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## READING HALAKHAH AS A SECULARIST

SANFORD LEVINSON\*

“THE demand that I make of my Reader,” James Joyce once apparently told Max Eastman, “is that he should devote his whole life to reading my works.” Although Eastman wrote that Joyce “smiled as he said that—smiled, and then repeated it,”<sup>1</sup> one might well believe that the author of *Ulysses* and *Finnegan’s Wake* believed it. We might read this as evidencing a kind of megalomania, but those within the literary community who proudly identify themselves as “Joyceans,” or “Janeites,” or indeed “lovers of the immortal Bard” might endorse his basic claim. What it means to take a particular author, or a genre, or other form of art, truly seriously is to devote one’s life to analyzing it in the perhaps hopeless quest to solve all of the mysteries that texts inevitably generate. To this day, obviously, we can debate the implications of classic texts and engage in heated arguments over what they truly mean. My friend and co-panelist Richard Weisberg has written notable exegeses of *Billy Budd* and *The Merchant of Venice* challenging what had largely been conventional wisdom, and one explanation for his zeal—a word I do not use critically—is that he believes that these texts have served to shape our culture and, concomitantly, that it is crucial, perhaps for the sake of our souls, to get them right. I find it hard to disagree with him. One explanation (and motivation) for devotion, after all, is a belief that the object of one’s affections indeed provides solutions to the great mysteries of life.

It is not difficult to extend the analogy to the study of law. Those of us who have devoted our lives to elaborating the United States Constitution might well agree with Justice Story’s aphorism that “the law is a jealous mistress,”<sup>2</sup> even if he chose not to repeat Lord Hale’s statement that “the law will admit of no rival, and nothing to go even with it.” In any

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\* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. I am grateful to David Caudill both for organizing this excellent symposium on Professor Saiman’s superb book and for inviting me to participate in the event on February 15, 2019. This draft reflects my benefiting from the excellent discussion that took place throughout the day.

1. See RICHARD ELLMANN, JAMES JOYCE (1982) (quoting *Interview with Max Eastman*, HARPER’S MAGAZINE (1931) (Eastman noted “He smiled as he said that—smiled, and then repeated it.”).

2. JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY ON THE TWENTY-FIFTH DAY OF AUGUST, 1829 (1829) (“I will not say with Lord Hale, that ‘the law will admit of no rival, and nothing to go even with it;’ but I will say, that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favours, but by a lavish homage.”).

event, few people who have chosen to spend their lives studying the Constitution believe that the subject is merely of “academic” interest and not freighted with the utmost importance for the actual lives of those living under its constraints and tutelage.

So this brings to me to Chaim Saiman’s truly remarkable book *Halakhah: The Rabbinic Idea of Law*.<sup>3</sup> In what spirit, exactly, does, or should, one read it, where the “it” refers both to the book under review and, more importantly, the topic announced in its title? At the very least the book *Halakhah* provides a treasure trove of fascinating discussions that offer illumination on every page for anyone interested in learning more about rabbinic Judaism and the Orthodox branches of Judaism that take halakhah—Jewish law and its teachings of a particular way of life—with consummate seriousness in a way that is not true of those outside the Orthodox community. But that only raises the question of *why* one might be interested in that topic and reading the book in the first place. As a lawyer and, increasingly, student of comparative law, I can easily agree that “the rabbinic idea of law” is at least as valuable as a focus of study as, say, the “German” or “Singaporean” idea of law, both of which present their own challenges to parochial Americans who know only about the United States Constitution. As Kipling once wrote, “what should they know of England who only England know?”<sup>4</sup> Paradoxically or not, the suggestion is that one in fact learns far more about one’s home and its traditions from encountering “alien” ideas; it is not that going to Paris will lead one to renounce Britain (or visiting Rome will cause one to leave Jerusalem behind), though that may of course happen. Instead, it is at least as likely that the trip outside will deepen one’s understanding of what exactly constitutes the particular society that one identifies with and may well in fact wish to return to with renewed respect and devotion. In any event, one almost always reads about foreign law not out of a desire to “convert” to what is, after all, at least initially an alien system, but, rather, because of what one can learn about the enterprise of law in general and even, as Kipling suggests, about one’s own legal system when one places it in the context of other systems.

