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## HALAKHAH BETWEEN HISTORICISM AND DOGMATISM

CHRISTINE HAYES\*

CHAIM Saiman's book *Halakhah: The Rabbinic Idea of Law*<sup>1</sup> describes halakhah as a dialectic integration of regulatory and expressive modalities, a discourse that not only conveys legal norms but also shapes thought, communicates social and religious values, and explores enduring human questions. Saiman argues that this integration of the regulatory and the expressive in Jewish law was encouraged by two features that set halakhah apart from state-based legal regimes. First, halakhah came of age in the period of the Mishnah and Talmud, after the demise of Jewish sovereignty; as a result, it contains a great deal of non-applied or once-applied law. Second, the ideal of Talmud Torah, or *study* for its own sake rather than for concrete application, was a central aspect of halakhah's practice and a foundational religious requirement. The integration of the regulatory and the expressive explains many of the distinctive features of halakhah: the mix of legal and non-legal genres (halakhah and aggadah) in the Talmud, the curious turns of the Talmud's dialogue, and the rabbinic devotion to the painstaking elaboration of even defunct or non-applied law.

The book offers a phenomenological study of halakhah as the playing out of the tension between these two poles. Illustrating his thesis with wonderful examples from late ancient to modern times, Saiman locates various scholars, schools, and communities on the continuum between those who hold a more static conception of halakhah as regulatory, and those who hold a more dynamic conception of halakhah as Torah—which in this context refers to a discourse to be studied. The book's chapters show that although the period following the close of the Talmud saw a movement towards halakhah-as-law, the pull of halakhah-as-Torah, continued to register. Saiman writes: "whether our point of reference is the Talmud, the Codes, the commentaries, or the responsa, the result is substantially the same. Halakhah is concurrently a system of governing rules and practices, a forum for legal analysis, a platform of religious expression, and an object of devotional study."<sup>2</sup>

In a final chapter, Saiman argues that the core features he has traced make halakhah ill-suited to serve as the legal-system of a modern state. State laws are ideally flat, unambiguous, static, and predictable, but the Talmud and the religious calling of Talmud Torah favor dynamic legal

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1. CHAIM N. SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* (2018).

2. *Id.* at 194.

argument, literary nuance, and cultural exploration over black-letter rules. Halakhah contains hyperbolic statements and linguistic imprecision that can be dangerous if treated as black letter law, as well as aspirational elements that cannot be enforced. It also places limits on its own operation, so as to almost be disabled as a system of governance, but then conversely fails to reign in what Saiman refers to as “sub-halakhah”—extra-halakhic practices and customs adopted and applied as time and opportunity required. Saiman sketches briefly the proper role of halakhah in a Jewish state by contrasting it to its improper role: “when halakhic authority is an artifact of state law rather than an autonomous cultural norm, the result is inevitably frustration and disenchantment on all sides . . . a brute mechanism of state power”<sup>3</sup>—words that might just as well have been uttered by Moses Mendelssohn or even Baruch Spinoza. In more positive terms, Saiman writes: “If, as we argued above, halakhic regulation is ideally encountered in a holy space where regulation, education, and religious reflection converge, then imposing halakhah through state law falls short on every account.”<sup>4</sup> *In nuce*, and to invoke Robert Cover, the proper role of halakhah in the Jewish state is paideic rather than imperial.

Saiman differentiates his work from the study of Talmud in academic circles. He describes academic studies of the halakhah as committed to a historical or a “still-shot” approach that understands each iteration of the law in historical context.<sup>5</sup> By contrast, the study of halakhah by lawyers—which is often labelled a constructive or dogmatic approach<sup>6</sup>—approaches Jewish law as a legal system structured by various propositions and analytical principles. However, while it is true that Saiman approaches the halakhah as a system and seeks to unveil its most fundamental ideas, he underestimates the extent to which his study is similar to recent work in academic Jewish studies. Increasingly, scholars of Talmud and Jewish law are charting a path between historicism and dogmatism, and producing works of intellectual history. These works assume a basic conceptual coherence as they chart the development of some aspect or element of the halakhah. Thus, Saiman’s narrative of the very idea of law in rabbinic culture will be a welcome addition to the library of any Jewish studies academic.

