was written to the king's satraps and to the governors over all the provinces and to the officials of all the peoples, to every province in its own script and every people in its own language. It was written in the name of King Ahasuerus and sealed with the king's signet ring. Letters were sent by couriers to all the king's provinces with instruction to destroy, to kill, and to annihilate all Jews, young and old, women and children, in one day, the thirteenth day of the twelfth month, which is the month of Adar, and to plunder their goods. A copy of the document was to be issued as a decree in every province by proclamation to all the peoples to be ready for that day. The couriers went out hurriedly by order of the king, and the decree was issued in Susa the citadel. And the king and Haman sat down to drink, but the city of Susa was thrown into confusion.<sup>60</sup>

Haman, not the king, emits this edict. The immutable law proceeds from Haman.<sup>61</sup> The king is so uninvolved that “he does not realize what Esther is talking about when she says [later] that she and her people have been given over to destruction (7:5).”<sup>62</sup>

Along with Jews everywhere, Mordecai laments the destruction facing his people. He dons sackcloth and ashes. Though, as the story makes clear very soon, Mordecai wishes to

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<sup>58</sup> *Id.* at 53.

<sup>59</sup> See THE MEGILLAH: THE BOOK OF ESTHER, *supra* note 8, at 48.

<sup>60</sup> *Esther* 3:12–15 (footnotes omitted).

<sup>61</sup> See FOX, *supra* note 17, at 54–55.

<sup>62</sup> *Id.* at 52.

tell Esther what has happened, he does not approach her.<sup>63</sup> He obeys the law, forbidding those clothed in sackcloth to enter the king's gate.<sup>64</sup> Esther offers Mordecai clothes to replace his sackcloth but Mordecai refuses. Both Mordecai and Esther adhere to the law against the wearing of sackcloth in the gate.<sup>65</sup> Consequently, they conduct their most sensitive and important conversation through a palace eunuch.

The conversation begins with Esther asking Mordecai the cause for lament. In his answer, Mordecai tells her of the decree, sending along a copy of it. He also commands her to plead with the king for her people.<sup>66</sup> But Esther replies to Mordecai:

“All the king's servants and the people of the king's provinces know that if any man or woman goes to the king inside the inner court without being called, there is but one law—to be put to death, except the one to whom the king holds out the golden scepter so that he may live. But as for me, I have not been called to come in to the king these thirty days.”<sup>67</sup>

And to this, Mordecai replies:

Then Mordecai told them to reply to Esther, “Do not think to yourself that in the king's palace you will escape any more than all the other Jews. For if you keep silent at this time, relief and deliverance will rise for the Jews from another place, but you and your father's house will perish. And who knows whether you have not come to the kingdom for such a time as this?”<sup>68</sup>

Esther agrees to obey Mordecai's command, but in turn, commands Mordecai to arrange for the Jews in Susa to join her in

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<sup>63</sup> See *Esther* 4:1–8.

<sup>64</sup> *Id.* at 4:2.

<sup>65</sup> *Id.* at 4:4–17.

<sup>66</sup> *Id.* at 4:5–9.

<sup>67</sup> *Id.* at 4:11.

<sup>68</sup> *Id.* at 4:13–14.

an absolute fast for her sake, a command Mordecai will obey.<sup>69</sup> Esther tells Mordecai, “I will go to the king, though it is against the law, and if I perish, I perish.”<sup>70</sup>

Of note here, Esther obeys Mordecai and Mordecai obeys Esther, but Esther agrees to disobey the law of Persia, the law of her husband the king. Two other matters of note arise from this part of the story. First, a portion of the fast Esther keeps, and commands Mordecai to have all the Jews of Susa keep, appears to fall upon Passover,<sup>71</sup> a holiday requiring the eating of ceremonial food.<sup>72</sup> Keeping the fast would appear to have violated the law of the feast.

Second, there is dispute as to whether the Persian law Esther agrees to violate, in approaching her husband uninvited, presented her no other option under the circumstances. Josephus, in one place of his *Antiquities*, describes the law as applying to the “king’s own,” whether meaning his “own people”<sup>73</sup> or “the royal family.”<sup>74</sup> Elsewhere, however, Josephus has Ahasuerus explain to Esther that “that law was made for subjects” and not for his queen.<sup>75</sup> These nuances go unmentioned by Herodotus in what may be his accounts of the law,<sup>76</sup> but those accounts present their own difficulties.<sup>77</sup> They seem to support the understanding that

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<sup>69</sup> See FOX, *supra* note 17, at 64 (emphasizing that Esther here commands Mordecai, and Mordecai obeys her command).

<sup>70</sup> *Esther* 4:16.

<sup>71</sup> CARUTHERS, *supra* note 34, at 176–77; THE MEGILLAH, THE BOOK OF ESTHER, *supra* note 8, at 82.

<sup>72</sup> See *Exodus* 12:1–28; *Deuteronomy* 16:1–8. “Esther . . . declares a three-day fast which means the obliteration of the festival of Passover that year.” HAZONY, *supra* note 1, at 247 (footnote omitted). Hazony does note, however, that “[i]t is actually unclear to what degree Passover was being practiced among the Jews of the time . . . .” *Id.* at 293 n.9. If the Jews were not practicing the Passover in any event, Esther’s declaring a fast would not be the cause of their breach of the Passover ordinances.

<sup>73</sup> JOSEPHUS, *supra* note 10, at 299 (as translated by William Whiston).

<sup>74</sup> MOORE, *supra* note 11, at 49.

<sup>75</sup> JOSEPHUS, *supra* note 10, at 301.

<sup>76</sup> See MOORE, *supra* note 11, at 49.

<sup>77</sup> Possible references to this law in Herodotus appear at Book One, Chapter 99, and Book Three, Chapters 72, 77, 84, 118, and 140. See HERODOTUS, *THE HISTORIES* 83, 234, 236–37, 241, 251, 261–62 (A.R. Burn ed., Aubrey de Sélincourt trans., Penguin Books rev. ed. 1972). Similarly, Edward Gibbon finds corroboration for a remark in Book One, Chapter 133, of Herodotus from evidence that important business frequently was discussed at the royal table of Persia, a practice itself corroborated in *Megillath Esther*. See 1 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 281, 756 n.53 (William Benton 1952) (1781).

one seeking an audience with the king could send a request to that effect.<sup>78</sup> Whether the accounts in Herodotus really are pertinent to the law Esther describes is itself unclear.<sup>79</sup> But even if they are pertinent, “there can have been no assurance that an audience would have been granted [Esther], given that she is not in very good standing with Ahasuerus.”<sup>80</sup> These complications notwithstanding, Esther herself presents the law as well known and categorical. Mordecai has asked her to risk her life by disobeying the law, and she will do as Mordecai has asked.

