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TEMPLE, TALMUD, AND SACRAMENT: SOME CHRISTIAN  
THOUGHTS ON *HALAKHAH*

NATHAN B. OMAN\*

INTRODUCTION

**I**N *Halakhah: The Rabbinic Idea of Law*,<sup>1</sup> Chaim Saiman provides an introduction not to what Jewish law says or requires but to what Jewish law does. The book is not a summary of the substantive demands of the halakhah or even a historical account of the development of that law over time. Rather, Saiman explores the cultural, intellectual, and spiritual uses of halakhah. In part the book is apologetic, if one may use that term without any negative connotations. In particular, Saiman responds to criticisms that Christians have leveled against Jewish law. His response is to analogize Jewish law to Christian theology. Where Christians reflect on the foundations of their religion through the process of theological arguments over the doctrines of the faith, the rabbis get at similar questions through the detailed discussion of concrete legal rules.

In this brief essay, I respond to Saiman's apologetic. The analogy that he draws is valid and insightful. However, it is incomplete. In part, the halakhah is an effort to recapture what was lost to Judaism in the destruction of the Second Temple in 70 CE, namely a way of coming into the presence of God. This is what study of God's law allows the rabbis to do. The proper analogy in Christianity, I argue, is not theology but rather the sacrament of the Lord's supper. If we see Jewish law in terms of trying to recapture what was lost in the destruction of the Temple, then we have a new way of thinking about what it teaches us about law more generally. Robert Cover famously argued that the halakhah provides a model for how law creates meaning in society, what he called *nomos*.<sup>2</sup> For Cover, however, authority is the enemy of *nomos*. The fuller understanding of the internal dynamics of Jewish law laid out by Saiman, however, suggests that authority—by gesturing toward transcendence—is integral to the ability of law to generate the kind of powerful meaning prized by Cover.

This Essay proceeds as follows: In Part I, I provide a summary of the two main Christian polemics against Jewish law and explore Saiman's responses to both attacks. In Part II, I argue that Saiman's analogy between

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\* Rollins Professor, William & Mary Law School. I would like to thank Chaim Saiman for many fascinating discussions on jurisprudence, religion, and halakhah. I've been anticipating his book for a while, and I am happy that it is finally here. This Essay also benefited from conversations with my colleague Tom McSweeney. As always, I thank Heather.

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

2. See Robert M. Cover, *The Supreme Court 1982 Term – Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

halakhah and theology is incomplete. In particular, understanding the relationship between the rise of the study of Jewish law and what was lost in the destruction of the Second Temple points toward the analogy not of Christian theology but of the Christian sacrament of the Lord's Supper. Both law and sacrament fulfill the same spiritual function, bringing the believer into the presence of God. Finally, Part III suggests some of the possibilities opened up by thinking about law in terms of experiencing the transcendent. In particular, it points toward the experience of law's authority as key to both its meaning-making power and its continued attraction in a public sphere that purports to eschew any link to the divine even while being unable to escape the search for the transcendent in our supposedly disenchanted world.

### I. TWO RESPONSES TO TWO CHRISTIAN POLEMICS

In part, Saiman's *Halakhah: The Rabbinic Idea of Law* is shaped, if only implicitly, by its response to two common Christian polemics against Jewish law. The first is the criticism of the Pharisees leveled by Jesus in the gospels.<sup>3</sup> There, Jesus castigates the Pharisees for their focus on legal minutia at the expense of the weightier matters of the law.<sup>4</sup> This is the accusation that Jewish law exalts form over substance, missing the deeper moral meanings of God's commands. The second criticism is intellectual rather than moral. It cannot be found in the New Testament. This is the claim that Jewish law is philosophically and theologically sterile.<sup>5</sup> The Christian tradition, so goes the criticism, has produced subtle philosophical and theological reflections, while the Talmud can offer nothing but the arid logic chopping of legal analysis.

There is no doubt more than a little anti-Semitism in both of these criticisms, but they have sufficient plausibility that Saiman feels called upon to respond to both arguments. In so doing, he implicitly compares Jewish law and Christian thought, pointing toward possible parallels between them. In response to the first criticism, the book quite rightly notes that the concerns of Jesus with the weightier matters of the law are present in the Mishnah and Talmud themselves.<sup>6</sup> Thus, far from ignoring the danger of exalting form over substance, this danger is a persistent matter

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3. See *id.* at 23–24 (summarizing Jesus' critique of Pharisaic Judaism); see also Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & RELIGION 97 (2007) (same).

