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IMPLICATIONS OF THE RABBINIC IDEA OF LAW
FOR THE HISTORY OF HALAKHAH: DIALECTICS,
APOLOGETICS, FRACTALIZATION?

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CHAIM Saiman modestly classifies his book, *Halakhah: The Rabbinic Idea of Law*, as an introduction to halakhah for law students. Whereas it does introduce key ideas about halakhah in a highly accessible manner, the book clearly accomplishes more; it offers a distinct point of view on the nature and role of halakhah. Saiman describes halakhah as constantly engaging with two poles: the legal/regulatory on the one hand, and the philosophical/ethical, on the other. In an immensely insightful manner, he shows how both poles are equally present in every halakhic iteration. At times, however, this approach encounters problems. The following pages point out some of the implications and complications of Saiman’s bipolar model of halakhah. First, I reflect upon the dialectical model and its explanatory power. Subsequently, I consider the risk of this ever-intensifying duality’s collapsing into circularity. I then discuss two important contributions of the book—Saiman’s interpretative effort and his historical insights. Finally, I suggest that the two interlock in Saiman’s concluding reflections, which interpret the meaning of halakhah in the current historical moment while relinquishing, to some extent, his own insistence on the perfect equality of both poles.¹

I. HALAKHAH: DIALECTICS AND APOLOGETICS

Saiman presents a model of Jewish law as a continuous spectrum spanning two poles, in which halakhah features as a dialectic process hovering between the two. He designates one pole as having a more strictly legal focus (“halakhah-as-regulation”) than the other, which provides a broader social, theological, cultural, and ethical perspective (“halakhah as *Torah*”). Halakhah exists in constant oscillation between the regulatory and the broader impulse. Saiman frequently alludes to Rabbi Joseph B. Soloveitchik and his school of thought, and, in some ways, the book could be seen as an attempt to adapt this titan’s thought to questions of Jewish legal theory.

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1. This essay is based on a talk I presented at a conference in honor of the publication of Chaim Saiman’s book, *Halakhah: The Rabbinic Idea of Law* (2018) at the annual Shachoy Symposium at Villanova University on February 15, 2019. I thank Chaim for having invited me to participate.

In his famous *Lonely Man of Faith*, R' Soloveitchik presents a dialectical interpretation of the book of Genesis.² He does so by identifying two opposing poles in the creation story, pointing to the different verses that highlight this dichotomy between man's existence as an animal creature, on the one hand, and his divine potential, on the other. Subsequently, R' Soloveitchik integrates the two, maintaining that both aspects persist, thus keeping the dialectic intact rather than resolving it. Moreover, he explains, precisely this constant tension expresses the most profound sense of what it means to be human. In other words, the dynamic is at its most illustrative precisely when it is unresolved.

Similarly, Saiman's exposition of halakhah constantly refers to both opposed poles, delineating which extreme finds expression in every part of every text and in every school of thought and historical instantiation of halakhah, repeatedly designating which aspects belong to either halakhah-as-law or halakhah-as-Torah. In his book, too, the essential point is that the dialectic remains unresolved, leaving both poles in play. Clearly, such an approach goes well beyond a standard introduction to the halakhic canon and its texts, becoming a profound philosophical interpretation of the nature of halakha. For one, this philosophical interpretation accomplishes what turns out to be an apologetic goal.

Early in his book, Saiman alludes to Jesus' critique that halakhah deals with legalisms and unimportant details while neglecting the much more important questions of faith and morality as well as to Paul's critique of halakhah as the letter of the law that kills, while the spirit gives life. The book seeks to refute this charge and the distinction between letter and spirit at its basis. Here Saiman's constant oscillation emerges as crucial: he does not oppose Jesus' and Paul's critical approaches to Judaism by simply refuting the claim that halakhah deals with dry, unimportant legalisms. Rather, Saiman pushes against the letter-spirit binary by highlighting the constant duality of halakhic text and discourse. An important intervention of the book, thus, is a view of halakhah that sets straight certain common misconceptions, demonstrating that halakhah is, in fact, not only about legalism.

