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Defining Law

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I am in the impossible position of speaking at the end of a day's worth of wonderful presentations. I am so honored to be a part of this rich conversation and I am so humbled by it. Thank you, Chaim, and thank you to Villanova and to our hosts and sponsors. This is incredible work and a wonderful opportunity to be a part of this symposium.

So, with that, I will echo earlier presenters and say that Chaim Saiman's book, *Halakhah: The Rabbinic Idea of Law*, offers a remarkably accessible and engaging account of the development of the framework of Jewish law. And in doing so, as the rich responses of this symposium have demonstrated, it refracts the many forces that influence how we define the rules. (I use "rules" in the capacious sense to include both rules and standards in the law because I think it will make more sense in the context of my conversation.)

Chaim Saiman's book makes salient the contingent interplay of history, narrative, ideals, culture, power, and texts in halakhah in a way that sheds light on other expressions of law. In reading it, I was struck by how it prompts us to consider what we mean by "law." This has come up in some of our conversations. In focusing primarily on American texts, I hope to show how the book gives us new purchase on our understanding of American law and the way law is embedded in language and narrative.

Specifically, a set of federal district court decisions from the late 1990s about the admissibility of evidence seized in a police stop serves as a useful case study of the contingency of norms and of the embeddedness of legal texts in the social world—which Chaim Saiman's book illuminates. This is not to suggest a simple analogy between American case law and halakhah but to demonstrate the dynamic of contingent norms, social context, history, and narrative that shapes the meaning of law.

The case I would like to look at is *Bayless v. United States*.[1] This case involves a couple of headline-making pre-trial decisions by Judge Harold Baer in the Southern District of New York. In *Bayless*, Judge Baer considered a motion to suppress evidence that was allegedly obtained in the absence of reasonable suspicion.[2] The police had stopped "a middle-aged

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1. Bayless v. United States (*Bayless I*), 913 F. Supp. 232 (S.D.N.Y. 1996) (order granting motion to suppress); Bayless v. United States (*Bayless II*), 921 F. Supp. 211 (S.D.N.Y. 1996) (order denying motion to suppress). For a more involved discussion of the way narrative informs the operation of law in this case, on which this essay draws in part, see Tal Kastner, *Policing Narrative*, 71 SMU L. REV. 1117 (2018).

2. *Bayless I*, 913 F. Supp. at 234.

black woman," observed in Washington Heights, New York in the very early morning hours as she was driving a rental car with Michigan license plates.[3] Among other things, the police found thirty-four kilograms of cocaine and two kilograms of heroin in duffle bags in the car.[4] Judge Baer's opinions, which I will return to in a few moments, demonstrate the intertextuality of common law decisions and the boundary challenge of isolating a rule (I mean "rule" in the capacious sense) in the rich text of what we think of as "law."

Halakhah: The Rabbinic Idea of Law[5] points to the distinctive way that halakhah manifests law. As lived practices, a belief system, and deep textual engagement of the traditional Jewish canon, halakhah resists easy categorization, both as a genre and in terms of its social function. But, as I would like to argue, this distinctive operation of this manifestation of law also derives from more universal dynamics. It emerges from social, historical, and philosophical forces and is forged through lived practice and language. In that way, halakhah points us to a range of factors and influences that, while they may be expressed in different and distinctive ways, make up a more universal process of constituting "law." In other words, rather than—or in addition to—categorizing halakhah as a strange case of law, an encounter with halakhah invites us to consider the constitutive dimensions of what we understand "law" to mean.

To be fair, as others have noted and Chaim Saiman's book highlights so beautifully, certain aspects of halakhah strike some as especially distinctive. The value of learning for learning sake, the investment in unresolved outcomes, and rules that are recognized as unrealizable and yet still important, appear especially remarkable.

More familiarly in line with conventional structure of contemporary American legal texts, canonical Jewish texts parse categories, distinctions, and rules—though these rules might or might not be literally applicable in the material world. In the process, they purport to shape human experience. Indeed, they have become embedded in social practices that themselves apply and inform their meanings.

These texts also operate, as *Halakhah* points out, through a deeply intertextual and allusive structure. They invite the reader to explore the valences of language. Talmudic discussion, for example, interweaves expressive and normative dimensions to embrace a multiplicity of meaning. The centrality of dialogue and debate, moreover, situates the texts in a distinct rhetorical and social context.

Thus, for example, the *Shulchan Aruch*—to take one text in the canon—comes to be seen both as an authoritative codification and, in Chaim Saiman's words, a devotional text. And, by way of a synechdotal example, its title demonstrates the range of dimensions through which

3. *Id.*
4. *Id.*
5. CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW (2018).

halakhic legal authority is constructed. Translated loosely as the "set table," this sixteenth-century "code" establishes its authority in part by way of allusion. It evokes commentary on the presentation of laws in Exodus in which Moses is commanded to set out the reasoning of God's laws like a table set before the nation. Through the engagement with precedent and performance of authority (think *Marbury*) the *Shulchan Aruch* creates its place in the canon.