So one response to Saiman’s book is simply to praise it to the skies, as I have happily done, and to suggest that almost everyone read it, regardless of his or her relationship to Judaism. Indeed, just as the old ad reminded its readers that one need not be Jewish to enjoy Levy’s rye bread, so it is the case that non-Jewish readers can profit immensely from reading *Halakhah*. Saiman writes with almost astonishing clarity, and I literally cannot think of a better introduction to what often appears to be the truly forbidding reality of Talmud. But that is not the same thing as necessarily being able to predict the actual lessons that will be learned or, indeed,

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

4. RUDYARD KIPLING, *THE ENGLISH FLAG* (1891), [http://www.kiplingsociety.co.uk/poems\\_englishflag.htm](http://www.kiplingsociety.co.uk/poems_englishflag.htm) [<https://perma.cc/R7V2-B4QR>].

necessarily to agree on what particular lessons *should* be learned. Return to Joyce for a moment. One can read him, at least in part, as an entry-point into learning about a strange and to most of us alien society of Irish Catholics. To be sure, another of Joyce's great novels, and probably his most accessible, *A Portrait of the Artist as a Young Man*, might have certain "universalistic" lessons to teach about the process of declaring independence from what is perceived as a stifling culture, including its religion, and to embarking on one's vocation as a writer, to help forge, as Joyce so memorably put it, "the uncreated conscience of my race." But for many readers, its most memorable lessons include its delineation of what to most of us may well be a thoroughly unattractive Irish society where one literally could not understand what it meant to be Irish without taking into account the ubiquitous role of a highly dogmatic Catholic Church. Few of its readers, one might suspect, believe that the young Stephen Daedalus is making a mistake in wishing to be free of the fetters placed upon him by Irish Catholicism. And, to do a fast-forward from the early twentieth century to the present, one might be altogether delighted that modern Ireland has systematically freed itself from the bondage imposed by the Catholic Church, as illustrated most dramatically in referenda involving divorce, abortion, and same-sex marriage.

Although that's not the only reason to read literature, our willingness to encounter other ways of being in the world, to experience what literary theorists call "defamiliarization," is surely one reason to pick up books one has never heard of that were originally written in languages that one does not read. Still, very few people read literature only for such non-parochial purposes. We also read novels and poems for what they tell us about our own recognizable lives and experiences. Yes, we might say, that was exactly what it was like to grow up in Newark in the 1940s or to go to college in the 1960s, etc. Or a poem might capture exactly what the first love, or breakup, felt like. There is nothing wrong with that as a motive for reading literature. Even if true knowledge of England might require some time spent looking outward, it would be bizarre to suggest that one need not also read Shakespeare, George Eliot, or historians of English history and culture. My real point in raising these examples is not that there is one right way to approach literature or any other complex aspect of our culture, but, rather, that it might make a difference exactly why one picks up a book and enters into debates about its value, either to oneself or to other potential readers.

With religious texts, especially, there is a fundamental difference between those who might be called "insiders" and "outsiders" to the traditions for whom the texts are fundamental. As Adam Gopnik wrote in a fine recent essay in *The New Yorker*,<sup>5</sup> it may well be incumbent on us, given

5. Adam Gopnik, *How to Read the Good Books: From the Torah to the Quran, Sacred Texts Can Resist and Reward Modern Readers*, NEW YORKER (Jan. 21, 2019), <https://www.newyorker.com/magazine/2019/01/28/how-to-read-the-good-books> [<https://perma.cc/8FYS-6B2K>].

the world today, to become more familiar with Islamic texts, but one will read and relate to them differently as an outsider than if one is a member of the Islamic faith community (or any of the given sub-communities within Islam). This does not mean, obviously, that one must be a Muslim in order to understand the Quran or even offer genuine insights into its meaning, but it does suggest that the phenomenological impact of these insights will differ depending on one's own stance toward Islam. An outsider might not really care if the implication of one's arguments is fundamentally to destroy what heretofore had been one of the pillars of the faith; for an insider, by definition, that is an existential crisis. Consider in this context only the different ways one might write about the Prophet Joseph Smith and his purported discovery and then translation of the golden tablets in upstate New York that established the basis of the Mormon Church.<sup>6</sup> Believers can presumably express only the most limited of skepticism. Non-Mormons, on the other hand, can give full sway to their inclination to view Smith as a charlatan; whether he was merely self-deluded or a conscious fraud is less important than rejecting any possibility that he may in fact have discovered divinely-inspired golden tablets and translated their messages in order to found what is probably the most important new religion since the emergence of Islam in the seventh century.

Thus, the question I want to explore is what difference it might make if one explores Saiman's book from a basically secular perspective rather than as an adherent of what might be termed, however problematically, religious Judaism. One possible peculiarity of Judaism, especially in its American form, is that it allows one to identify oneself as a "secular Jew," instead of say, as is the case with those born within the Catholic Church, as "lapsed Catholics." Secular Judaism represents the transformation of a particular form of religious sensibility centered around a covenantal relationship with God into an ethnos of shared habits, including culinary preferences, and recognizable styles of living in the world. As we shall see later, Saiman fully acknowledges this possibility. The term "Jewish" now refers to far more than adherence to halakhic injunctions. It is now "a more amorphous term that enables a wider array of identities to coalesce under its banner. This is a particularly important feature in a culture where the majority sees itself as decidedly Jewish though not necessarily bound to halakhah."<sup>7</sup> As a secular Jew, I can applaud his sociological generosity. But one can scarcely completely dismiss the question whether Judaism—and being Jewish—must necessarily be intertwined in some recognizable way with God, including halakhah. An earlier book, by