Saiman's response entails a risk: while compelling, at times it slips into implicitly privileging the "non-legal" side of halakhah. He explains that "Jesus . . . missed a crucial point. Precisely because halakhah loomed so large in the rabbinical consciousness, it became the medium through which the rabbis did in fact engage *weightier matters* of the law."³ In one of his masterful readings, Saiman maintains: "[B]y shifting the focus from the specific case to its underlying concept, the Talmudic discussion transforms an obscure ruling into a *value-laden* claim . . ."⁴ This statement implies that such matters are, indeed, weightier than the laws, that the

2. Joseph B. Soloveitchik, *The Lonely Man of Faith*, TRADITION, Summer 1965.

3. SAIMAN, *supra* note 1, at 28 (emphasis added).

4. *Id.* at 102 (emphasis added).

redeeming value of halakhah's obscure rulings depends upon the other "value-laden" things that they do. This conundrum lays bare an underlying problematic of Saiman's project: The constant focus on halakhah's dialectical structure, and the book's unflagging effort to accentuate it at every turn, renders it incredibly difficult to make other meaningful claims about halakhah beyond stating and restating its duality.

II. DIALECTICS AND FRACTALIZATION

Dialectics are, as their Hegelian roots imply, at their core, a philosophical-historical mode of interpretation. As such, dialectic describes movement between two poles, which continuously undergoes synthesis and thus emerges on a different plane, resulting in new and different iterations of these poles. This dialectic, then, has a direction that can describe the philosophical-historical development of a people. Saiman declares that his study of halakhah is not historical, but rather phenomenological, philosophical, and legal-theory based. He is interested in the single idea of law⁵ that these various texts, taken together, represent. This perspective on halakhah, however, both intensifies and historically flattens these dialectics to arrive, somewhat paradoxically, at a less dynamic description.

In order to portray this "single idea of law," Saiman constantly reiterates the to-and-fro movement between both poles, which increases in intensity as the description progresses. For instance, at the legal pole, halakhah-as-law has both a regulatory function, as exemplified by applied law on the one hand, but also a more theoretical dimension on the other. This other, theoretical, dimension is exemplified by non-applied law, those significant parts of Jewish law produced after most of the institutions discussed no longer existed. This type of halakhah was thus no longer applied—or at times was entirely inapplicable. Conversely, Saiman points out that while many "true" halakhic rules never governed in practice, the halakhah that *was* to some degree concretely enforceable was, paradoxically, imposed by rabbis through measures which were not purely halakhic, such as excommunication, termed "sub-halakhah" by Saiman.⁶ Moreover, the book shows how halakhah-as-law often communicates spiritual ideas from the realm of halakhah-as-Torah, and, in Saiman's words, a discussion that starts with something as practical as the laws surrounding "bread" might evolve into the realm of ideas and "theology."⁷

The two poles appear not only within the world of halakhah-as-law. Within the realm of halakhah-as-Torah, too, halakhah-as-law aspects abound. The more story-like portions of the Talmud known as *aggadah*, Saiman explains, are often highly relevant to the legal discussion. A discussion about occurrences in the heavenly realms thus has regulatory con-

5. *Id.* at 53.

6. *Id.* at 54.

7. *Id.* at 64.

sequences for the time of reciting the *Shema* prayer. This reappears at yet another, deeper, level at which the theological discussion carries implications that go beyond the legal decisions themselves: the legal aspect contains an element that is broader than the regulatory perspective. This more general element addresses the phenomenology of “night” rather than the point in time, and the theological meaning of “accept[ing] God’s dominion,” thus allowing “the halakhic data to convey the inner content of the commanded act itself.”⁸ But there is more: A “halakhah-as-theology” reading of a Jewish legal topic, such as R’ Soloveitchik’s derivation of the judge’s role from *aggadic* interpretations of biblical passages, has practical implications for the view of halakhah as law. Simultaneously, Saiman points out, R’ Soloveitchik presents this legal teaching in a *drasha*—a “halakhah-as-Torah” genre, rather than simply placing its conclusions in a halakhah-as-regulation framework.⁹

