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## THE EXPRESSIVE POWER OF RABBINIC LAW

RICHARD H. McADAMS\*

THIS is a great event for a magisterial book and I am glad to be a part of it. I was asked in my invitation to address the expressive powers of law. So my role here today is to examine Professor Saiman's book, *Halakhah: The Rabbinic Idea of Law*,<sup>1</sup> from the perspective of that body of literature. My comments are somewhat discursive. I will not state that there is a single way in which the book relates to the literature on law's expressive powers, but will endeavor to show multiple intersections. I try to be critical of some of the points that I make and that lead me to other points.

To begin, many rules in the halakhah are expressive in the simple sense that they are not enforced by legal sanctions. The one that struck me immediately is the death penalty as a sentence for certain crimes. In a sense, all criminal punishment could be described as expressive in that, following Joel Fineberg, it is not merely the infliction of harsh treatment on rule violators on account of the violation, but an infliction of harsh treatment on rule violators on account of the violation for the purpose of denouncing or condemning them for that kind of rule violation.<sup>2</sup> But, a criminal sanction is even more purely expressive when it's not actually ever imposed. We then have a statutory rule that expresses that some crime deserves some particular punishment, and the nominal punishment merely identifies how serious the offense is—how strongly it needs to be condemned. It doesn't in any real sense provide for the punishment to be inflicted.

The Jewish law of capital punishment seems to be expressive in this purely symbolic sense. First, there are procedures that make it impossible to actually implement. Beyond that, near the end of the book, Professor Saiman describes as possibly just rhetorical some rabbinic claims that certain behavior deserved capital punishment. Those are examples of law as purely expressive.

Yet this expressive example and others do not tell us if expressive theory has any special insight into the halakhah, i.e., whether the expressive theories of law, the ones I contributed to or others, have any bearing on our understanding of Jewish law. Much of the theory on expressive powers of law, including my own, seeks to explain how law has the power to

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

2. Joel Fineberg, *The Expressive Function of Punishment*, 49 *THE MONIST* 397 (1965).

influence behavior by mere expression. This expressive literature views law as influencing human behavior in ways independent of threatening sanctions and by more than what the psychologist or sociologist might call the legitimacy of law. Before I got to my own work on this, I realized some people simply and sweepingly explain the other effects of law as saying that people internalize the obligation to obey law. I was always critical of the notion that people have internalized generally a duty to obey law because my observation is that most people violate many laws and obey many laws. That they violate many laws doesn't look to me like people feel some strong internalized duty to obey law in general. So, that leads many to think that most people have internalized the duty to obey some specific laws. That seems right to me but I didn't think it could be the first explanation of people obeying the law. As a psychological matter, it seemed like people would have to obey a law before they could internalize it. I really didn't understand psychologically how people could, at one time, be flouting the law and then one day internalize the law and the next day start obeying it; rather it seems like they would be obeying the law and then after time they would internalize it and then that means that we have to explain step one—why they obey the law before they have internalized it—before we get to step two, internalization.

So, that's what I tried to do with expressive theory, to explain how people first come to obey certain laws and not others, and not for reasons of deterrence or what is conventionally understood as legitimacy.<sup>3</sup> Here, I will just name without explanation two specific expressive theories of law's influence on behavior: a theory about law as a coordination device, and a theory about law as information.

Yet, Professor Saiman's book was somewhat humbling for me because it points out something important that I had neglected. I had been focusing on the expressive power of secular law. The halakhah does not require expressive powers because religious law has special resources. Here, you can explain obedience in terms of human development: when you are not yet an adult, your parents tell you to do certain things; if they are insistent, then you tend to do them. That certainly includes religious practice. So, we could explain internalization as follows: children start to practice the rituals and rules of a religion because—step one—they obey persistent adult instruction and then—step two—they come to internalize them. We don't have a need for any other theories of legal compliance, including expressive ones.

Against this sense of doubt, I came to think that nonetheless there are some important connections between expressive theories and this sensational book. Some specific rules of halakhah seem to reflect some expressive concerns, that is, some ways of trying to get the law to influence behavior beyond the mechanism of deterrence or religious-based internal-

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3. See RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015).

ization. These are tentative ideas and I should perhaps apologize for their functionalist quality. I will not here justify functionalism, but this is how I tend to see legal rules. And to be clear, functionalism need not be a theory of how the rules came to be; it doesn't have to be why the rules were motivated in the first place. It could just be that rules that are functional tend to last longer than rules that are not functional. Rules might not come into being because of their functionality but when rules turn out to be dysfunctional there is a greater push to get rid of them. So, functionalism can exist alongside non-functionalist explanations in that both can have some truth to them.