As it turns out, of course, Ahasuerus grants Esther her life, attends her banquets, and puts to death her enemy, Haman. But the decree for destruction of the Jews still stands. Esther’s work is unfinished:

Then Esther spoke again to the king. She fell at his feet and wept and pleaded with him to avert the evil plan of Haman the Agagite and the plot that he had devised against the Jews. When the king held out the golden scepter to Esther, Esther rose and stood before the king. And she said, “If it please the king, and if I have found favor in his sight, and if the thing seems right before the king, and I am pleasing in his eyes, let an order be written to revoke the letters devised by Haman the Agagite, the son of Hammedatha, which he wrote to destroy the Jews who are in all the provinces of the king. For how can I bear to see the calamity that is coming to my people? Or how can I bear to see the destruction of my kindred?”<sup>81</sup>

Pleading only her own suffering as cause,<sup>82</sup> Esther casts the decree as the work of the executed Haman and not as an official royal act. “Not only does she avoid recalling the king’s complicity, she also stresses that the decree was an *individual’s* scheme. Perhaps if it

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<sup>78</sup> See FOX, *supra* note 17, at 62; PATON, *supra* note 1, at 220.

<sup>79</sup> See CLINES, *supra* note 12, at 301.

<sup>80</sup> *Id.*

<sup>81</sup> *Esther* 8:3–6 (footnotes omitted).

<sup>82</sup> Clines sees this move as an “appeal[ ] to the king’s sympathy for [Esther] personally.” CLINES, *supra* note 12, at 315.

can be seen as merely an individual administrative order, it can be annulled.”<sup>83</sup>

Ahasuerus, apparently characteristically, leaves the matter to Esther and Mordecai: “[Y]ou may write as you please with regard to the Jews, in the name of the king, and seal it with the king’s ring, for an edict written in the name of the king and sealed with the king’s ring cannot be revoked.”<sup>84</sup> Perhaps leaving the matter to Esther and Mordecai spares Ahasuerus responsibility for altering the unalterable edict against the Jews.<sup>85</sup> In any event, what Esther and Mordecai devise does not truly alter the unalterable. Their decree leaves Haman’s strictly intact.<sup>86</sup> The enemies of the Jews may still attack them as before, but now the Jews may defend themselves by virtue of an express grant that is contradictory, if at all, only to an understanding merely implicit in Haman’s edict.

Mordecai commands the terms of the edict. They are much like those of Haman’s.<sup>87</sup> The edict allows the Jews to act on the very day Haman’s edict had set for their destruction,<sup>88</sup> “to gather and defend their lives, to destroy, to kill, and to annihilate any armed force of any people or province that might attack them, children and women included, and to plunder their goods.”<sup>89</sup> And so the law of Persia has been called “absurd” by one commentator at least, in that “it made it necessary to authorize a civil war throughout the vast empire; both parties acting *by* and *against* the king’s authority at the same time!”<sup>90</sup> The supposed dignity and permanence of unchangeable Persian law has resulted in actual lawlessness. “According to the irrevocable law of 3, the heathen are to kill the Jews; and according to the equally irrevocable law of 8, the Jews are to kill the heathen. Lively times are to be anticipated.”<sup>91</sup>

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<sup>83</sup> FOX, *supra* note 17, at 93.

<sup>84</sup> *Esther* 8:8.

<sup>85</sup> See LACOCQUE, *supra* note 8, at 54.

<sup>86</sup> *See id.*

<sup>87</sup> Compare *Esther* 8:9–14 (Mordecai’s) with *id.* 3:12–15 (Haman’s).

<sup>88</sup> One commentator has discerned in this circumstance that the Jews were to act responsively and not preemptively. CARRUTHERS, *supra* note 34, at 257 (citing a Provençal commentator from the turn of the fourteenth century).

<sup>89</sup> *Esther* 8:11 (footnotes omitted).

<sup>90</sup> CARRUTHERS, *supra* note 34, at 245 (quoting 2 THOMAS SCOTT, THE HOLY BIBLE CONTAINING THE OLD AND NEW TESTAMENTS, ACCORDING TO THE AUTHORIZED VERSION; WITH EXPLANATORY NOTES, PRACTICAL OBSERVATIONS, AND COPIOUS MARGINAL REFERENCES 4 n.6 (Andesite Press, 2015) (1827)).

<sup>91</sup> PATON, *supra* note 1, at 282 (footnotes omitted).

Lively times ensue indeed, and the Jews are victorious over their enemies. On the days following their victory, the Jews celebrate, establishing a practice of celebrating on the anniversaries to follow.<sup>92</sup> But the anniversary celebrations rest not only on custom:

And Mordecai recorded these things and sent letters to all the Jews who were in all the provinces of King Ahasuerus, both near and far, obliging them to keep the fourteenth day of the month Adar and also the fifteenth day of the same, year by year, as the days on which the Jews got relief from their enemies, and as the month that had been turned for them from sorrow into gladness and from mourning into a holiday; that they should make them days of feasting and gladness, days for sending gifts of food to one another and gifts to the poor.<sup>93</sup>

Mordecai obliges the Jews to keep the anniversary. But the obligation does not rest only upon the letters of Mordecai:

So the Jews accepted what they had started to do, and what Mordecai had written to them. For Haman the Agagite, the son of Hammedatha, the enemy of all the Jews, had plotted against the Jews to destroy them, and had cast Pur (that is, cast lots), to crush and to destroy them. But when it came before the king, he gave orders in writing that his evil plan that he had devised against the Jews should return on his own head, and that he and his sons should be hanged on the gallows. Therefore they called these days Purim, after the term Pur. Therefore, because of all that was written in this letter, and of what they had faced in this matter, and of what had happened to them, the Jews firmly obligated themselves and their offspring and all who joined them, that without fail they would keep these two days according to what was written and at the time appointed every year, that these days should be

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<sup>92</sup> See *Esther* 9:17–19.