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6. Compare for example, the excellent biography RICHARD LYMAN BUSHMAN, *JOSEPH SMITH: ROUGH STONE ROLLING* (2006), with FAWN M. BRODIE, *NO MAN KNOWS MY HISTORY: THE LIFE OF JOSEPH SMITH* (1945). Bushman, a distinguished historian at Columbia University, is also a believing Mormon; Brodie, though born a Mormon, left the Church and wrote a decidedly skeptical overview of Smith's claims.

7. SAIMAN, *supra* note 3, at 238.

Roberta Kwall, *The Myth of the Cultural Jew: Culture and Law in the Jewish Tradition*, strongly challenged the coherence of “secular Judaism.” She denies that one can lead an authentic Jewish existence without living within a world structured by halakhah.

Saiman, on the other hand, makes no overt arguments as to what constitutes “authentic Judaism.” His book is largely descriptive rather than prescriptive; one might even see it as a kind of anthropological examination of what to most of us, even if we define ourselves as Jewish, is a distinctly peculiar culture. But the people he is describing most definitely have strong views on what does, and does not, count as an authentic Jewish existence. Few of them are pluralists who are genuinely tolerant of a number of different approaches to living one’s life. Many of the adherents of Halakhic Judaism would not recognize people like me—or perhaps even devoted members of Reform or Conservative temples and synagogues who might, in the contemporary world, have partners in interfaith marriages who have not in fact converted to Judaism—as co-religionists, any more than self-acknowledged lapsed Catholics would be eligible to receive communion. Academics are well aware that departments of literature may be riven by deep differences of opinion on how best to read Shakespeare, with genuine consequences, for example, as to who will be hired to granted tenure. Differences within the overarching “Jewish community” are certainly often bitter, with consequences going far beyond the vagaries of academic politics.

With regard to tensions within Catholicism, the fault lines might certainly involve theological principles: Does one really believe in the Virgin Birth or the bodily assumption of Mary into heaven? In recent years, especially, a great deal of emphasis, particularly with regard to political figures, has been placed on the stance taken toward abortion, which is viewed by the institutional Church (even if not by most practicing Catholics) as murder. Judaism is far less overtly theological, though one can scarcely deny some distinctly theological underpinnings to the rabbinic Judaism studied by Saiman. “[H]alakhah governs as law imported from above, and as divine wisdom explored from within. The ideal of *talmud Torah* is for law to be encountered in *the sanctified space* where regulation, education, and religious reflection meet *under the canopy of God’s grace*.”<sup>8</sup> The version(s) of Judaism studied by Saiman demand not only rigorous adherence to certain behavioral norms, but also an inner consciousness about the existential import (and theological origin) of the texts and traditions that generate the norms. In particular, at what might be termed its extreme manifestations, a devotion to *halakhic* Judaism, especially as delineated by Saiman, ultimately demands, at least as a regulative ideal, that one devote one’s life entirely to the study of Talmud Torah. To put it mildly, this is no small matter, nor can its consequences be easily accepted by those outside this version of the Jewish community.

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8. *Id.* at 221 (emphasis added).

I suspect that I am not the only American secular Jew—or even non-Jew—who became caught up in the Israeli television series *Shtisel* when it became available on Netflix. It is the absolutely gripping story of an extended Haredi—i.e., “ultra-Orthodox”—family in Jerusalem defined in significant measure by their resolute rejection of what most of us define as “modernity.” Many of the story lines center on the commitment of men to study Torah incessantly, with their wives (and children) simply accepting the implications of that decision. A central figure, the patriarch of the family, is the principal of a Talmud Torah, and it is made altogether clear that no secular subjects will be welcome into its halls. From the perspective most certainly of secular Jews, the children are being systematically socialized into a culture of willful ignorance about anything outside the extraordinarily limited boundaries of halakhic Judaism.<sup>9</sup> If one isn’t at least somewhat sympathetic to this cultural reality, one will be tempted to view it as a form of institutionalized child abuse, even if one grants that the parents who attempt, quite successfully, to control their children’s lives are loving and wish only the best, as defined by their own culture, for their children. But, to put it mildly, there is no respect at all for the notion of liberal autonomy, defined in terms of the right (and ability) of individuals to forge their own lives after introduction to, and contemplation of, varying possibilities.<sup>10</sup> Nor, for what it is worth, will any genuine attention be paid at the Talmud Torah to the fact that everyone is living, after all, within an ostensibly “Jewish state.” Israeli Independence Day is treated as only a distraction, what with loud flyovers by Israel fighter planes and the like. The community of the *Shtisel* family is not so extreme as those Haredi who reject the legitimacy of the state of Israel because, after all, it was not founded by the Messiah, but it gives no evidence of having been tainted by religious Zionism and the sacralization of the Israeli state. I will touch on Saiman’s final chapter on Israel toward the conclusion of my own remarks. But one suspects that the Briskers he describes, assuming, almost certainly contrary to fact, they knew who James Joyce was, would agree that seriousness should be measured by the willingness to devote one’s entire life to the books at hand, that anything less is dilettantism or worse.