In discussing the post-Talmudic genres of halakhic text, Saiman continues to employ this dynamic of revealing a regulation pole and a Torah one within every instance of halakhah, and once again within every pole, sometimes several times over. Saiman reveals that Codes, the most legal forms of halakhic works, likewise contain Torah-like aspects, which become dominant as the accumulating layers of commentaries on those legal codes shift the emphasis back from regulation to intellectual activity. These commentaries, in turn, are never purely halakhah-as-Torah genres either, Saiman explains. Indeed, the commentaries themselves have both Torah-like and law-like instantiations; for example, though both commentaries on the same halakhic code, *Kzot ha-hoshen* by the eighteenth-century Rabbi Aryeh Heller from Galicia is more theoretical-intellectual, versus *Pithei Tshuva*, by the Lithuanian Rabbi Tzvi Hirsch Eisenstadt in the nineteenth century, which is more practically regulation-focused. Instead of describing a historically developing dialectic in which the poles shift and change in meaning with every iteration, Saiman depicts halakhah as a fractal structure in which both poles are continuously reiterated in a self-similar manner with ever increasing density. What risks getting lost amidst such a description is a deeper consideration of the structure’s meaning.

III. CIRCULARITY AND REDUNDANCY

The reiterative dynamic, of course, derives precisely from what Saiman is trying to demonstrate. He emphasizes the literary, rhetorical, and intellectual energy that is *consciously* and *knowingly* invested in discussing law that clearly is not applied and sometimes by definition not applicable, explaining that the Talmud weaves together applied and theoretical law, assuming that this mixture would not pose a problem: “[B]y constantly mixing, matching, and moving around halakhah’s meanings, the Talmud signals that, from its perspective, these distinctions are not very

8. *Id.* at 111.

9. *Id.* at 123.

significant.”¹⁰ Paraphrasing McLuhan, Saiman claims that this mixing of the media is the message for halakhah. “The Talmud’s claim is subtle but significant: the Torah’s ideas do not stand apart from the regulations that give rise to them.”¹¹

The message of Saiman’s book itself, thus, is that the medium is the message. The constant reiteration of the halakhah-as-law and a halakhah-as-Torah pole nesting within every pole, however, teeters precariously close to the edge of collapsing both categories into each other, making it difficult to engage with *the significance* of this unique structure—where does it leave halakhah? In other words, when taken to a certain extreme, this move risks calling into question the very need for the serious (and largely successful) effort that Saiman undertakes throughout his book: If we assume that the two types of halakhah are, in fact, meant to be one, then painstakingly pointing out and comprehending the distinctions is redundant, somewhat tautological, and perhaps even counterproductive. Let me provide an example from Saiman’s treatment of responsa.

Saiman explains: in responsa “the ethos of the Talmud and the ideal of *talmud Torah* are so powerfully enmeshed in the rabbinic consciousness that it can be hard *even in the responsa literature* to pinpoint the frequently shifting rulings, Talmudic analysis, and rabbinic study and speculation.”¹² Saiman’s highlighting of *even in the responsa literature* emphasizes that, regardless of responsa’s nature as “halakhah-as-law”—significantly, even *there*—halakhah very often functions as Torah. However, if—according to the point that Saiman makes throughout the book—the two are profoundly enmeshed from the get-go, as early as in the Talmud, there is no reason to assume that responsa would be exclusively the one or the other.

In other words, this circularity does not disprove Saiman’s point (on the contrary). If the purpose of the book, however, is limited to proving a truth claim concerning the essence of halakhah’s dual nature, this circularity risks rendering the bulk of the book, in which Saiman points out this duality in numerous halakhic texts of various types, times, and places, somewhat redundant. The work could have ended by proving this claim concerning the Talmud. In order to make a meaningful statement about halakhah beyond pointing out its essential duality, it is necessary to take a position that steps outside of the constant back-and-forth. Saiman, indeed, does more in two ways: The book provides profound interpretations of halakhic texts and shows how the dual nature of halakhah is experienced and deployed in different Jewish cultures and times.

IV. MEANING AND INTERPRETATION

The interpretative perspective of the book is sometimes hidden from the reader, and, perhaps, at times, even from the author himself. In many

10. *Id.* at 56.

11. *Id.* at 89.

