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2019]

"TURN IT AND TURN IT, FOR ALL IS IN IT":  
REFLECTIONS ON CHAIM SAIMAN'S *HALAKHAH*:  
*THE RABBINIC IDEA OF LAW*

CATHLEEN KAVENY\*

I. INTRODUCTION

I would like to extend my deep appreciation to Professor Chaim Saiman for writing *Halakhah: The Rabbinic Idea of Law*. Not only is he a wonderful writer, he is also a marvelous teacher. I opened the book knowing very little about halakhah. While still having much to learn, I have gleaned three valuable pieces of wisdom.

First, I now have a framework that allows me to continue learning. Professor Saiman's book provides not only an introduction to the substance of halakhic reasoning, but also a way of orienting it conceptually and historically.

Second, I now have a sense of not only the letter of halakhah, but also of its inspiring reach and spirit. Professor Saiman writes:

Halakhah is not primarily about regulating the social sphere but a system of divinely ordained concepts that undergirds the spiritual—even physical—universe. Torah study is not about crafting law to govern society but the founding act of Jewishness that strives to master God's wisdom.<sup>1</sup>

Third, at the heart of wisdom is a desire to learn. After reading Professor Saiman's book, I have a desire to learn more about halakhah. I have a sense of the questions I want to ask, and the issues I want to pursue, given my own commitments and training, which are both similar to and yet very different from his. Like Professor Saiman, I am a secular lawyer. I am also a Christian theological ethicist. As I worked through the book, I came to see that halakhah has significant overlap not only with canon law, which aims to regulate behavior in the community of the Catholic Church, but also with moral theology, which asks basic questions about human action, character, and community, and even with systematic theology, which asks fundamental questions about the nature of humanity's relationship with God. As Professor Saiman's book makes manifest, the study of Torah is the study of the entire world. Consequently, bringing his book into conversation with Christian thought—my task in these brief comments—is a considerable challenge.

Because Professor Saiman is such a good teacher, I began to ponder how I would construct a co-taught graduate seminar in "Comparative The-

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1. CHAIM N. SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* 211 (2018).

ology and Law,” bringing Christian and Jewish sources into conversation, and structured around the issues raised by Professor Saiman’s book. In these remarks, I will point to three questions I would like the opportunity to pursue more fully in such a seminar.

## II. HOW DOES GOD RELATE TO THE LAW?

Professor Saiman explicates two views of halakhah—the *functionalist* view, which treats halakhah as a more or less defined body of precepts that regulates actions and behavior within the community here and now, and the *devotionalist* view, which incorporates not only law narrowly construed, but a broader variety of literature, including stories and commentaries. This second view correlates with a high view of Torah’s meaning and function.

For the rabbis, Torah is God’s wisdom, and thus the locus of intellectual and spiritual attention. This is captured in the famous statement about Torah: “Turn it and turn it, for all is in it (m.Avot 5:22).” Since God is the Creator of the universe and the Torah is God’s direct communication with man, much (perhaps all) of what man needs to know is found within it.<sup>2</sup>

The functionalist view of Torah would helpfully be compared with Christianity’s codes of canon law and teachings on moral theology. But the most fruitful point of contact with the devotionalist view of Torah is far more fundamental to the Christian belief system: Christology, the part of Christian theology that deals with the nature and role of Jesus Christ. The opening words of the Gospel of John focus on God’s Word (Dabar in Hebrew, Logos in Greek, Verbum in Latin):

In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through him, and without him not one thing came into being. What has come into being in him was life, and the life was the light of all people. The light shines in the darkness, and the darkness did not overcome it.<sup>3</sup>

In certain important respects, some of the claims that the Jewish tradition makes about the Torah—and halakhah broadly construed—would be analogous to the claims that Christians make about Jesus Christ. In credal Christianity, the Word of God—the entire order of the universe—was and is intimately bound to the life of one human being, who, according to Jesus of Nazareth, lived, died, and rose from the dead.

For many branches of the Christian community, this belief is not an arcane mystery, but functions as a powerful hermeneutical principle. The Word relativizes and interprets the words: that is, the written words of

2. *Id.* at 137–38.

3. *John* 1:1–5.

Scripture, the words of the tradition, are always in a sense normed by the living person of Jesus Christ. The written Scripture is interpreted in a community of worship, centered around the living Christ, but also engaged with the world, particularly the natural world.