To be sure, Judaism has never mimicked the Catholic tradition of monastic life that requires the repudiation of family life. *Shtisel*, for example, is all about the complexities of family life. But it is hard to discern in Saiman’s book a Judaism that includes genuine regard for anything

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9. I am extremely grateful for the opportunity to read a remarkable essay written by Zalman Rothschild when he was a student at the Harvard Law School on the extraordinarily limited nature of the educational system imposed on children by certain strands of the Hassidic Jewish community in New York and the basically resolute refusal by the State of New York to assess the degree to which the system deviates from the ostensible requirements of the State for non-public education.

10. See, e.g., Meira Levinson, *The Demands of Liberal Education*, 25 OXFORD REV. EDUC. 39, 58 (1999).

outside of traditional Jewish culture (as defined by the Orthodox), not to mention any real concern for what might be termed the demands of membership in a political society faced with the practical exigencies of organizing a functioning polity. Perhaps one would take off time from study to attend to family responsibilities or even business responsibilities. Many Orthodox Jews are diamond merchants, for example, and one of the realities of the diamond trade is that it is often governed, as a practical matter, by the strictures of halakhah that speak quite explicitly to a variety of commercial concerns.<sup>11</sup> And parts of the Orthodox communities in New York State and Israel are especially active in politics, using their propensity for bloc voting as an effective way of securing benefits for their “discrete and insular” minorities.<sup>12</sup> Indeed, the New York City suburb of Ramapo has been rent by the capture of its school board by the roughly 50,000 Orthodox Jews living there and their almost complete lack of concern for the actual vitality of the public school system. The reason is simple: Most of the Orthodox send their children to Jewish day schools, so why should they care if the public schools are in fact grossly underfunded (by taxes) and thus underserve the largely racial and ethnic minorities who in fact attend them? Only someone concerned about the community in general, or even groups with whom one shares political and social space, might be perturbed by public schools that can afford to meet only four days a week, which have been forced by financial constraints to abolish “frills” like music or art. It is hard to imagine that particular Orthodox community lobbying public officials about the great issues of the day that are not directly related to the parochial interests of the Jewish community. For many within that community, this might include some attention to Israel, but only in its form as an exceptional state for Jews. One of the lessons taught by *Shtisel* (and, possibly, by *Halakhah*) is that the “goyim” and the political communities they dominate are of no interest to a Jew even if prudence requires recognition that they might have a certain degree of political power that one must submit to and, on occasion, attempt to manipulate.

11. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

12. See Isabel Fattal, *A Heavy Blow to One of America’s Most Controversial School Boards*, THE ATLANTIC (Nov. 17, 2017), <https://www.theatlantic.com/education/archive/2017/11/another-blow-to-one-of-americas-most-controversial-school-board/546227/> [https://perma.cc/YAY4-TXEV]. An alternative perspective is provided by the school board’s attorneys. See David J. Butler, Randall M. Levine & Stephanie Schuster, *Inside the East Ramapo Central School District Case*, TABLET MAG. (Aug. 8, 2019), <https://www.tabletmag.com/jewish-life-and-religion/294111/the-birth-of-tradition> [https://perma.cc/7JDV-2FHK]. On the notion of “discrete and insular minorities, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). As Bruce Ackerman suggested some years ago, it is not always the case that such minorities are truly marginalized at the level of local politics, where they may be able to seize the levers of power by disciplined political action. See, e.g., Maya Shwayder, *NY Jewish Community Wiolds Growing Political Power*, THE JERUSALEM POST (Sept. 20, 2013), <https://www.jpost.com/Jewish-World/Jewish-News/NY-jewish-community-wiolds-growing-political-power-326599> [https://perma.cc/2LX4-ALD5].



So the lessons taught by the book will differ quite substantially depending on which of (at least) two audiences pick it up. As already suggested, some might be readers with an interest in comparative law who want to broaden their horizons. And, as I wrote in a review that was part of a symposium that I organized on Balkinization on Kwall's book in 2015,<sup>13</sup> one might already realize that the "internal" materials of any legal system—texts, legal decisions, etc.—are inevitably intertwined with the "external" culture within which the legal system operates.