12. *Id.* at 187.

instances of halakhic discussions which, at first glance, seem occupied solely with legal minutiae, Saiman virtuosically teases out the underlying spiritual significance. Often, he explains these readings so convincingly that he creates the impression that these deeper meanings are simply “there” in the Talmudic text itself. In reality, however, these meanings often are, at most, hinted at in the original text. When the Talmud records disagreement over whether a corpse must be measured from the navel or the nostrils, depending on where they believe man was created, Saiman describes it as about “how we measure the human essence.”¹³ This explanation rings true and, indeed, holds up when considering the proof texts advanced for each side of the argument in the Talmud. Extracting this philosophical discussion is, however, the result of an act of interpretation—nowhere does the Talmud state that this is the real import of the discussion.

The greatest (and most revealing) example both of the precarious fractalization of “halakhah-as-law” within “halakhah-as-Torah” and vice versa and of Saiman’s tendency to present subtle interpretations as though they were already obvious in the text concerns the laws of the rebellious town. Saiman interprets an opinion that it “will never come into being” as standing in opposition to the idea that it did come into being, as a locus where the discussion is, in essence, not just about these particular laws but a “core question of halakhic theory.” In his words: “What needs to be understood is that these core questions of halakhic theory are themselves addressed through technical halakhic rules.”¹⁴ In reality, however, there is no hint at explicit theorizing in the text.

Saiman states: “The debates . . . are plainly *not* about the historical record, but about the nature of halakhah itself.”¹⁵ I am not sure whether the sages whose various opinions are discussed in the cited passage would agree that their debate is “plainly . . . about the nature of halakhah itself.” In many ways, that view of the debate is Saiman’s interpretation. Although his claim is well-made and solidly grounded, in fact, *the rabbis do not* formulate it in such a way and make no attempt to do so. This is more than an issue of Saiman’s not giving himself enough credit. It also leads us to one of the most crucial questions at the core of this book: What is the significance of the rabbis’ discussing everything through the prism of law? The opportunity to ask this is lost when Saiman presents the theoretical ideas about law as explicit statements rather than as implicit—albeit convincing—interpretations.

Regarding one *Tosefta*, Saiman concludes that the discussion “eventually became absorbed in a web of halakhic thought that does not fret over the conceptual chasm which stands at its core; in fact, the Talmud seems

13. *Id.* at 62.

14. *Id.* at 54.

15. *Id.* at 53.

to celebrate it.”¹⁶ If it does not fret . . . then, will separating those strands efficiently contribute to explaining what halakhah is truly about? And how to explain not just the lack of “fretting” but also the fact that none of the more profound theological, philosophical, and spiritual deliberations behind the halakhah-as-law discussions are ever made as explicit as they appear in Saiman’s skillful interpretations? Here, I believe, Saiman is both overstating the certainty of his point and understating the amount of his own active intellectual work. This omission does not lead the book into erroneous conclusions, but it does risk missing important opportunities to investigate the meaning of halakhah’s strange structure. Fortunately, Saiman does not miss these opportunities when further interrogating the duality of halakhah—they appear wherever he pauses to consider halakhah from a historical perspective.

V. HISTORY

Although Saiman claims that his book is not historical, it is, in fact, *highly* historical in several ways. He writes: “The specific persons or historical examples discussed were . . . chosen . . . to show . . . how the concepts of halakhah-as-Torah and halakhah-as-regulation *played out at critical junctures in the development of halakhic thought.*”¹⁷ And: “the goal is not to unearth the history of halakhah, but to offer a constructive account of the *interpretative and conceptual practices* presented within it.”¹⁸ It is precisely in providing an account of the interpretative and conceptual practices of halakhah *as they played out at critical junctures in the development of halakhic thought* that Saiman’s inquiry becomes very interesting historically, on multiple levels.

The entire perspective animating Saiman’s treatment throughout the book is shaped by the historical *reception* of halakhah. His analysis is not about the pure nature of halakhah in a philosophical or theoretical way but, rather, about the various distinctive expressions of halakhah throughout Jewish history, about what Jews made of halakhah. It is about halakhah as it was formulated in the Mishna and Talmud, which, historically, took place after Jewish sovereignty ended—and this *historical* fact is crucial to Saiman’s thesis. Saiman then takes his model and applies it to understanding subsequent intellectual halakhic projects throughout Jewish history: Tosafot, Maimonides’ *Mishne Torah*, the Codes, responsa, and so forth. Saiman conceptualizes theoretically and explains for the reader this perspective of halakhah as it developed, was received, and elaborated—and not a purely theoretical philosophical account of the essence of halakhah. In this he is doing us a great service.