Consequently, critique, revision, and development, are possible. For example, knowledge gleaned from and about the physical world, the world that is ordered and made through the Logos, is a legitimate source of revision in biblical interpretation. St. Augustine went so far as to say that if a literal reading of a scriptural passage is contradicted by the most reliable knowledge of the natural world, the passage must be read metaphorically:

But someone may ask: "Is not Scripture opposed to those who hold that heaven is spherical, when it says, *who stretches out heaven like a skin?*" Let it be opposed indeed if their statement is false. The truth is rather in what God reveals than in what groping men surmise. But if they are able to establish their doctrine with proofs that cannot be denied, we must show that this statement of Scripture about the skin is not opposed to the truth of their conclusions.<sup>4</sup>

Christological convictions also justify (and constrain) development of moral doctrine. The eminent scholar and jurist John T. Noonan, Jr., concluded his study of the development of Catholic teaching on usury, religious liberty, and the death penalty with a Christological reflection:

In the Church, there can always be fresh appeal to Christ, there is always the possibility of probing new depths of insight. To grow is to change, and the gospel parable of the mustard seed promises growth (Matt 13:31–32). The kingdom of heaven, we are told, is like a householder who from his storeroom brings forth things old and new (Matt 13:52). Our world has grown by mutation, should not our morals, especially when the direction and the goal are provided by the Lord? "[H]ere below to live is to change. And to be perfect is to have changed often." Must we not, then, frankly admit that change is something that plays a role in Catholic moral teaching? Must not the traditional motto *semper idem* be modified, however unsettling that might be, in the direction of *plus ça change, plus c'est la même chose?* Yes, if the principle of change is the person of Christ.<sup>5</sup>

These reflections on the relationship of God and the law within my own tradition prompt me to ask, first of all, about the possibility of growth

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4. I SAINT AUGUSTINE, *THE LITERAL MEANING OF GENESIS 59* (John Hammond Taylor trans., Newman Press 1982).

5. John T. Noonan, Jr., *Development in Moral Doctrine*, 54 *THEOLOGICAL STUD.* 662, 677 (1993) (alteration in original) (footnote omitted).

and change in halakhah and (or) its interpreters. How, if at all, does halakhah develop? Is development a legal or theological concept within this system of thought and worship? Is it possible to gain greater insight into God's requirements over time? Second, and more specifically, does halakhah admit the existence of semi-independent sources of knowledge about God's requirements? Do new insights about the natural world, human biology, or social systems affect how halakhah is interpreted?

### III. HOW DO WE KNOW THE LAW?

A second set of questions that Professor Saiman's book raised for me pertain to the way in which human beings know the law. God commands the study of Torah to Jewish men. The study of Torah brings them closer to God. Do the rabbis reflect on how and why human beings are fit to commune with God in this manner? Would it be possible for people other than Jewish men—say Jewish women, or gentile men and women—to study Torah and say something true as a result of their study? If so, would it be because God is enlightening them, because of their skills and training, or both? If not, why not? More generally, what do human beings, as human beings, know about God's law? And why and how? Does the Jewish tradition adopt any kind of anthropological answer to this question? Or is it an illegitimate question?

Thomas Aquinas would be a helpful conversation partner for considering these questions in comparative perspective. Aquinas describes the natural law as the "participation" of the human intellect in the eternal law, which ultimately, for Aquinas, is the equivalent of the divine mind. Consequently, every human being, no matter what their religious tradition, has the rudimentary equipment necessary to interpret the basic moral law, which is binding on all persons. At the same time, Aquinas also maintains that a person's ability to interpret the natural law in reliable fashion is supported and enhanced by the gift of divine grace, which removes the impediments of sin and enables a higher form of communication with God. In fact, the gift of grace to a human being is essentially a form of divinization. Aquinas writes:

Now the gift of grace surpasses every capability of created nature, since it is nothing short of a partaking of the Divine Nature, which exceeds every other nature. And thus it is impossible that any creature should cause grace. For it is as necessary that God alone should deify, bestowing a partaking of the Divine Nature by a participated likeness, as it is impossible that anything save fire should enkindle.<sup>6</sup>

The process of divinization has another function within Aquinas's thought: it enables human beings to become friends with God. Operating

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6. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I-II, Q. 112, Art. 1 (Fathers of the English Dominican Province trans., Benzinger Bros., Inc. 1947) (1485).

within a broadly Aristotelian framework, Aquinas believes that friendship requires a certain degree of similarity and even equality. Because God desires to be friends with human beings, God bestows on them a share in the divine nature.

The idea of finite and flawed human beings being true friends with the infinitely perfect divine being is astonishing and perhaps even risible. Yet as I was reading Professor Saiman's book, I wondered whether such a relationship was also possible within Judaism. Saiman writes: "To the Talmud, ultimate perfection is God and the angels arguing over the intricacies of halakhah."<sup>7</sup> This sort of intellectual engagement and intimacy, as well as the mutual respect between God and the angels, sounds very much like friendship. Are the rabbis also included in the circle of conversation? Can we rightly call them friends of God?