<sup>93</sup> *Id.* at 9:20–22 (footnotes omitted).

remembered and kept throughout every generation, in every clan, province, and city, and that these days of Purim should never fall into disuse among the Jews, nor should the commemoration of these days cease among their descendants.<sup>94</sup>

The Jews accept the obligation to continue what they already had “started to do,”<sup>95</sup> “firmly obligat[ing] themselves and their offspring and all who joined them.”<sup>96</sup> But there is still more:

Then Queen Esther, the daughter of Abihail, and Mordecai the Jew gave full written authority, confirming this second letter about Purim. Letters were sent to all the Jews, to the 127 provinces of the kingdom of Ahasuerus, in words of peace and truth, that these days of Purim should be observed at their appointed seasons, as Mordecai the Jew and Queen Esther obligated them, and as they had obligated themselves and their offspring, with regard to their fasts and their lamenting. The command of Queen Esther confirmed these practices of Purim, and it was recorded in writing.<sup>97</sup>

So Queen Esther also obligates the Jews to observe this anniversary, the festival of Purim, confirming and commanding what has been established. This last instance of law in the *Megillah* appears very strange after the earlier instances. Until now, law is command. But here, law is less command than norm. The Jews adopt a practice. Mordecai obliges the Jews to continue what they had begun. The Jews accept this obligation. Then Esther, along with Mordecai, confirms the practice. The authority of Mordecai—though Persian vizier—and Esther—though Persian queen—to establish Jewish law is not obvious.<sup>98</sup> Especially when compared with other law to be found in the *Megillah*, the ordinance for Purim seems to lack the force of law. Ironic then

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<sup>94</sup> *Id.* at 9:23–28 (footnotes omitted).

<sup>95</sup> *Id.* at 9:23.

<sup>96</sup> *Id.* at 9:27 (footnote omitted).

<sup>97</sup> *Id.* at 9:29–32 (footnotes omitted).

<sup>98</sup> See LACOCQUE, *supra* note 8, at 40–41.

that this ordinance is the one law in the *Megillah* to retain the force of law. In some respects, it is the very purpose for the *Megillah* itself.<sup>99</sup>

### III. LAW AND THE PURPOSES OF THE MEGILLAH

The *Megillah* establishes Purim as a festival to be observed by all Jews throughout time.<sup>100</sup> This it does without so much as mentioning God, the ultimate source for Jewish law.<sup>101</sup> To be sure, observing Purim is not the most onerous of religious duties. Purim is “a riotous festival at which revelers are exhorted by the Talmud to ‘drink wine until you can no longer distinguish between “Blessed be Mordecai” and “Cursed be Haman.””<sup>102</sup> Nonetheless, there exists the solemn obligation to observe the unsolemn festival. How does the *Megillah* give rise to law—truly unalterable law of absolute obligation?

It may be no overstatement that the *Megillah* is a meditation on law.<sup>103</sup> But with respect to Persian law, this meditation is more mockery than serious reflection.

The normally sedate affairs of state, the carefully organized and controlled government structure, the legal system, the efficient postal system, the

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<sup>99</sup> The *Megillah* ends with a three-verse postscript. See *Esther* 10:1–3. Esther goes unmentioned, but the three verses form a sort of recapitulation of the teaching of the *Megillah* on law. They begin with the King taxing his empire, and with reference to the official record of “all the acts of his power and might.” *Esther* 10:1–2. They end with a celebration of Mordecai, elevated by the King, “great among the Jews and popular with the multitude of his brothers, for he sought the welfare of his people and spoke peace to all his people.” *Id.* at 10:3. By law the King dominates. By law Mordecai leads brothers for their good. A medieval Jewish exegete used *Esther* 10:3 as the springboard for his Aristotelian view of civil government, noting both Mordecai’s authority and the goodness of his Purim decree, and so finding in Mordecai an Aristotelian ideal. See WALFISH, *supra* note 17, at 48–49 (discussing the work of Isaac Arama).

<sup>100</sup> *Esther*, 9:20–32.

<sup>101</sup> See MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT IVRI)* 5–6 (1999). Some Orthodox Jewish authority emphasizes the importance of the *Megillah* as support for the rabbinic Oral Law, presumably because there appears no explicit divine command to observe Purim. See CARRUTHERS, *supra* note 34, at 12.

<sup>102</sup> CLINES, *supra* note 12, at 331 (quoting from the Babylonian Talmud).

<sup>103</sup> One commentator has remarked similarly that “the book of Esther could . . . be considered an extended meditation on the power of the written word.” CAROL M. BECHTEL, *ESTHER* 14 (2002). Much of the written word she cites in support is law. See *id.* at 14–16.

impressive accumulation of wealth indicative of a successful empire—all of the achievements most praiseworthy in the Persian empire are turned into a burlesque of Persian court life, caricatured by ludicrous edicts delivered by speeding messengers, a foppish royal court with an endless hierarchy of officials, and a wooden adherence to nonsensical laws. A major policy decision, the annihilation of the Jews, is made casually; but a small domestic incident, Vashti's nonappearance at a party, becomes a crisis of state, with all the bureaucratic trappings that can be mustered.<sup>104</sup>

Persian law is itself a mockery of law. "The legal system is so rigid that it makes the most whimsical and the most vicious of laws binding even upon the king, yet it does not even provide true law and order."<sup>105</sup> Persian "noblemen are obsessed with status, yet advocate laws that are far from dignified; they are devoted to law, yet show no awareness of justice."<sup>106</sup> King Ahasuerus himself falls victim to the immutability of Persian law. "Even he is manipulated by the very tool of his omnipotence . . . . The king, so to speak, dethrones himself."<sup>107</sup> So, as we have seen, the fully deliberated ruling on the Vashti affair, crafted to encourage wifely obedience to husbands, leads to crowning a queen who disobeys the laws of her husband. Actually, Queen Esther obeys her uncle more than she does her husband king. Haman's unchangeable decree to destroy the Jews—a people disobedient to Persian law, as he tells the king—leads to Mordecai's decree that yields the destruction of the enemies of the Jews and increases the number of professing Jews. The Jews, again as Haman informs the king, "do not keep the king's laws, so that it is not to the king's profit to tolerate them,"<sup>108</sup> but in fact, Mordecai the Jew saves the king's life and becomes his vizier. And, most significantly, the real effectiveness of the king's law is as naught compared with the effectiveness of the law the Jews make for themselves.

To complicate matters, it may not be the Persian law only that is shown less than total respect. Esther and Mordecai both

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<sup>104</sup> BERLIN, *supra* note 8, at xix.

<sup>105</sup> FOX, *supra* note 17, at 177.

<sup>106</sup> *Id.* at 249.

<sup>107</sup> LACOCQUE, *supra* note 8, at 123 (footnotes omitted).

<sup>108</sup> *Esther* 3:8.

may appear willing to violate the Jewish law of the Torah. They may have fasted on the Passover when they should have been eating ceremonial foods, and Esther for over a year may not have adhered to the laws of *kashrut* while keeping her Jewish identity secret.<sup>109</sup> Though the *Megillah* by no means treats Jewish law as roughly as it does Persian, it may pose the question generally whether law carries categorical obligation.