But I also indicated my doubt that her primary audience would be comparativists. At bottom, she was writing to her fellow Jews and trying to persuade them that halakhah is central to any coherent conception of Judaism. She clearly seems to believe that to be a Jew requires at some level that one believe that "God commanded the Jews to preserve their particularity and gave them a path to guide them in this endeavor."<sup>14</sup> So, although I am a member of what I suspect is her primary audience of Jewishly-identified readers, it remains true that I reject her central thesis.

I publicly identify myself as Jewish, and some of my scholarly work has been very much informed by what I learned about Jewish law and hermeneutics from David Hartman and his marvelous associates at the Shalom Hartman Institute in Jerusalem. Indeed, a group of Americans who were for many years part of an annual conference at the Hartman Institute, in response to the conference now being terminated, organized a gathering that took place in Washington, D.C. in May, where one of the two texts to be discussed was *Halakhah* (we all agreed that it was an excellent book!). However, as I elaborated in a short essay that I prepared for a 2014 symposium organized by Professor Kwall at DePaul Law School on the relationship of one's Jewish identity to one's work as a student of the American Constitution,<sup>15</sup> my invaluable time at the Institute did not in one whit make me any more of a "religious" Jew in terms of an internalized commitment to the precepts of the Jewish legal system. Jewish law certainly interests me, but, at the end of day, I feel no more bound by it than by any other foreign legal system. Indeed, from one perspective it may bind me less, inasmuch as I do feel bound by, say, the Italian legal system when I visit Italy or, for that matter, the Israeli legal system during my frequent visits to that country. But that is very different from feeling any bonds to halakhic Judaism (even if, for reasons of etiquette, I will obey some of its precepts when, for example, I am visiting Orthodox friends).

I am certainly fascinated by the feats of hermeneutic derring-do by Talmudic scholars. Professor Saiman's book illustrates many such feats.

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13. Sandy Levinson, *A Symposium on Roberta Kwall, The Myth of the Cultural Jew: An Introduction*, BALKIN BLOG SPOT (Aug. 16, 2015), <https://balkin.blogspot.com/2015/08/a-symposium-on-roberta-kwall-myth-of.html> [https://perma.cc/VK22-ZYW7].

14. SAIMAN, *supra* note 3, at 283 (emphasis added).

15. See Sanford Levinson, *The Possible Impact of Judaism and Israel on One Particular Career as a Legal Academic*, 16 RUTGERS J.L. & RELIGION 321, 329 (2015).

He is clearly a brilliant student of the Talmud and able to convey its interpretive riches to any reader willing to engage with the text. Still, whatever my self-identity as a Jew, I look at the halakhic system from the perspective of the outsider, even if the fact that I am interested in it at all can no doubt be traced to my particular autobiography. Perhaps it is relevant that I do not affirmatively believe in God, though I am well aware of a strong tradition with Judaism that emphasizes orthopraxis, i.e., the willingness to adhere to the demands of halakhah, rather than any kind of theological orthodoxy. From this perspective, who cares if one actually believes in God so long as one lays tefillin every morning or observes Shabbat (neither one of which I in fact do, however?). Even if I define myself as an agnostic rather than an atheist, that may be only a sign of my own intellectual lack of courage.

Still, it is certainly the case that I cannot ascribe any divine aspect to whatever is set out in halakhah, nor do I feel “obliged” to follow any of the halakhic precepts. Consider, for example Deuteronomy 27:10: “Thou shalt therefore hearken to the voice of the Lord thy God, and do His commandments and His statutes, which I command thee this day.” In no way do I find myself called upon to “hearken” or otherwise obey the ostensible “commandments” set down. It is not that I violate each and every one of them. I have not murdered anyone, though not because I would otherwise have been tempted to do so in the absence of the Sixth Commandment. Perhaps it is more relevant that I do continue to refrain from eating certain foods, like pork or shellfish (though I gladly mix milk with non-kosher beef); again, this has nothing to do with a conscious desire to obey the halakhic prohibitions (I am, obviously, what has come to be called a “cafeteria Jew” in terms of picking and choosing among the laws of *kashrut* that I pay even minimal attention to). If forced to offer an account of what friends often describe as basically irrational behavior, I talk about the powerful force of habit, going back to how I was raised as a child in a small North Carolina town, and the degree to which food customs are ways by which marginal communities especially create a sense of collective identity (and, for better or worse, become defined as “the other” by the wider community). One of the reasons I love living in Texas, for example, is that the barbecue, the national dish of Texas, is almost entirely beef, unlike North Carolina, where pork reigns.