Now to my first example of applying some element of expressive theory to halakhah: Many of the rules here are about how to honor someone or something, e.g., how to honor the dead, how to honor the Sabbath, etc. This connects with what I describe as law's ability to help people coordinate when they need to coordinate. Some of the examples of coordination I use in talking about law's coordinating function are mundane matters of traffic: to avoid a traffic accident, you have to find a way to coordinate. At an intersection, you might like to go while the other person stops, but if the law just proposes that you are the one that stops, then you might think that the mere proposal will make the other person think that you will stop. If the other person thinks you'll stop, then they won't stop; if they won't stop, you do want to stop, and when you do, you are obeying the law. In this case, the law's mere suggestion creates self-fulfilling expectations that people will obey the law.

This works also with the need to have a coordinated understanding among individuals for what it means to give honor to something. For example, consider a federal statute, United States Code title 4 section 8, which describes how to honor the American flag, e.g., how to display the flag, how to store it, and how to dispose of it when it is tattered in a manner that pays the flag respect.<sup>4</sup> This statute caught my attention because it is purely expressive because the First Amendment prohibits punishing anyone for not following this statute. Does it mean it has no function? Absolutely not. The statute likely affects behavior because there are some people who are motivated to honor the flag. They might realize that within any country large in geography and population, absent some centralized articulation of the rules for honoring the flag, that you would have divergent norms emerge in different parts of the country. This could lead to a situation where people living in two different towns follow two different customs and each of looks in horror at how the other town treats the flag thinking it's disrespectful even though they are both motivated by the desire to show respect. Burning the flag, for example, is often a form of protest but the statute proscribes that, at the end of the flag's natural life, one honorable way of disposing of it is to burn it. You can imagine there is real possibility of disagreement. The law helps to solve this coordination

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4. 4 U.S.C. § 9 (2018).

problem just by articulating the rituals of honoring the flag. You could ignore them because there is no consequence but you realize that other people will now interpret your behavior as honoring the flag so it helps you coordinate.

With the internet, it might seem all too easy to solve the coordination problem among dispersed people who want to agree on a set of behaviors that show honor. But this was certainly a difficult problem for many centuries, when there would have otherwise been a tendency for local divergence. Just as the appearance of a dialect may make it difficult for people who at one point spoke the same language to communicate, local variation could threaten this sense of unity within a single religion as to how to give honor to people and things and ideas. So the people need an expressive law, which can coordinate without needing sanctions. That is one example that I wanted to give you.

A second example has to do with an idea that Professor Meir Dan-Cohen once described with the term “acoustic separation.”<sup>5</sup> I don’t think I understood how much Dan-Cohen’s ideas matter to the expressive powers of law until I read Professor Saiman’s book and something clicked into place. I should begin by explaining acoustic separation. Dan-Cohen imagines (borrowing from Bentham) that legal rules always have two audiences: (1) those who are directed to follow the rule, frequently the general public, and (2) those officials who are directed to enforce rules by sanctioning violators.<sup>6</sup> If a rule tells the public how to behave, Dan-Cohen calls it a “conduct rule,” while a rule that tells officials when to sanction individuals is a “decision rule.”<sup>7</sup>

Dan-Cohen observes that, in the real world, the same statute, ordinance, judicial decision, etc., tends to serve as both the conduct rule and the decision rule, addressing the two audiences with the same text.<sup>8</sup> Now, in theory we could acoustically separate the audiences, and if we did we could separate the rules, which would create some new possibilities. Why would we want to do that? In fact, we usually value governmental transparency, and the idea of acoustic separation makes the decision rule non-transparent to the people affected by it.

Dan-Cohen agrees with that as a presumption—that presumptively transparency is good. He explores the exceptional cases where he thinks there might be some advantage to separating the rules. A perfect acoustic separation—perfect non-transparency—is impossible anyway, but he imagines that there could be some selective transmission of the rules.<sup>9</sup> One example he gives is the duress defense in criminal law.<sup>10</sup> Critics of

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5. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

6. *Id.* at 630.

7. *Id.*

8. *Id.* at 631.

9. *Id.* at 635.

10. *Id.* at 632–33.

the defense worry that, if people know that they have a defense when they are pressured to commit a crime, they might too easily give into the pressure and commit the crime because they know the defense exists. Dan-Cohen imagines that maybe the ideal would be to have a conduct rule where you just say, “don’t commit the following acts, which are crimes.” You don’t tell the people about the duress defense, but as a decision rule you tell the enforcers, “If people are subjected to duress, don’t bother enforcing the conduct rules against them.” Then individuals being pressured to commit crimes would desirably hold out against the pressure for longer than when they know the defense exists. Yet we would never actually wind up punishing people we think don’t deserve it or are undeterable because of the pressure that they were under, because the decision rule tells the enforcers not to do so. In sum, selective transmission might sometimes accomplish a social good.