And yet, again, a chief purpose of the *Megillah* is to present as a categorical obligation the law requiring the celebration of Purim.<sup>110</sup> To achieve this purpose, the *Megillah* must support a distinction between laws that always bind, and laws that do not. It is to that distinction that this article now turns.

#### IV. THE TEACHING OF THE MEGILLAH ON LEGAL OBLIGATION

The *Megillah* is a narrative. Whatever prescription it carries, comes only by way of description. The *Megillah* describes Jews taking on the obligation to observe the festival of Purim. It lacks an explicit command to the Jewish reader to observe the festival. An implicit command, however, it surely does have. Likewise, implicit is the command to emulate Mordecai and Esther. These two are presented as models of wise and good conduct. This, even if they may fail to observe all Jewish law.<sup>111</sup>

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<sup>109</sup> See CLINES, *supra* note 12, at 303; see also notes 40–42, 71–72 and accompanying text.

<sup>110</sup> See *Esther* 9:26–28. The text states:

Therefore they called these days Purim, after the term Pur. Therefore, because of all that was written in this letter, and of what they had faced in this matter, and of what had happened to them, the Jews firmly obligated themselves and their offspring and all who joined them, that *without fail* they would keep these two days according to what was written and at the time appointed *every* year, that these days should be remembered and kept throughout *every* generation, in *every* clan, province, and city, and that these days of Purim should *never* fall into disuse among the Jews, nor should the commemoration of these days cease among their descendants.

*Esther* 9:26–28 (emphasis added). The tension thus established by the *Megillah* is still more intense if one takes the view that “Purim was legislated in much the same way that all Persian law was legislated—by means of a document written by the king or his authorized agent and circulated throughout the empire.” BERLIN, *supra* note 8, at xvi.

<sup>111</sup> See *supra* notes 40–42, 71–72, 109 and accompanying text.

Haman, on the other hand, is the model of corruption and evil. But it is into his mouth that the *Megillah* puts the crux of its teaching on legal obligation. Accusing the Jews before Ahasuerus, he reports, “[t]heir laws are different from those of every other people, and they do not keep the king’s laws, so that it is not to the king’s profit to tolerate them.”<sup>112</sup> Jewish law is unlike Persian law, and Jews do not adhere to Persian law, so Haman says. The *Megillah* itself to a marked degree says the same. How then does the *Megillah* explain the difference between Persian law and the Jewish law of Purim, and the difference in their degree of obligation, at least for Jews?

Persian law seems shaped for utility. From the very beginning of the *Megillah* and the decree against Queen Vashti, law is an instrument to mold the king’s realm after his will. The law is to effect social control, even unto the eradication of an entire people. Vashti is to be the victim of exemplary punishment. The Jews—or their enemies—are to be annihilated. Not justice, but the king’s will and its social objectives, are the business of the law.

One of many ironies of the *Megillah* is that the instrumentalistic Persian law is a very poor instrument. So much so, that the climax of the *Megillah*, the resolution of the crisis fomented by the Persian law of Haman’s edict, must be found in a civil war sparked by what is essentially the removal of positive law altogether: a fight for survival reminiscent of a “state of nature.”<sup>113</sup> Unchangeable and mighty Persian law must be set aside so that peace may come through lawlessness.

That civil war and lawlessness attend the removal of Persian law highlights a major element of Persian law. Persian law is portrayed as “merely positive;” remove it, and there is no other correlative law to take its place. Though the Jews may be understood to act in proper self-defense against their enemies, the text itself paints the picture of a lawless melee, the Jews victorious because local Persian officials could tell which way the wind was blowing. If Persian law stood for norms otherwise respected and accepted as binding, removing Persian law should have led to no such departure from the usual state of affairs. Persian law is an extension of the king’s will. Sometimes he takes deliberate

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<sup>112</sup> *Esther* 3:8.

<sup>113</sup> For classic discussions of the mythic “state of nature” before the mythic social contract see THOMAS HOBBS, *LEVIATHAN* 104–43 (Herbert W. Schneider ed., Liberal Arts Press 1958) (1651); *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 4–11, 170–79 (1947).

counsel, sometimes not. Regardless, there seems to be no effective link between Persian law and the reality of the world. Persian law, a purportedly unchanging social truth, finds itself unsuited to the rest of truth. For this reason, it does not work well.

One element of this reason has to do with the obligation felt by the subjects of Persian law. Law viewed as merely positive invites something less than wholehearted obedience.<sup>114</sup> If law exists wholly by virtue of its being commanded by civil authority without its being necessarily suited to other aspects of human life, it may be taken solely as a projection of a will liable to cause pain for disobedience. Law ineptly adopted is of limited use. Bad law invites the reaction of the “bad man, who cares only for the material consequences which . . . knowledge [of the law] enables him to predict.”<sup>115</sup> People will disobey such law whenever it suits them—whenever it is convenient.

The *Megillah* depicts Persian law as bad law. Persian law is generally inept and counterproductive. It is disobeyed, countermanded, disregarded—hardly an effective projection of the king’s will. An unconstrained positive norm, it is taken with a grain of salt. And this is the reaction not so much of bad men, but of good. Law merely positive falls before doing the right thing, repeatedly. For the good actor, Persian law is a prudential consideration and nothing more. For all its positive force, it is weak law.

Such a response to Persian law is that of Esther and Mordecai, models of goodness and justice. Esther is queen of Persia. Mordecai is a well-regarded courtier of sorts, and eventually vizier. To them, Persian law is no alien imposition. They are loyal to Persia and Ahasuerus. In fact, they serve the king better for having departed from Persian law as they did.<sup>116</sup> Furthermore, they usually seem to obey Persian law:

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<sup>114</sup> See ALEXANDER PASSERIN D’ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 139–40 (1994) (contrasting Anglo-American with Continental respect for law and suggesting the difference derives from the degree to which positive law coincides with morals).

<sup>115</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Or as the author’s colleague Scott Pryor has put it privately to the author, “[w]illful law invites willful disobedience.”

<sup>116</sup> See LACOCQUE, *supra* note 8, at 128; Hochner, *supra* note 9, at 771 (“Vashti’s disobedience mainly undermines the king’s authority, while the humble Esther is assumed to strengthen the realm.”)