Yet its name invites an even more expansive and multidimensional conception of law. A "set table" presents itself as a metaphor of human existence and socialization, thereby conjuring the text's comprehensive sustenance. It invokes the communal and dynamic facets along with explicit and implicit rules of fundamental human activity. As sociologists point out, much of our normative experience is determined by the way we move through or inhabit our world. The so-called "habitus," or the muscle memory and the things we all take for granted, directs our understanding of the world and the norms we share.[6] Through the metaphor of a meal, the set table gestures toward the unstated components of law that are baked into each community's experience.

A two-word title thereby suggests the interplay among rule-positing texts, practice, and inhabited norms in quotidian life. And if we can treat the *Shulchan Aruch* as indicative, we see that the collection of Jewish texts—and the lived traditions that they invite and through which they are understood—form a distinctive cultural artifact.

At the same time these dynamics—including the expressive/regulatory interplay—can been seen as part of a continuum that, while manifested in different ways, influences the way that we understand law, even in the (for some, more familiar) space of American life.

In contemporary American life, the formally codified rules of a statute inevitably fail to account for the operation of law. The implementation of a written rule implicates all kinds of human and social dimensions, such as prosecutorial discretion, institutional norms, and bureaucratic processes, to name just a few. Even within the text, the project of isolating a rule is not necessarily simple. As professors of law, we teach students to differentiate between holding and dicta, and between the majority view and dissenting opinions, for example. But we know these distinctions are not necessarily stable nor independent of social norms. A litigator constructs and distills rather than finds rules, and line-drawing by courts is a function of contingent experiences, context, and framing of fact.

This brings us back to the *Bayless* case that I mentioned at the outset.

At the first pretrial hearing in *Bayless,* Judge Baer granted a motion to suppress the evidence.[7] He held that the police lacked reasonable suspicion to justify the stop.[8] Judge Baer's initial decision follows a familiar

6. *See* PIERRE BOURDIEU, THE LOGIC OF PRACTICE (Richard Nice, trans., 1980).
7. *Bayless I,* 913 F. Supp. at 234.
8. *Id.* at 243.

mode of legal reasoning: questioning the purported significance of fact in light of context and, at times, overarching principles of justice. Rejecting the state's characterization of events, Judge Baer viewed the facts through a different lens—a move familiar to any lawyer, and one that *Halakhah* highlights in the Talmud. Rather than accepting that a car with Michigan plates ought to prompt suspicion in New York, Judge Baer identified its presence as unremarkable, especially as he put it, in "a city that considers itself 'The Capital of the World.'"[9] Similarly, Judge Baer rejected the characterization of men seen approaching the car "single file" as suspicious, and of their running off at the sight of the unmarked police car as evasive conduct.[10] Shifting the contextual frame, the decision asserts that, in light of recent successful prosecution of police corruption "in this very neighborhood," "had the men not run when the cops began to stare at them, it would have been unusual."[11]

More unusually, perhaps, Judge Baer's first pretrial decision seizes on intertextuality to telegraph its philosophical perspective. It begins with an epigraph that quotes John F. Kennedy stating, "The great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, pervasive, and realistic."[12] The opinion thereby reminds us that the articulation and enactment of law is not only informed by worldviews and at times aspirational ideals but also impacted by contingent social forces. In fact, Judge Baer's first *Bayless* decision quickly became a cultural flashpoint in what happened to be a year of tough-on-crime campaigning. The case prompted an outcry from the press (New York Times editorial page included) and politicians—ranging from Republican New York City Mayor Giuliani to Democratic President Bill Clinton—with some even calling for Judge Baer's impeachment.

Following this response, Judge Baer granted a motion for reconsideration and reargument, which in turn opened the door for additional testimony by the police about the transaction history on the particular corner on which the car was spotted. In addition to highlighting the way law is embedded in social forces and distinct places and moments in time, the second phase of this case illustrates the difficulty of delineating legal rules in a rich text.

The second *Bayless* decision reflects Judge Baer's concerted effort to circumscribe the rules (and authority) of law. But—reminiscent of, if not analogous to, the challenge of defining *Aggadah*—this decision too demonstrates the difficulty of isolating "law" in the richness of text.

In this second *Bayless* decision, Judge Baer reversed course and admitted the evidence, explicitly abandoning what he called "the . . . dicta . . . in

9. *Id.* at 240.

10. *Id.* at 235, 240.

11. *Id.* at 242.

12. *Id.* at 234 (quoting President John F. Kennedy, Commencement Speech at Yale University (June 11, 1962)).