I think we can generalize this point. Start with the obvious point that law tends to be dichotomous: you are either married or you are not, the defendant is either liable or he or she is not. Law is dichotomous in many cases where it is nonetheless trying to influence behavior along a continuum. When the behavior is continuous, we often want to encourage people to do something as much as possible. We might decide that it is good for people to save water in a draught and the more water conservation the better. Or if individuals bear a duty to return lost property, the greater the effort they make to return it, the better. But, when we’d like to push people along some continuum, a dichotomous legal rule is a poor tool. If we set the standard very high, it might be that a lot of people find compliance too costly and there is widespread disobedience of the rule, which then loses its effect. But, if we set the standard too low, it might cause those already willing to provide more of that good behavior to decrease their contribution because the rule tells them there is no liability above some minimal point. Some exemplary citizens, who have been contributing far more than average without knowing it, might then look at the new rule stating the minimum and realize they can cut back their efforts and still comply. Given this kind of problem, there can be an advantage to acoustic separation or at least the more realistic alternative of selective transmission.

What does this have to do with halakhah? Well, first, maybe it seems nothing because if it is a virtue to study the Talmud then selective transmission is difficult or impossible because everyone knows the law. Universal study of the Talmud would mean there is only ever one audience for the rules, not two. And yet, it seems to me, that maybe some of the indeterminacy and open-endedness of the halakhah might create something like acoustic separation. Here I guess I am following Christine Hayes’ view in reading the book to see in halakhah the tendency at times to lead to perpetual uncertainty. Consider then that Professor Saiman’s book at one point discusses where the Talmud itself struggles with the choice of selective transmission.

On page seventy-eight, Professor Saiman presents a question concerning the ritual of the showbread. Rabbi Ami states, “Even if a person studied only one chapter in the morning, and one in the evening, He has fulfilled the obligation derived from scripture, this Torah shall not depart from your mouth.”<sup>11</sup> The Talmud then addresses but leaves open the question of whether this minimalist view should be taught to “the unlearned.” One rabbinic opinion is that it is forbidden to teach this lesson in the presence of the unlearned, but the other rabbinic opinion is that it is a “commandment” to teach the lesson to the unlearned. Distinguishing what is to be said to individuals based on their mastery or ignorance of the Talmud seems like a form of acoustic separation or selective transmission. Of course, the difference here is that the separation is not to have a different rule for officials as from the governed, but to have one rule for the governed for who are learned in the rules and another rule for the governed who are not learned. You might imagine that it perhaps could be functional to distinguish between them. Perhaps those who study the Talmud could be trusted to do more than the minimum after they have already internalized the values of the halakhah, where those who are not learned are more likely to do only the stated minimum. This would be very much like telling particularly manipulable individuals in society what the criminal law rule is without mentioning the defense of duress so they would hold out against pressure as long as possible, but telling people of strength and independence that the duress rule exists.

Dan-Cohen also discusses how actual law brings about selective transmission through a variety of doctrines and practices that are not normally understood to have this function.<sup>12</sup> One of them is the vagueness or obscurity of a rule.<sup>13</sup> Here, we should consider the striking example from around page ninety of Professor Saiman’s book. There is a discussion of the eating rights of workers. The employer has to provide some food during the workday for the workers. The question is: how much food? There is an interesting disagreement. One possibility is to give very limited eating rights, just whatever the local custom is. But note that stating a conduct rule with a very minimal definition of eating rights might create an “expressive spill-over” of lowering the food that some employers would otherwise have provided to their workers. We might therefore like to have a conduct rule that demanded more than minimal eating rights even though we would prefer a decision rule that refrains from enforcement as long as the minimal local custom is followed.

If everyone gets the rule from the same place, there is no selective transmission. So, we might deal with this problem by having a vague standard. Just say that one must provide a reasonable amount of food; perhaps that works. The vagueness of it would stop you from lowering the

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11. SAIMAN, *supra* note 1, at 78.

12. Dan-Cohen, *supra* note 5, at 637–41.

13. *Id.* at 639.

contributions of people inclined to contribute more. The problem is that some employers will give less than is reasonable, so we want a specific rule that they can't go below and yet if we do that explicitly, we signal to the employers that they can get away with giving less.

I found it interesting that the Mishna might provide a functional solution. It states here the rule but also states what to me, sounds like a counter rule, that, "even a feast like Solomon's at the height of his grandeur" may not be enough. So, perhaps this creates a state of uncertainty that works to accomplish what a vague standard would accomplish. Everyone then knows they have to give the minimum, but many may be less than certain that giving just the minimum is actually sufficient. Earlier today, Professor Hamoudi referred to this idea in Islamic legal thought where some people want to be safe, and it wouldn't hurt to do more. And so maybe that is what is accomplished by having, not a vague standard, but a rule paired with a counter-rule. The resulting uncertainty is the same, and it raises the contribution of the employers inclined to give the least without lowering the contribution of the employers inclined to give the most.

I am now out of time but let me just say that I have learned a lot from the book and from the other speakers today. Thank you.