The Jews act in accordance with the law of the land . . . Jewish commitment to the king's law is demonstrated by showing Mordecai and Esther first seeking the cancellation of Haman's decree, and only when denied that route issuing a decree of their own—one which is also the king's . . . [W]hen possible, Jews work within the framework of the imperial law.<sup>117</sup>

But their obedience to Persian law ends when they so decide. Without explicitly embracing a view that positive law is void when it runs afoul of higher norms, the *Megillah* may suggest as much. For example, “Esther will go to the king *illegally*, violating the law as Mordecai did earlier. She recognizes a higher law, her duty to the community and, possibly, to God.”<sup>118</sup> Esther expresses no moral compunction in violating Persian law, the law of her king and husband. She expresses regard only for the “material consequences”:<sup>119</sup> “I will go to the king, though it is against the law, and if I perish, I perish.”<sup>120</sup>

In a sense, law merely positive is law without God. The will of the king suffices to create law, subject to the rule against change. Ahasuerus pretends to a godlike power to make unchanging law. The *Megillah* shows the result. This lesson was not lost on Algernon Sidney:

An unlimited prince might be justly compared to a weak ship exposed to a violent storm, with a vast sail and no rudder. We have an eminent example of this in the book of Esther. A wicked villain having filled the ears of a foolish king with false stories of the Jews, he issues out a proclamation for their utter extirpation; and not long after being informed of the truth, he gave them leave by another proclamation to kill whom they pleased, which they executed upon

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<sup>117</sup> FOX, *supra* note 17, at 215; *see also supra* text accompanying notes 39, 43, 65.

<sup>118</sup> *Id.* at 63–64.

<sup>119</sup> *See supra* note 115 and accompanying text.

<sup>120</sup> *Esther* 4:16 (footnote omitted). The loyalty of Esther and Mordecai to the regime of Ahasuerus, and the willingness Esther here expresses to suffer the consequences of her disobedience to its law, may both serve to harmonize their conduct with such precepts as those found in *Romans* 13:1–7 and *1 Peter* 2:13–17.

seventy thousand men . . . . Such was the state of things, when [like] proclamations passed for laws, and numbers of flattering slaves were ready to execute [such] commands, without examining whether they were just or unjust, good or bad. The life and death of the best men, together with the very being of nations, was exposed to chance, and they were either preserved or destroyed according to the humor of that man who spoke last to the king, or happened to have credit with him.<sup>121</sup>

Such law is not to be ignored, but neither does it command the respect that leads to robust obedience. Furthermore, the true God apparently is taken aback not at all by the divine pretensions of Persian law. He works through them to accomplish his purpose, and his providence may have left its traces in the ironic frustration of whatever Persian law is directed against the Jews.

Whereas the *Megillah* portrays Persian law as merely positive, and on that account weak, it portrays Jewish law—at least the Jewish law prescribing the observance of Purim—as of a very different nature. (And so it must, if the law of Purim is to be paid more respect than the law of Persia.) To be sure, Mordecai and Esther do command the Jews to continue to observe Purim much as the king, or others in his name, command Persians. But the law for Purim is not mere command. The Jews take upon themselves the obligation to observe Purim.

The context of Jewish law is covenant.<sup>122</sup> Even the commands of God are rooted in His covenantal relationship with

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<sup>121</sup> ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 560 (Thomas G. West ed., Liberty Fund 1990) (1698) (footnote omitted).

<sup>122</sup> See DANIEL J. ELAZAR, COVENANT AND POLITY IN BIBLICAL ISRAEL, 22–23 (1995).

A covenant is a morally informed agreement or pact based upon voluntary consent, established by mutual oaths or promises, involving or witnessed by some transcendent higher authority, between people as parties having independent status, equal in connection with the purposes of the pact, that provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect, which protect the individual integrities of all the parties to it.

*Id.* Specifically as to the Jews:

Israel. Covenant exists in mutual consent and commitment. Law in the context of covenant springs from that consent and commitment. Such law also reflects the substance of the covenant. So with Purim, the Jews mutually obligate themselves and their offspring to keep the festival, and to do so in commemoration of their deliverance, and the survival of the covenant community, as they already had done in spontaneous celebration. The *Megillah* itself sets forth the grounds of Purim. The law to observe the holiday is not merely positive law, but a covenantal precept embraced for all time and in response to truth. It is not an act of will alone to order the behavior of underlings.<sup>123</sup> Unlike

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The classic Jewish political worldview can be summarized in the following way. The family of tribes descended from Abraham, Isaac, and Jacob that God raised up to be a nation (*goy*) became the Jewish people (*Am Yisrael*) through its covenant (*brit*) with God, which, in turn, laid the basis for the establishment of a Jewish commonwealth (*edah*) under Divine sovereignty (*malkhut shamayim*) and hence bound by the Divine constitutional teaching (*Torah*). The *am* so created must live as a community of equals (*kahal*) under the rule of law (*hukah, hok*), which applies to every citizen (*ezrah*), defined as a partner to the covenant (*ben-brit*). Every citizen is linked to his neighbor (*rea*) by covenant obligation (*hesed*).

*Id.* at 440.

<sup>123</sup> See FOX, *supra* note 17, at 227–28. Fox explains:

[The nature of the Jewish law of Purim] is contrasted with the law of the Persian (i.e. gentile) realm, in which all formal power is invested in the office of king. His word alone is authoritative, so much so, that even when his decision is only an impulse or whim, it creates a law that binds the monarch himself. In reality, the despot's "servants" may exercise actual power by manipulating him, but that only compounds the confusion, for they too can be silly (chap. 1) or evil (chap. 3). The law that emerges from this tug-of-war between despotism and erratic influence is beyond anyone's control, yet it holds the entire empire in its grasp.

The Jews, in contrast to the Persians, arrive at decisions through a dialectic between leaders and community. Mordecai and Esther do speak from a position of authority, but it is moral authority. Perhaps as vizier and queen they could have imposed their will on their co-religionists, but they do not attempt to do so. When addressing the Jews they do not write "in the king's name" or "seal [it] with the king's signet." Mandating behavior in this way would be a poor foundation for a ritual practice lacking divine sanction or historical background. Rather, Mordecai *extracts* the holiday from the people's unprompted activity and turns it into a permanent, official communal rite. The text is emphatic on the

unchangeable Persian law, the covenantal context ensures that the law of Purim will be observed faithfully throughout generations.<sup>124</sup>

As Persian law is law in the absence of God, so also in a sense is the law for Purim. Purim springs from human, not divine, law.<sup>125</sup> Nevertheless, Purim ultimately rests upon the covenantal

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duality of the process: “And the Jews committed themselves to continuing what they had begun doing and what Mordecai had written to them” (9:23). All this is then reconfirmed by Esther. Instead of authoritative prescription, Mordecai and Esther employ authoritative validation.