In one important respect, however, Saiman’s work does differ from similar studies in the academy. Saiman provides an almost entirely immanent account that privileges an unfolding inner logic when explaining or charting the development of law and minimizes the effect of historical context. While it is true that certain characteristic features or qualities inherent in halakhah are engines of halakhah’s story, it is also true that no legal system develops in historical isolation. The story of any legal system’s

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3. *Id.* at 241.

4. *Id.* at 240–41.

5. *Id.* at 13.

6. Joseph E. David, *Divinity, Law, and the Legal Turn in the Study of Religions*, 32 *J.L. & RELIGION* 172 (2017).

development is necessarily a mix of inherent principles, doctrines, and ideas that unfold naturally and contingent historical factors and interactions that exert pressure on or shape the path of its development. Saiman states, however, that he is not interested in the historical question of how and why the rabbis' idea of law developed as it did. He confines himself to the phenomenological question: what was the *effect* of this understanding of halakhah? And to answer the question, Saiman reaches for the contrast between analytical philosophy and literature.

Saiman explains that the goal of philosophy's analytical inquiry is to approach a subject in the purest and most abstract form possible, free of distracting contingencies.<sup>7</sup> The philosopher works through reason alone, downplaying reliance on specific laws, histories, and traditions. Literature works from the opposite perspective. To understand a work of literature one must inhabit the plot, characters, and symbols. Any *detail* can shed light on how the novel is to be read. Saiman asserts that the Talmud is more like literature than analytic philosophy because it resists detached inquiry and is difficult to universalize.<sup>8</sup> And yet, Talmud is not exactly like literature since Talmud speaks in the legislative tone and literature does not. It is a curious *sui generis* combination.

The philosophy/literature contrast is wonderfully instructive but it leaves us wondering *why* the rabbis chose the path of literature instead of philosophy? I submit that Saiman's phenomenological analysis would have greater power, and the stakes of the rabbinic wager would be clearer and sharper, if we allow ourselves to explore the larger cultural context that conditioned and shaped the rabbis' choice and made it so meaningful. This is where Saiman's claims most closely intersect with my own recent work.<sup>9</sup>

The Mishnah emerged in Roman Palestine after a period of intensive encounter with Greek and Roman ideas of law. The Talmuds of the Land of Israel and Babylonia are also the products of a minority community elaborating its native traditions at a time of great cultural ferment and interaction. When viewed in historical context, the dialectic interplay of regulatory and expressive modalities at the heart of halakhah is revealed as more than an interesting cultural phenomenon with important effects; it is a profound act of resistance to an alternative epistemology.

Saiman actually takes us a good way down this path in chapter 4 where he describes the conflict between Torah and philosophical inquiry as a conflict over knowledge and the means by which knowledge is processed and transmitted. As Saiman notes, Western tradition values sin-

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7. SAIMAN, *supra* note 1, at 138.

8. *Id.* at 139.

9. The ideas developed in the remainder of this Essay will be presented in fuller form in my forthcoming monograph on play and humor in rabbinic law, but for the nonce see my "Humor as Epistemic Barometer in Rabbinic Literature," seminar paper delivered at the AJS annual meeting, in Washington D.C., December, 2017.

gle-authored works with a thesis supported by arguments running from premise to claims to conclusion.<sup>10</sup> No classical text of Jewish law or thought works this way. None is single-authored, and the Sea of the Talmud is like “a network: a system where individual nodes can be arranged and rearranged in multiple configurations, but that has no true beginning middle or end.”<sup>11</sup> There is “perpetual uncertainty as to the guiding direction” and “conversations . . . simply stop rather than conclude.”<sup>12</sup>

This is exactly correct, but again the question is *why*? Are these two a-historically represented orientations (the orientations of philosophy and of literature) simply inexplicable preferences, or can we push beyond the phenomenological to the historical so as to understand better *why* the rabbis approached halakhah as they did? I submit that we can and when we do, the rabbinic idea of law is revealed as an intentional choice based on a fundamental resistance to Greek ways of knowing, to Greek claims about (divine) truth as a static abstraction divorced from the material world. Viewed in its larger cultural context, the rabbinic idea of (divine) law is not only an alternative idea of law; it is an alternative epistemology and indeed, an alternative ontology.