In defining “the concept of law,” H.L.A. Hart paid great attention to the “internal” aspect of law, by which people do X because the law requires it and not, for example, because X is thought, on entirely independent grounds, actually to be the right thing to do morally. Although my not eating spareribs is consistent with halakhic observance, it has precious little to do with explaining why I refrain from spareribs but not from beef ribs. Perhaps I would have more difficulty explaining why I always participate in (one night of) a seder or that I cancel classes on (the first day of) Rosh Hashanah and Yom Kippur (and fast on the latter), especially given that I also feel increasingly uncomfortable with any liturgy that is suffused

with acknowledgments of a divine sovereignty that almost literally makes no sense to me personally. But this takes us into the realm of individual and social psychology, perhaps more suitable for a writer like Philip Roth, rather than truly systematic theoretical reflection.

Kwall begins her last chapter by adverting to the title of her book: “The ‘myth of the cultural Jew’ is that one can adhere to Judaism on just a cultural level” without recognizing that he or she is simultaneously “embracing a degree of Jewish law and tradition regardless of whether they are aware of this reality or acknowledge it.”<sup>16</sup> Here is where she most clearly throws down her gauntlet to the Jewish readers of the book. They are (I am), she asserts, simply kidding themselves (or myself) if we deny that “reality” (and its ontological connection to a divine presence?). Well, if all I have to do is to say that, there is some connection between my not eating pork (or fasting on Yom Kippur) and Jewish law—it’s like trace residues of arsenic in the drinking water—then sure, I’ll plead guilty. Fasting can clearly be traced back to Leviticus 16:29–34 and the historical fact that that injunction “took,” as it were, within the Jewish community in a way that the rigors of the Jubilee year or the duty to discipline rebellious sons did not. But I don’t think she would find such a concession enough.

What is so striking about the book is Kwall’s own double consciousness. She wants to remind especially Orthodox Jewish readers of her book that they are deluding themselves if they believe that halakhah is truly a closed legal system impervious to the influence of the surrounding culture. A noble cause, for which she deserves full support, and which I suspect that Saiman agrees with even if that is not a central theme of his book. But the awful truth is that almost none of the contemporary Orthodox leaders in the United States or, even more so, in Israel, are likely to read her book because a) she’s a woman, who b) teaches at a Catholic law school, and c) is clearly a political progressive with regard to such issues as gender. And the fact that her book is published by the Oxford University Press probably doesn’t help either! Perhaps Saiman’s book will receive a better reception from within the Jewish community to complement what I am confident will be the eager embrace from “outside” readers. After all, the remarkable endorsements on the back jacket include testimonials from the former Chief Rabbi of Great Britain, Jonathan Sacks, and Mosheh Lichtenstein, the dean of Yeshivat Har Etzion.

It may be worth noting that Sacks represents Diasporic Judaism. Though a strong advocate of Israel, he has obviously chosen to make his life outside the ostensible “Jewish state.” Lichtenstein’s Yeshiva, on the other hand, is located in the West Bank, which left-secularists like myself continue to view as “occupied territory” now for over fifty years, while Lichtenstein, no doubt, views it as part of Judea and the inheritance pledged to the Jewish people by God through Abraham and his successors. Although

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16. ROBERTA ROSENTHAL K WALL, *THE MYTH OF THE CULTURAL JAW: CULTURE AND LAW IN JEWISH TRADITION* 281 (2015).

this is not the occasion for a full discussion of Israel, Zionism, and the meaning of a “Jewish state,” that operating culture, as reflected in the governance of the state, has never broken free of those who are not only committed to Halakhic Judaism and demand its full integration into the sinews of Israeli law, but also, and just as importantly, view Israel as in some sense a sacralized state. It appears clear that David Ben-Gurion made his own decisions to compromise with the Orthodox community at the time of Israeli independence because he viewed it, basically, as a declining population that would in due time basically become irrelevant to the future of a vibrant (and secular) Israeli state.<sup>17</sup> He was, of course, completely wrong in his ability to read the future. As a result, it is an unfortunately open question today whether Israel continues to manifest a commitment to liberal constitutionalism or, instead, is increasingly casting its lot with a distinctly illiberal form of constitutionalism that not only privileges a given ethnoi, but also privileges as well the halakhah and those who instantiate a commitment to a halakhic way of life, including the priority of study of Talmud Torah over any other ostensible responsibilities. It should be clear that this is not only a “theoretical” question; it is at the heart of contemporary Israeli politics and explains in large measure why Prime Minister Netanyahu was unable to form a successful coalition in May 2019 and instead manipulated the Knesset to call new elections. Avigdor Lieberman refused to enter the government, explaining<sup>18</sup> that “[w]e are natural partners for a right-wing government but not for a government based on Jewish law.”