The source of the holiday is the people themselves, and the festival calendar is shaped to their actions. The holiday reenacts what *they* do. Mordecai only helps them convert their action into an institution. As in the refusal of spoil, there is a wisdom inherent in the people independent of the instructions they receive. A leader formalizes this wisdom and holds it up to their inspection. The basic authority resides in the Jewish people, without whose joy the spontaneous celebrations would not have occurred and without whose consensus the practice would not have become binding. With this consensus, however, the practice becomes as durable as a Persian law and attains a universality and stability that the Persian law does not. All Jews, in all places and in all ages (note the extraordinary emphasis on national unity in 9:28) uniformly celebrate the peace and joy that followed upon their struggle for existence.

FOX, *supra* note 17, at 227–28 (footnote omitted).

<sup>124</sup> See CLINES, *supra* note 12, at 328 (“[T]hough the Persians cannot overcome the Jews by force of arms their concept of unalterable law has here (ironically) gained the mastery in Jewish society.”). Yoram Hazony sees the voluntary establishment of Purim as a “re-founding of the Jewish people,” the covenantal community itself. HAZONY, *supra* note 1, at 238. In the Diaspora, each Jew must himself voluntarily choose whether to be a part of the Jewish people. Purim, the establishment of which is so emphasized as being a voluntary undertaking, marks this voluntary choice. In this sense, Purim stands for the whole of Jewish covenantal obligation. Hazony claims, “Mordechai [sic] did indeed consider his campaign to secure widespread voluntary observance of Purim to be tantamount to a quest for renewed acceptance of the covenant of Moses.” *Id.* at 239. Purim, then, is a paradigm of law in the context of covenant rather than law merely positive.

<sup>125</sup> See FOX, *supra* note 17, at 125–27 (explaining that *Esther* 9:31 describes the law for Purim as a voluntary obligation unlike those commanded by Torah or prophet). “All of the other Jewish holidays which merit explicit imperatives in the Bible are already commanded in the books of Moses, a thousand years before the events described in Esther took place.” HAZONY, *supra* note 1, at 236. Hazony goes still further: “Mordechai [sic] and Esther’s crusade to institute a new Jewish festival flies in the face of an explicit injunction in the books of Moses forbidding any effort to ‘add to the law.’” *Id.* at 247 (footnote omitted); *cf.* *Deuteronomy* 4:2 (“You shall not add to the word that I command you, nor take

relation among the Jews, a relation that itself rests upon their covenantal relation to God. With Purim, the Jews respond appropriately to their deliverance. The law of Purim clarifies and structures their response. The law for Purim comes from no willful Ahasuerus of pretended godlike power. It comes from a covenant community—leaders and led—that commits itself to celebrating its own deliverance.

Jews were long to live under Gentile authorities. That is, they were long to live under two simultaneous law orders. The *Megillah* teaches a distinction between these law orders. The (lack of) obligation due one is not to affect the obligation due the other. The distinction prevents a general dilution of legal obligation if legal obligation were to be compromised in some part. So, if the Gentile law order were to be owed respect, but not too much; were to be owed some, but not total, allegiance; were to be seen as the foolish, ironic, lawless acts of an authority that pretends to divine prerogative; nevertheless, Jewish law of the sort that establishes the feast of Purim, rooted in covenant and community, founded upon a relationship with the God of Israel, would be a different matter altogether.<sup>126</sup> The *Megillah*, then, graduates legal

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from it, that you may keep the commandments of the LORD your God that I command you.”), 12:32 (“Everything that I command you, you shall be careful to do. You shall not add to it or take from it.” (footnote omitted)).

<sup>126</sup> The *Megillah* is less than clear on whether Mordecai and Esther themselves observe all the Jewish law. See *supra* notes 40–42, 71–72, 109–111 and accompanying text. Instead, the *Megillah* seems intent upon setting Persian law and the law for Purim against each other in sharp relief. Of the obligation of Jewish law in general it does not explicitly speak. Perhaps it implies, however, that whatever obligation Jewish law in general may carry, the law for Purim is without doubt categorically obligatory. In fact, a passage of the Talmud may suggest as much:

The Talmud explains the verse: . . . *And they stood under the mount* [Exodus 19:17—in reference to the Jews’ receiving the Torah at Mount Sinai] “Rav Avdimi ben Chama ben Chasa said: This teaches that the Holy One, blessed be He, overturned the mountain over them like a cask, and said to them: ‘If you accept the Torah, it is well; if not, there shall be your grave.’ Rav Acha ben Jacob observed: This furnishes a strong protest against the Torah [i.e., this provides an excuse for nonobservance, since the Torah was imposed by threat of death thus rendering its acceptance invalid.] Said Rava: Yet, even so they reaccepted it in the days of Ahasuerus, for it is written: . . . they confirmed and undertook—i.e., they confirmed what they had undertaken long before”

obligation. It presents law as a plural—or at least dual—phenomenon.

The duality of law for the *Megillah* reflects both the sources and the substance of law. Persian law is imposed by the rule of a foreign king, or the rule of his bad counselors. The Jewish law of Purim is adopted by the Jewish community, as led by its wise Jewish leaders. Persian law is a tool of power and domination, often foolish and counterproductive even for the ends it was crafted to serve. The Jewish law of Purim articulates and institutionalizes a commemoration already in place to celebrate a just and glorious victory that won the salvation of the Jewish people. Persian law, the extension of power, is not owed the degree of obligation owed to the Jewish law of Purim, the response of a community to the day of its deliverance. Law resting upon command alone—even *authorized* command—is unlike law resting upon the life of a people. Mere commands sometimes are better left unobeyed—and more honored in the breach. Sometimes the cost of obedience outweighs the cost of disobedience. But norms founded upon the very life of one’s polity carry an obligation greater than that of mere commands. To disobey such norms is to sever one’s relationship with one’s polity. On such teaching, the *Megillah* seeks to preserve Purim as a holiday for Jews to be kept through the ages.

#### V. CONCLUSION: *MEGILLATH ESTHER* AND THE RULE OF LAW

The legal regime portrayed in *Megillath Esther* is not one friendly to the rule of law. Some law is received as obligatory,

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[(*Shabbos* 88a)].

THE MEGILLAH: THE BOOK OF ESTHER, *supra* note 8, at 130 (bracketed material in original). “[T]hey confirmed and undertook” here translates the words of *Esther* 9:27, the words translated above, as “firmly obligated themselves.” *Supra* text accompanying note 94. Rava understands these words to speak of the Jew’s confirmation of an undertaking to observe the Torah, a confirmation that cures any defect in obligation the Torah might have from its being imposed by threat. Whether these words actually speak of the Torah at all may seem doubtful, pace Yoram Hazony. *See supra* note 125. But it is not doubtful that they speak of the obligation to keep the feast of Purim. *See supra* text accompanying note 94. Consequently, the *Megillah* actually may elevate the obligation to observe Purim above the obligation to observe the Torah. The main point, however, is that the *Megillah* prescinds from the question of the obligation of the Torah, focusing on the solemn and categorical obligation to observe Purim as contrasted with the weak obligation with which Mordecai and Esther regard Persian law.

some is not. Some law receives obedience, some does not. As with the situation in American overcriminalization,<sup>127</sup> the mixture of what might be called “genuine law” with what is treated as ersatz threatens the rule of law. The *Megillah*, however, may show the way to minimize this threat.