I would argue that the Talmudic preoccupation with detail—often trivial and impracticable—is a weapon in the rabbis’ arsenal against absolutist claims of *certain* knowledge. I recognize that this runs against the conventional view that the baroque argumentation of the Talmud seeks to ascertain knowledge by exhausting all possible alternatives, so I am delighted to see that Saiman joins me in the view that there is “perpetual uncertainty as to the guiding direction” of a halakhic debate, and “conversations . . . simply stop rather than conclude.” But to understand how the Talmud’s playful focus on detail disrupts the acquisition of certain knowledge requires a consideration of the epistemological function of detail as propounded by ancient Greek culture.

For all their differences (and there are many), the theories of knowledge propounded by Plato and Aristotle had this in common: For both, the object of true knowledge is the universal form or essence rather than particular substance. This is because knowledge is knowledge of truth and truth is immutable; since particular *material* substances are subject to change, genuine knowledge cannot be of particulars, but must be of universal forms, essences, or concepts that are immaterial and metaphysically real.<sup>13</sup>

The particular details of any given substance, which are a function of its material substratum (its being a brown or white horse, a tall or short

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10. *Id.* at 70.

11. *Id.* Saiman credits JONATHAN ROSEN, *THE TALMUD AND THE INTERNET: A JOURNEY BETWEEN TWO WORLDS* (2001) with the analogy.

12. SAIMAN, *surpa* note 2, at 71.

13. An important difference between Aristotle and Plato is that the latter locates the universal forms in an independent, transcendent realm, access to which is impeded by sensory perception of material particulars.

horse), may distinguish that substance from other particular substances in its class (horses), but such details do not contribute to an apprehension of the universal form that unites and defines the class (horse-ness), and indeed certain details must be suppressed when seeking to identify and abstract the common essence that unites a group of particular substances. Insofar as it aims at a unity beyond diversity, Greek epistemology deemed a preoccupation with detail as an impediment to the acquisition of true and certain knowledge.

Ancient Greek theories of knowledge focusing on the relation of the particular to the universal, the detail to the whole, shed light on the epistemological revolution posed by the Talmudic *sugya*, and this is my claim: where Greek epistemology sought to stabilize knowledge and achieve certainty through *abstraction* from detail, Talmudic epistemology sought to *destabilize* knowledge and *undermine* certainty through *distraction* with detail.

The scholarly consensus is that the Talmud's detailed argumentation is designed to bring more certainty; I disagree and on my reading of Saiman's book, he does too. The plethora of detail and the argumentative meanderings are designed to bring less certainty and I submit that they do so pointedly and intentionally. The Talmud's seemingly endless scholasticism is an intentional reminder that divine law is infinite, because it can never consider every possible case, condition, or variable detail, and so we must never claim final certainty. The halakhah's refusal in so many instances to arrive at a single definitive answer may be seen as a resistance to epistemological certainty and static absolutes in the name of the dynamic, the particular, the situational, the relational.

Halakhah is not represented in Talmudic argumentation as the mirror of a fixed transcendent reality and its categories do not point beyond themselves to a static abstract truth. On the contrary, the play of halakhic argumentation, for all its analytical conceptualization and rational rigor, points towards and remains anchored in the ever-shifting *details* of this world—with its creditors and debtors, its pots and pans—as the only reality. Halakhah requires an existential commitment to the dynamic and world-sustaining contestation of *all* static absolutes.