Throughout the history of halakhah, this internal complexity has found expression in multiple ways, which are not always easily recogniza-

16. *Id.* at 54.

17. *Id.* at 11 (emphasis added).

18. *Id.* at 13–14 (emphasis added).

ble. There is thus incredible value in pointing those ways out to the reader. One sees this most clearly in Part Three, where Saiman discusses post-Talmudic genres: It is especially apparent in his focus on the Brisker movement. Saiman finds Brisk particularly instructive because, as he explains, Brisk took halakhah-as-Torah to an unprecedented degree. If, in “standard” halakhah, “the laws of prayer reflect on the meaning of prayer . . . halakhah both constructs and is constructed by the underlying theology,”¹⁹ this theology is not created in halakhah; it exists outside of the discussion although it is constructed by halakhah. In the case of Brisk, however, we are no longer talking about a spectrum with two poles. The structure has a clear directionality: halakhah as *law* (discussed legally and only legally) but *not* as applied law (only as Talmud Torah, nothing else), in fact, determines moral/spiritual reality. These halakhic determinations, however, do not fulfill the function of discussing pre-existent philosophical views. To Brisk, the non-law elements are wholly neutral and void; all values are supplied by halakhah. This example shows clearly how the different halakhic schools are not merely interchangeable reiterations of the same bipolar structure. Every iteration is unusual, its emphases, values, and import are unique and significant.

VI. REGULATION AND MEANING

Saiman’s concluding reflections, which come closest to a statement about the significance of halakhah’s particular nature, similarly advance beyond the duality and consider our historical moment. Ultimately, Saiman contends, halakhah privileges the aspect of regulation: “Despite everything we’ve said about the way halakhah combines several modes of thought, there is no gainsaying that its regulatory aspects dominate.”²⁰ In these instances, when Saiman acknowledges a dominant pole, it becomes possible to explore what the model of halakhah as a whole means for Jewish culture. Saiman writes: “the Talmud offers a profoundly different way of thinking. Its starting point is the mitzvah—God’s call to action—and its core intellectual tool is interpretation.”²¹

These points in the book come closest to formulating the significance of halakhah’s way of expressing ideas legally: “[T]he decision to entwine a demanding system of regulation within a sanctified framework of religious study and creativity has allowed halakhah to survive and thrive under a vast array of disparate legal and cultural settings.”²² This has interesting sociological and religious implications that shift from one historical period to another.

For instance, “whereas personal commitment to halakhah was once a prerequisite for advanced Talmud study, today the reverse is true: Talmud

19. *Id.* at 89.

20. *Id.* at 130.

21. *Id.* at 71.

22. *Id.* at 248.

study is increasingly a tool to strengthen observance.”²³ In earlier periods of Jewish history, the function of halakhah’s dialectic was understood differently than it is perceived today by those who are religiously committed to halakhah: “In [pluralist democracy], Torah study can be a generator of religious fervor that in turn enables halakhic practice to survive It can be surprisingly effective in creating a culture of halakhic compliance outside the arena of state power.”²⁴ By writing through the medium of law, Saiman explains, “halakhah ideally becomes less about commands imposed from the outside than about an internal desire to follow in God’s path. Thus, in contrast to the ‘hard’ regulation associated with the bureaucracies of state law, Torah study may operate as a ‘soft’ form of halakhic regulation and enforcement.”²⁵ Thus, the reason why halakhah’s duality is so crucial in this case lies in its potential to inspire a different form of adherence. In this particular instantiation, the regulatory aspect becomes voluntary and internalized through the aspect of halakhah-as-study.

The effect of the dialectic when it stubbornly refuses to be resolved thus presents a multiplicity of options for understanding and living with halakhic adherence. Simply pointing out the existence of this dual nature as a structure that constantly inheres in halakhah regardless of time and place has its value. On the one hand, such a perspective has but limited explanatory potential for those studying halakhah as historians. On the other hand, however, using the duality as a starting point for understanding how halakhah is constructed, maintained, and mobilized for meaning in varying times and places can yield highly important insights.

23. *Id.* at 246.

24. *Id.* at 244.

25. *Id.* at 243.