The rule of law embraces the notion that the law is obeyed. Aristotle observed:

[[Y]ou do not secure the rule of law] by having a good set of laws which are not actually obeyed. . . . We have to distinguish two senses of [the rule of law]—one which means obedience to such laws as have been enacted, and another which means that the laws obeyed have also been well enacted.<sup>128</sup>

The rule of law requires that the law, in fact, rule. Furthermore, the law that rules is itself to be composed of rules:

Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.<sup>129</sup>

Lon Fuller put it categorically:

Surely the very essence of the Rule of Law is that in acting upon the citizen . . . a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative

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<sup>127</sup> See Luna, *supra* note 3, at 798–99.

<sup>128</sup> ARISTOTLE, *POLITICS* 152 (Ernest Barker trans., Oxford Univ. Press 1995). For more on the rule of law in the thought of Aristotle, see Craig A. Stern, *The Common Law and the Religious Foundations of the Rule of Law Before Casey*, 38 U.S.F. L. REV. 499, 501–02 (2004).

<sup>129</sup> F.A. HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., 2007) (footnote omitted); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

of his rights and duties. If the Rule of Law does not mean this, it means nothing.<sup>130</sup>

Typically, the focus of the rule of law is that the civil government itself adhere to the rules of law.

But the purposes of the rule of law extend it beyond this focus. Among those purposes is to see that the law remain “a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.”<sup>131</sup> Certainly, the rule of law includes the principle that the civil government is to abide by the law. Beyond this, however, the civil government is to see to it that those subject to its authority also abide by the law. The law is to rule both government and governed if the rule of law is to be honored.<sup>132</sup>

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<sup>130</sup> LON L. FULLER, *THE MORALITY OF LAW* 209–10 (rev. ed. 1969). Similarly, another authoritative scholar of the rule of law has written of it, “[i]t means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.” A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202 (10th ed., St. Martin’s Press 1959). (1885).

<sup>131</sup> FULLER, *supra* note 130, at 210; *see also* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 272 (2d ed. 2011) (“And here we touch, at last, the reason why the Rule of Law is a virtue of human interaction and community. . . . Individuals can only be *selves*—i.e. have the ‘dignity’ of being ‘responsible agents’—if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a ‘lifetime.’ This is the primary value of the predictability which the law seeks to establish . . . .”); HAYEK, *supra* note 129, at 117 (“It may even be said that for the Rule of Law to be effective it is more important that there should be a rule applied always and without exceptions than what this rule is . . . . The important thing is that the rule enables us to predict other people’s behavior correctly, and this requires that it should apply to all cases—even if in a particular instance we feel it to be unjust.”); Gerald J. Postema, *Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in *BENTHAM’S THEORY OF LAW AND PUBLIC OPINION* 19–20 (Xiaobo Zhai & Michael Quinn eds., 2014) (rule of law necessary if law is to effect social ordering); Thomas M. Riordan, Comment, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 *LOY. L.A. L. REV.* 675, 678 (1994) (“A legal system based on rule of law values will encourage maximization of common good by promoting certainty, fairness, and equality in social arrangements.”).

<sup>132</sup> *See* Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 *GA. L. REV.* 727, 748 (1984) (“Given their obvious limitations, human beings need fairly clear rules to govern many activities. They also need the support of authoritative adjudicators and centrally organized sanctions to ensure that the rules are observed by individuals who might benefit from breaking them. Legal rules, and the rights they create, help establish for a society what one

This aspect of the rule of law is where the behavior of Esther and Mordecai seems in tension with the rule of law. Their behavior departs from the law of Persia, and with impunity. Their behavior is not *ruled* by the law of Persia, and the *Megillah* seems to endorse that it is not ruled by the law of Persia. Another way of putting the matter is that Persian law is not really what it purports to be, because it does not (and apparently should not) hold Esther and Mordecai accountable for departing from the stated rules. Persian law manifests what Lon Fuller called “a failure of congruence between the rules as announced and their actual administration,” the sort of failure that threatens the very existence of the legal system.<sup>133</sup> In any event, the rule of law cannot exist if those subject to the civil government do not obey the law.<sup>134</sup>

Because general obedience is essential to the rule of law, many commentators have insisted that the rule of law requires a culture of obedience, a widespread attitude that the law is to be obeyed.<sup>135</sup> It is not enough that the governors embrace a commitment to the law. The polity as a whole must share that commitment, a commitment manifested in general obedience to the law. For this reason, it has been claimed that the law must align with the consciences of those subject to it lest the demand to obey the law also “demand that a man betray his conscience [and so] eliminate[ ] the only moral basis for his fidelity to the rule of

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citizen can expect of another, and typically they mark occasions for the interpretation of public force.”); Postema, *supra* note 131, at 7 (“Law was not to be merely an instrument of governance; law was meant to rule governors and citizens alike. This is the simple, central idea of the rule of law.”), 32 (“[F]or law to rule in a polity law must *count* among ordinary citizens as well as officials; it must occupy a prominent place in the normative economy of members of the polity.”).

<sup>133</sup> FULLER, *supra* note 130, at 39; *see also id.* at 209–10.

<sup>134</sup> *See* Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZA L. REV. 2083, 2098 (2007) (“Citizens must obey . . . the substantive rules of the society . . . for the rule of law to exist.” (footnote omitted)); Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SINGAPORE J. LEGAL STUD. 232, 233 (“The rule of law means that government officials and citizens are bound by and abide by the law.”).

<sup>135</sup> *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 56–57 (1987); RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD 20, 99 (2012); Hall, *supra* note 134, at 2098; Postema, *supra* note 131, at 7–8, 20, 25, 39; Tamanaha, *supra* note 134, at 246–47; Riordan, *supra* note 131, at 717.

law.”<sup>136</sup> The rule of law then depends upon the moral obligation, subscribed to by all, to obey the law.

Consequently, again, the attitude Esther and Mordecai manifest to the law of Persia detracts from the rule of law. “[T]he law should apply in the same way to everyone . . . no one is above the law. By deciding to break the law, disobedients already seem to assert that they are above the law. This contention damages the rule of law.”<sup>137</sup> Does the *Megillah* then necessarily draw in question the rule of law? Or does the *Megillah* supply a way to preserve the rule of law when some rules of law are to be disobeyed?