If the rabbis' commitment to excessive detail arises from, and is a sign of, their resistance to epistemological certainty and static absolutes in the name of the dynamic, the particular, the situational, the relational, then the story of halakhah suffers a serious disruption with the methods of the Brisker Yeshivah, as described in chapter 12. This disruption is obscured if we adopt Saiman's phenomenological lens only. On Saiman's account, the Brisker approach and the legal philosophy of R. Hayyim Soloveitchik and his grandson R. Joseph Soloveitchik represent an extreme swing towards the halakhah-as-Torah/discourse pole. But viewed through a historicist lens, the Brisker approach stands revealed as a singular departure from Talmudic epistemology and ontology. In other words, once we un-

derstand that the rabbinic idea of law is a resistance to a dominant and static conception of abstract truth transcending the human and material world, the Brisker conception of halakhah emerges as a radical deviation from the halakhah's story. R. Hayyim Soloveitchik conceived of halakhah as a transcendent and abstract reality that stands outside of time and history and served as "the blueprint for creation."<sup>14</sup> His grandson, R. Joseph Soloveitchik analogized the halakhist to a mathematician or physicist because the propositions of halakhah are "true" regardless of the actual physical existence of the things they organize and govern, an "ideal construction which . . . lasts forever."<sup>15</sup> As Saiman notes: "The idea that halakhah predates creation means that its rules are hard-wired into the fabric of the universe. . . . The halakhah that God studies with the angels in heaven consists of objective principles beyond the reach of humans."<sup>16</sup>

Soloveitchik, of course, earned a doctorate in philosophy and was well-versed in Platonic and Aristotelian thought. He notes with admiration the Greek valorization of the abstract as the only ontological reality in his *Halakhic Man*: "The common denominator of both the Platonic and Aristotelian views is that the random and particular are not deemed worthy of being granted the status of the real and existent and remain in the realm of chaos and the void."<sup>17</sup> Perhaps we should not be surprised that he internalized these ideas and that he reformulated Talmudic epistemology and ontology to align with the classical Greek philosophy for which he had developed an admiration. Nevertheless, it is remarkable that in this respect Soloveitchik's conception of halakhah, a conception that undergirds contemporary forms of Judaism that consider themselves deeply "traditional," has more in common with such Hellenized Jews as Philo, or even the sectarians at Qumran (both of whom attributed some form of ontological reality and immutability to the Torah) than with the rabbis of the Talmud (who, in general, did not).

Certainly, insofar as the Brisker school invests considerable effort in discerning the principles that animate the halakhah's internal structure, it is merely another instance of the pull away from the pole of halakhah-as-law towards the pole of halakhah-as-Torah,<sup>18</sup> but insofar as it ascribes to halakhah's principles and structure a static and objective metaphysical reality that is discovered when it is "freed from the bonds of facticity, external and common-place explanations, and . . . transformed into abstract concepts,"<sup>19</sup> it aligns with prominent elements of Greek epistemology and ontology. It is a stunningly radical departure from the rabbinic idea of law

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14. SAIMAN, *supra* note 1, at 205.

15. *Id.* at 206.

16. *Id.* at 20.

17. JOSEPH SOLOVEITCHIK, *HALAKHIC MAN* 5 (1983).

18. SAIMAN, *supra* note 1, at 201.

19. R. Joseph Soloveitchik, *Mah Dodekh mi-Dod*, in *IN ALONENESS, IN TOGETHERNESS: A SELECTION OF HEBREW WRITINGS* 227 (1971) (describing his grandfather's method, as cited by Saiman, *supra* note 1, at 203).

according to which halakhah is “from heaven but no longer in heaven,” a divine gift that far from being objective, static, and beyond the reach of humans, is only actualized when it reaches human hands and is applied to particular, subjectively-experienced situations.<sup>20</sup>

Chaim Saiman’s *Halakhah* is a masterful work and the academic discipline of Talmudic-rabbinic studies is the richer for its having been written. The rabbinic idea of law that emerges from Saiman’s phenomenological analysis is inherently engaging; in addition, when set alongside alternative ancient cultural formations and their epistemologies, its distinctive features illuminate the foundational commitments at the heart of the rabbis’ intellectual universe.

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20. This characterization of the rabbinic approach, demonstrated in countless legal discussions and determinations on every page of the Talmud, is not obviated by a handful of hyperbolic references to a pre-existent (but nevertheless divinely-created) Torah consulted by God when creating the world. See *Genesis Rabba* 1 and 8.