#### IV. HOW DO WE BALANCE LAW'S REASON AND LAW'S COMMAND?

There is an ongoing tension in the Western legal tradition about the nature of law. Is it fundamentally a matter of reason or is it fundamentally a matter of will? Over the centuries, scholars of the law have debated whether a fully valid law as to be reasonable, given its goals of governing the community, or whether it is enough for it to be the duly enacted command of the sovereign. Not surprisingly, Aquinas's definition of law incorporates both elements. He defines law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."<sup>8</sup> The word ordinance connotes command—but the ordinance must be a reasonable one, oriented toward the goal of effectively governing the community.

This ambiguity over the proper definition of law has resulted in very different definitions among Christian thinkers about what counts as unhelpful legalism in moral reasoning. For example, the conservative Catholic philosopher Germain Grisez maintains that legalists wrongly place too much emphasis on God's command without fully recognizing that God's command conforms to the requirements of reason. Yet H. Tristram Engelhardt, Jr., who is an Eastern Orthodox philosopher, defines legalism in precisely the opposite way. He maintains that legalists wrongly place too much emphasis on human reason without being prepared to submit themselves unconditionally to the will of God.<sup>9</sup>

When thinking about divine law, do we emphasize God's reasonable plan for the universe or God's will? In some branches of Protestantism, the emphasis has squarely been placed upon God's will, and the concomitant obligation to obey the divine command. As I moved through Professor Saiman's book, I wondered whether the Jewish idea of law might have

7. SAIMAN, *supra* note 1, at 3.

8. AQUINAS, *supra* note 6, at I-II, Q. 91, art. 1.

9. See CATHLEEN KAVENY, *ETHICS AT THE EDGES OF LAW: CHRISTIAN MORALISTS AND AMERICAN LEGAL THOUGHT* 213–38 (2018).

more in common with the writings of Karl Barth, the twentieth century's great Protestant divine command theorist, than with Catholic thinkers, who tend to stress divine reason rather than divine will.

Barth maintains that the problem with Catholic moral thought is its anthropological superstructure. In Catholic moral theology, moral obligation flows from the nature and telos of human beings—it is woven into the very structures of creation. In Barth's view, this enmeshment undercuts the new and unconditioned quality of God's command. As William Werphewoski has observed, "[o]n such a presupposition, the doctrine of divine command cannot be an implication of the doctrine of election, and thereby, according to Barth, cannot accommodate an understanding of God's command as *total gift* and *total demand*."<sup>10</sup>

At the same time, like all divine command theorists, Barth must fight off objections relating to the potential arbitrariness of God's command. He must also counter criticisms that divine command theory leads to moral solipsism, because an individual's response to a divine command cannot be subject to critique by third parties. Barth responds to these challenges by showing how the command of God coheres with (but does not depend upon) the manifest everyday world in several ways. For example, he acknowledges that the divine command must be interpreted in light of the history of the church's relationship with Christ, which includes the whole sweep of salvation history documented in scripture. Moreover, Barth stresses that discerning God's command requires attention to the "givens" of one's own life. The locus and focus of our divinely given vocations are the obligations of everyday life. Finally, Barth recognizes that the practice of "practical casuistry" is indispensable for discerning God's command in specific situations. This practice is not simply the mechanical application of rules to fact patterns, but rather involves a lively and relational engagement with the command of the living God as it is revealed in particular cases.<sup>11</sup>

These reflections on the nature and function of law within Christian theology prompt two questions for Professor Saiman. First, how does halakhah strike the balance between treating God's law as reason and law as command or will? Second, and relatedly, if I am correct in seeing the halakhic tradition as more akin to Barth's theology in its emphasis on God's command, how do rational commitments, including beliefs about the ordinary course of ordinary human life, affect the interpretation of those commands?

## V. CONCLUSION

*Halakhah: The Rabbinic Idea of Law* is a crucially important and exciting book. Professor Saiman gives his readers a clear and compelling account

10. William Werphewoski, *Command and History in the Ethics of Karl Barth*, 9 J. RELIGIOUS ETHICS 298, 301 (1981).

11. *Id.* at 313.

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and demonstration of the vibrant core of Jewish law. In so doing, he makes a contribution to the understanding of the conceptual structure of Jewish life and insightfully illuminates the nature of law itself. He also graciously invites members of other law-based religious traditions to learn not only about Judaism, but also to learn something about themselves in conversation with the rich, nuanced, and deeply humane tradition of Jewish law.