So now, at long last, I turn more explicitly to Saiman’s book. As already suggested, I learned an immense amount from every page. It is simply one of the richest books I’ve read in some years. From literally the beginning, where Saiman vividly portrays a picture, based on Talmudic sources, of heavenly argument about the meaning of Torah, in which God participates as an equal, being challenged by angelic participants, one is entranced. I note that he clearly made a deliberate decision to avoid mentioning the passage of Talmud probably best known to secular students of Talmud, Baba Metzia 59B, where rabbinic authority is clearly privileged over even the intervention of the Divine Voice itself. “The Torah is not in heaven,” as the rabbis assert, which means that God no longer has the authority to determine the operational meaning of its injunctions. Although Jews are enjoined, particularly at the High Holy Day services, to give almost unending praise to a sovereign God, it turns out that the reality is a quite odd form of sovereignty. Hobbes, for example, would never

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17. See, e.g., HANNA LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* (2011).

18. See Isabel Kershner, *After Coalition Talks Crumble, Israel on Course for Another Election*, N.Y. Times (May 29, 2019), <https://www.nytimes.com/2019/05/29/world/middleeast/israel-election-benjamin-netanyahu.html> [<https://perma.cc/R4R6-BTAG>].

have tolerated a sovereign who allowed his subjects to dispute with him as equals and, even more dramatically, to defy his apparent views.

That being said, what I found most remarkable about the book, in many ways, is its chapter on the Briskers, who are, nonetheless, only a perhaps extreme extension of the perspective that one must basically spend all of one's time in the study of what are, after all, a relatively few texts. I earlier quoted Justice Story's reference to law as "a jealous mistress." But the demands placed on law students and then law professors, let alone ordinary lawyers, is almost laughably limited compared to that placed upon what Rabbi Josef Soleveitchik called "Halakhic Man." Saiman writes, for example, that for Briskers, "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>19</sup> To be sure, the Briskers do not represent the majority of halakhic Jews, any more than even distinguished scholars regularly emulate Harry Wolfson, who was legendary at Harvard for arriving at his Widener Library office early in the morning and staying until the end of the day studying Jewish philosophers in his quest for understanding. Saiman has clearly rejected the empirical world of Brisk, but his book clearly shares the understanding that halakhah is far, far more than a set of dry legal precepts and that one must immerse oneself in the Aggadic materials—the stories that evoke comparisons with literature—if one is ever to understand what is said to be Jewish law.

Indeed, for the comparativist, it is a deep error to attempt to reduce Jewish law to a set of legal precepts divorced from the materials surrounding them. Perhaps that is true, of course, for any body of law. Can one truly understand "American" or "French" law without full immersion in the cultures that produce them? Who, after all, does not agree with Oliver Wendell Holmes that one must understand both "logic" and "experience" when analyzing any given legal order—or that "experience" will ultimately dominate "logic" with regard to explaining the survival of any legal system over significant spans of time? And just as one cannot understand a legal order without paying attention to the surrounding culture, concomitantly one may well be unable to understand the cultural surround without paying attention to the extent to which aspects of "the law" help to shape it.

But these quite abstract observations take on special importance when one addresses the interplay between the demands of halakhic logic and the imperatives of actually governing a political order. This accounts for the special interest of the last full chapter of Saiman's book, which explicitly addresses "[t]he State of Halakhah and the Halakhah of the State," the latter, of course, being Israel itself. As Saiman notes, "Operating in the context of exile, halakhists had little need to deal with questions of theory, legal or political, or address the structural issues of statecraft and legal

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19. SAIMAN, *supra* note 3, at 211.

enforcement. Indeed, prior to the onset of modernity, there is scant rabbinic reflection on such topics.”<sup>20</sup> David Hartman used to speak of Israel as representing the “return to history” of a politicized Jewish people who had, presumably, been in exile from genuine political agency, often captured, helpfully or not, by invoking the notion of political “sovereignty,” seemingly irrevocably lost by the destruction of the Second Temple in seventy CE. 1948 represents a fundamental change in this aspect of Jewish reality, at least for those who do not share the views of those ultra-Orthodox who believe that Israel’s claim to be a “Jewish state” is itself heretical inasmuch as such a state requires Messianic intervention and, most certainly, not the proclamation of “independence” by secular Jews basically indistinguishable from the goyim.