The *Megillah* suggests that human law is of two basic types. The Persian law stands for law merely positive, law simply as authorized command. Good actors may find that departing from such law at times is sound. The law for Purim, on the other hand, is not merely positive, but a norm that reflects prior moral commitments and constitutes part of a covenantal web of mutual fidelity. This law is not to be disobeyed. Discerning this distinction and its consequences may preserve the rule of law even when some law is to be disobeyed. Kent Greenawalt has suggested something similar for the contemporary American context:

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<sup>136</sup> Lynn D. Wardle, *Protection of Health-Care Providers’ Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 8 (2010); cf. KLEINFELD, *supra* note 135, at 101 (“If most citizens break laws regularly, then only a despotic state with immense policing powers will have the power to enforce the rule of law. For a government to enforce the laws without resorting to undue repression, most people must simply follow the laws regardless of policing, because they accept the legitimacy of the bulk of the laws and their moral codes generally align with the laws.” (footnote omitted)); José de Sousa e Brito, *Political Minorities and the Right to Tolerance: The Development of a Right to Conscientious Objection in Constitutional Law*, 1999 BYU L. REV. 607, 614 (“It was not only the recent denial of freedom of conscience by dictatorships that made an understanding of freedom easier, it was the understanding that the individual conscience is the main ethical support of a democratic state of the rule of law, which bases the power of its principles on the intimate conviction of those people that defend their values and give them reason, more than in the fear of its sanctions.”).

<sup>137</sup> Hall, *supra* note 134, at 2106; see also E.C.S. Wade, *Introduction to DICEY*, *supra* note 130, at cxliv (finding in lawlessness a decline in the English veneration for the rule of law); cf. FINNIS, *supra* note 131, at 360–61 (drawing upon Aquinas to note that even some unjust laws ought to be obeyed to the degree “as is necessary to avoid bringing ‘the law’ (as a whole) ‘into contempt’” and so suggesting that the rule of law would be compromised if one were to disobey even unjust laws).

At a time when our lives are subject to an incredible number of legal norms, touching unimportant as well as important matters, more selective attitudes toward the moral force of legal norms should be adequate to achieve wholesome levels of compliance, so long as people recognize that duties toward fellow citizens are strongly implicated in serious questions of disobedience. These duties, based on reciprocal relations of benefit and need, constitute the main underpinning of our responsibility to comply with the law and with other rules that govern our lives.<sup>138</sup>

The *Megillah* may point the way for preserving the rule of law when universal obedience to the law is not to be sought.

Perhaps the teaching of the *Megillah* supplies a useful way to understand what Greenawalt means here by “serious questions of disobedience” that implicate duties “based on reciprocal relations of benefit and need.”<sup>139</sup> Perhaps another way to put Greenawalt’s point is to distinguish between “legal norms” that are merely positive and those rooted in a more covenantal context. Covenant has played a significant role in the America national heritage,<sup>140</sup> and it continues to play a significant role in the American polity.<sup>141</sup> Of particular importance to our discussion, Daniel J. Elazar, celebrated scholar of the covenantal tradition in politics, has described the covenantalism to be found in the nineteenth century border states as explicated in the writing of Mark Twain:

A close reading of Mark Twain reveals him to be a classic spokesman for the covenant tradition in

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<sup>138</sup> Greenawalt, *supra* note 132, at 769.

<sup>139</sup> *Id.*

<sup>140</sup> See DANIEL J. ELAZAR, COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY 40 (1998) (noting the impact of the idea of covenant on American constitutionalism); ELAZAR, *supra* note 122, at 28, 47, 426–27 (same); Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21 (1990) (tracing the important role of the covenantal tradition in American constitutionalism beginning with the seventeenth century).

<sup>141</sup> See ELAZAR, *supra* note 140, at 18, 29, 254. For an application of the American covenantal tradition to contemporary American politics see Ronald J. Wright, *The Contributions of Natural Law and Covenant Thought as Sources for Public Theology*, 2 LIBERTY U. L. REV. 969 (2008).

American life as expressed in the Middle States, from the mid-Atlantic to the Middle Border . . . . [T]he exponents of the covenantal tradition in the Middle States were members of [covenantally] structured churches but constituted a minority within a larger individualistic, market-oriented, or traditionalistic, slavery-accepting civil society . . . .

As Mark Twain's own writings reveal, the Middle States covenantalists were in a tragic position in the classic sense of the term. Longing for the covenantal community, they were forced to live and make their way in an individualistic society. Hence they often became cynical as they recognized the gap between their ideals and the reality around them. One aspect of Lincoln's greatness is that he, in the same situation, did not succumb to cynicism but transcended his environment without rejecting or ignoring it.<sup>142</sup>

Border states, then, manifested the duality of a simultaneously covenantal and non-covenantal society. That duality is the duality of the *Megillah*, a duality that may be of use in distinguishing Greenawalt's "serious questions of disobedience"<sup>143</sup> from those less serious.

An important component of covenant is that it is "a morally informed agreement."<sup>144</sup> A covenant "rest[s] on a moral basis and ha[s] moral ends."<sup>145</sup> If Americans pick and choose—*must* pick and choose—which laws to take seriously and which to take with a grain of salt,<sup>146</sup> the *Megillah* counsels Americans to take seriously the laws that reflect the covenantal relationship they share with one another, laws rooted in the moral ends of their polity. The scant regard they may pay to some laws must not be allowed to color the regard they pay to others, to laws that articulate "reciprocal relations of benefit and need."<sup>147</sup>

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<sup>142</sup> ELAZAR, *supra* note 140, at 156–57.

<sup>143</sup> See *supra* notes 138, 139 and accompanying text.

<sup>144</sup> See *supra* note 122; see also ELAZAR, *supra* note 140, at 43, 128, 257.

<sup>145</sup> ELAZAR, *supra* note 140, at 128.

<sup>146</sup> See *supra* note 3.

<sup>147</sup> See *supra* note 138, 139 and accompanying text. This second category of laws might especially include private law that, for example, simply facilitates

If the teaching of the *Megillah* is sound, the best for the rule of law—because it best supports the obligation to obey that is necessary to the rule of law—would be a system of laws more like the law for Purim than the law for the Persian Empire. For law to serve as a binding norm and to be recognized as such it should be less a command alone from some authority and more a mutual covenantal undertaking of a polity itself. Second best would be to distinguish between laws of the one type from laws of the other. That at least would preserve a measure of law with genuine obligation and not just submission when convenient. The *Megillah* speaks to life under these two types of law. It may be our misfortune to have to heed.

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coordination among private actors. (The author owes this observation to his colleague, Scott Pryor.)