[his] initial decision."[13] In doing so, he acknowledged the porousness of the distinction between reasonable suspicion and an unlawful stop in light of the complexity of facts. "The facts of this case," he says, "have consistently danced the fine line between a valid search and seizure . . . and a trespass on citizens' rights."[14] But, the expression of his disavowal performs its ambivalence. It demonstrates the impossibility of neatly extracting law from language or social existence. Veering back to the macro socio-legal problem that the case engages, Judge Baer asserted, "While it is clear that the Fourth Amendment operates to protect all members of our society from unreasonable searches and seizures, it is equally as unclear whether this protection exists to its fullest extent for people of color generally, and in inner-city neighborhoods in particular."[15]

Notwithstanding the pains Judge Baer took to define the holding as "a proposition of law," the decision continues to belie the simplicity of this definition.[16] Alluding to aspirational narratives and social critique, Judge Baer concluded by quoting Justice Thurgood Marshall's dissenting opinion in the case of *United States v. Sokolow*[17] rejecting stereotypes as a basis for reasonable suspicion. In what could be considered dicta, Judge Baer reiterates Justice Marshall's warning: "Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations . . . apply to the innocent and guilty alike."[18]

Considered across time, the challenge of circumscribing the "law" invoked in this case becomes even more pronounced. We can see the shifting interplay of narratives, culture, ideals, power, and texts in light of recent case law through which Judge Baer's aspirational worldview migrates from dicta to dissent to operative rules.

In the 2016 case *Utah v. Strieff*,[19] Justice Sonia Sotomayor penned a headline-grabbing dissent. In *Strieff*, Sotomayor rejected the Supreme Court's holding that the discovery of a preexisting traffic warrant attenuated the connection between an unlawful (admittedly suspicionless) police stop and the seizure of drugs.[20] In light of the existence of a warrant, discovered after the unlawful stop, the majority of the Court held evidence of a drug crime admissible.[21] Justice Sotomayor's dissenting opinion echoes Martin Luther King Jr.'s now-canonical *Letter from a Birmingham Jail* to give weight to the overlooked social costs of unlawfully obtained evidence.

13. Bayless v. United States (*Bayless II*), 921 F. Supp. 211, 217 (S.D.N.Y. 1996) (order denying motion to suppress).

14. *Id.*

15. *Id.*

16. *Id.*

17. 490 U.S. 1 (1989).

18. *Bayless II*, 921 F. Supp. at 217 (quoting *Sokolow*, 490 U.S. at 11 (Marshall, J., dissenting)).

19. 136 S. Ct. 2056 (2016).

20. *Id.* at 2064 (Sotomayor, J., dissenting).

21. *Id.*

She tells a story that positions the reader as an innocent defendant, and not only cites literature—from the works of James Baldwin to Ta-Nehisi Coates—but creates a space for the legitimacy of empathetic texts as a basis for judgment. In *Strieff*, Justice Sotomayor mobilizes King's rhetorical approaches and reframes the narrative to reject the majority's cost/benefit assessment of the exclusionary rule in this case. Echoing King's demand for empathy through direct address, her dissenting opinion begins by warning the reader: "Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."[22] She warns, "By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that . . . your body is subject to invasion while courts excuse the violation of your rights."[23]

The opinion thereby embeds literary allusion and contingent social experience into its definition of the costs that must be weighed in the application of the exclusionary rule. And, though expressed in dissent, this vision ultimately emerges as a rule in other cases that begin to recognize the experience of others. For example, this same year, the Massachusetts Supreme Judicial Court determined that the flight of black men from the police must be considered in the context of racial profiling when assessing reasonable suspicion[24]—thereby creating a diachronic link to Judge Baer's prescient framing of law.

I will wrap up by noting that this complex interaction of texts, norms, rules, contingent contexts, formative narratives, and the application of the force of law is not confined to our public space. Indeed, in an area that is closer to home for me, the distinctive American treatment of contracts—especially the proliferation of contracts of adhesion in the form of consumer contracts, nondisclosure agreements, and terms of use, for example—can be seen as an outgrowth of a particular idea of contract in the nineteenth century as a counterpoint to slavery. Following Emancipation, transactions between formerly enslaved people that replicated the constraints of slavery were deemed voluntary. In this way, contract served as a mark of freedom and shaped our understanding of what freedom means. As a result of an American worldview of contract as a manifestation of freedom, we have perhaps come to take for granted that our legal rights do not presuppose a social safety net, education, or healthcare, as they do in other parts of the world. Similarly, our contract doctrine cannot be unpacked from this worldview as we stand in contrast to other legal systems that recognize the asymmetrical power dynamic of certain form contracts. In a world of "seduction by contract,"[25] American consumers are

22. *Id.* at 2065 (Sotomayor, J., dissenting).

23. *Id.* at 2071 (Sotomayor, J., dissenting).

24. Massachusetts v. Warren, 58 N.E.3d 333 (Mass. 2016).

25. *See* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012).

given the so-called "choice" of not transacting or "agreeing" to ancillary terms that threaten to deprive them of fundamental rights. In other words, contemporary American contract law is also hard to unpack from the history, language, and culture that give it meaning.

Of course, history, text, social experience, culture, rules, and power each operate differently in different contexts. But, as Chaim Saiman's lucid book reminds us, we should not overlook the contingent and defining dynamics of how they come to constitute "law."