Still, for better and worse, all Jews, whatever their specific religious sensibilities, are in effect required to have opinions about the State of Israel, especially inasmuch as its leaders (have the *chutzpah* to) claim that they indeed speak on behalf of the entire world Jewish community and not simply those persons, Jewish and non-Jewish, who happen to live in Israel. Indeed, one of the most controversial—and I think completely unfortunate—aspects of contemporary Israel is the proclamation by Prime Minister Netanyahu that Israel is fundamentally, perhaps we should even say ontologically, a state committed primarily to the welfare of its Jewish citizens and only secondarily to those of the roughly 20% of the population who are not Jewish at all. “Israel is not a state of all its citizens,” Netanyahu wrote during his most recent bid for re-election.<sup>21</sup> “According to the basic nationality law we passed, Israel is the nation state of the Jewish people—and only it.”<sup>22</sup> Like many secular liberals, I find this notion repugnant. Israel is a de-facto bi-national state, as are, for that matter, most countries in the world today. And, of course, as Saiman himself fully recognizes, most Jews within Israel are scarcely “religious” as that term is generally used. There are thus multiple reasons to wonder why ordinary Israelis, whether secular Jews, Muslims, or Christians (or other sects), would feel committed to a “Jewish state” defined at least in part by adherence to halakhah. It would be outrageous if the United States Supreme Court, for example, explicitly relied on the religious teachings of Christianity (or any other religious community) in giving meaning to the Constitution. Traditionally, at least one seat on the Israeli Supreme Court has been reserved for an Orthodox Jew who is regarded as an expert on halakhic teaching. One might explain this politically, but can any secularist find it an admirable feature of the Israeli legal system and culture?

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20. *Id.* at 214.

21. See Benjamin Netanyahu Says Israel is “Not a State of All its Citizens,” GUARDIAN (Mar. 10, 2019), <https://www.theguardian.com/world/2019/mar/10/benjamin-netanyahu-says-israel-is-not-a-state-of-all-its-citizens> [<https://perma.cc/2624-9QMH>] (quoting Benjamin Netanyahu, Prime Minister of Israel).

22. *Id.*

To some extent, Saiman sidesteps full discussion of the propriety of halakhah playing any role at all in the governance of Israel. What is most interesting about his chapter is his exploration, albeit brief, of the tension between what might be viewed as the most “idealistic” aspects of halakhah and the practical requirements of statecraft. This comes out most clearly in his discussion of what he calls “halakhah’s idealistic yet impractical rules of warfare,” surely a central topic for the state of Israel over its seventy-year history.<sup>23</sup> He discusses a controversy between two eminent rabbis about the injunction to leave open a means of exit for the inhabitants of a city under siege contrasting the “idealistic view” of Rabbi Shlomo Goren (who would become Israel’s Chief Rabbi) and that of Rabbi Shaul Yisrael, who interpreted the relevant Talmudic passages as being only “advisory” rather than compulsory and who counseled accepting the advice of Israeli generals who “thought a lockdown siege was tactically superior.”<sup>24</sup> Rabbi Goren remained unconvinced. “In the end,” Saiman writes, for Goren “a Jewish army must place its faith in God’s hand, and ‘we do not involve ourselves in God’s mysteries.’”<sup>25</sup> For Saiman, “This episode underscores the difficulty of mixing spiritual ideals with the realities of governance.”<sup>26</sup> One can readily agree with him, but then the key question is to what extent the “realities of governance” should always take priority over what might well be described as the merely “idealistic” musings of rabbis who never had to concern themselves with such realities.

Perhaps it is worth mentioning that the second book discussed at the May gathering mentioned earlier, along with *Halakhah*, was the recent book by Moshe Halbertal and Stephen Holmes, *The Beginning of Politics: Power in the Biblical the Book of Samuel* (2018), a quite extraordinary meditation on the lessons taught by the rise of the Davidic kingdom. It is quite easy to read those lessons as basically similar to those taught by Machiavelli,<sup>27</sup> Max Weber,<sup>28</sup> or Michael Walzer.<sup>29</sup> That is, political leaders must always be willing to set aside the teachings of what might be termed ordinary morality and instead get their “hands dirty” by doing what the community interest requires, whatever its incongruence might be with ordinary morality. After all, Saul lost his kingship because of his unwillingness to follow through on the imperative to commit genocide against all Amelikites. David was always willing to smite those deemed Israel’s enemies, which often included complete communities including women and children. And, of course, it is all too possible to read these slaughters as having been ordered by God. At the very least, this raises the

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23. SAIMAN, *supra* note 3, at 224.

24. *Id.* at 225–27.

25. *Id.* at 227.

26. *Id.*

27. See NICOLÒ MACHIAVELLI, *THE PRINCE* (1532).

28. See MAX WEBER, *POLITICS AS A VOCATION* (1946).

29. See Michael Walzer, *The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160, 180 (1973).

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all-important question of whether halakhah—and, ultimately, God’s commands—are open to independent moral judgment (and critique).

Full treatment of such issues obviously requires going far beyond the pages assigned to a book review. It is a tribute to Saiman’s achievement, though, that his book necessarily provokes engagement with the most important questions that anyone can ask about how to live one’s life, whether as an ostensible “individual” or member of a socio-religious-political community. His own relatively detached tone regarding many of these questions allows a freedom of intellectual exploration (and on occasion criticism) that might have been discouraged by a more polemical book. *Halakhah* is a book easy both to admire and to recommend to a wide range of potential readers, whether or not they are within or outside any of the communities identified with Judaism.