4. See, e.g., *Matthew* 23:23 (“Woe unto you, scribes and Pharisees, hypocrites! for ye pay tithes of mint and anise and cummin, and have omitted the weightier matters of the law, judgement, mercy and faith: these ought ye to have done, and not to leave the other undone.”).

5. Saiman isn't explicit about the religious origins of this critique of law's formalism, rather calling this approach to law “the typical American view” and looking to Grant Gilmore Gilmore is hell. The difference could not be starker.”).

6. See *id.* at 26 (“Jesus's complaints against halakhah have not gone unanswered”).

of halakhic discussion.<sup>7</sup> The chief difference between the gospels and the rabbis of the Talmud is the idiom in which these concerns are expressed. As Saiman points out, within the halakhic tradition legal analysis becomes the genre in which a morally sensitive understanding of divine law emerges.<sup>8</sup>

The book's response to the second line of Christian attack builds on this insight about genre. Saiman shows that legal analysis is not the arid conceptual wasteland of the Christian polemic. Rather deep questions of theology and ethics are often dealt with in the halakhic discussion.<sup>9</sup> The difference between the halakhah and the Christian tradition of philosophical theology is again a matter of genre. Where a Christian thinker such as Thomas Aquinas articulates his theology using the language of Aristotelian philosophy, the rabbis get at many of the same questions indirectly by asking specific questions about technical legal rules. As the book ably illustrates, the seemingly arbitrary outcomes in these legal arguments emerge from important substantive judgments on various theological issues.<sup>10</sup> Thus, according to Saiman, the halakhah provides not only the kind of morally serious engagement with God's law called for by Jesus, but also a medium through which the rabbis can do the work reserved for philosophers and theologians within the Christian tradition.

There is much to admire in the cogency and subtlety of this defense, and I have no reason to object to the book's claim that legal analysis is a genre through which we can grasp and address transcendent questions. Indeed, as a scholar of the common law, Saiman's arguments on this point are both congenial and persuasive to me. The common law, of course, has come in for more than its fair share of accusations as to incoherence and arid logic chopping. As one nineteenth-century intellectual dismissively put it, the common lawyer's ideal of a perfect understanding of the law is "chaos with a full index."<sup>11</sup> The reality, however, is that even such pedestrian doctrinal questions as the proper measure of damages for breach of a sales contract or the precise meaning of consideration can raise fundamental questions of political morality and social organization. On this point, for me at least, Saiman is preaching to the choir. Indeed, as a Chris-

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7. See, e.g., *id.* at 104 (arguing that "the halakhic debate over the time at which to recite the *Shema* prayer relates to the meaning of the ritual itself").

8. See *id.* at 103–23 (arguing that the Talmud collapses the distinction between halakhah—law—and aggadah—"the loosely structured collection of narrative, thought, and ethics"—in order to elucidate the deeper meaning of Torah).

9. See *id.* at 77–89 (setting forth this argument at length).

10. See, e.g., *id.* at 84–87 (illustrating how debates about the application of the rule against carrying objects on Shabbat applies to a sword worn but not carried deal with issues of war and peace and male identity).

11. The nineteenth-century English writer T.E. Holland claimed, "the old-fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index." Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13 n.41 (1983) (quoting Holmes, *Book Review*, 5 AM. L. REV. 114 (1870)).

tian (of a sort),<sup>12</sup> I confess to more than a little “holy envy” at the devotional study of contract law.<sup>13</sup> Likewise, Jesus’s attack on the Pharisees represents an important rebuke to the kind of short-sighted and self-righteous hypocrisy to which all religious believers are prone. With Saiman, however, I reject the anti-Semitic claim that this is a peculiarly Jewish vice or one to which the halakhah necessarily leads. That said, in its artful response to these criticisms, the book sets up a strong parallel between legal analysis and philosophical or theological reflection. One might read it as saying that the study of the Talmud and the Torah is what Jews do in place of theology. I want to suggest, however, that this analogy is only partial.

## II. SEARCHING FOR THE TEMPLE

In 70 CE, Roman legions under the command of the future Roman Emperor Titus seized the city of Jerusalem. The legions’ attack came at the end of a hard-fought Jewish revolt against Roman domination, and the account of the siege in Flavius Josephus’s *The War of the Jews* makes for chilling reading, chronicling an escalating cycle of brutality.<sup>14</sup> In the end, the Jewish defenders were defeated, and, in forcing their way within the walls of Jerusalem, Roman legionaries set fire to the Second Temple.<sup>15</sup>

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12. My identity as a Christian could be disputed on two grounds. First, as an ethical matter, I confess to many deficiencies in the matter of loving my neighbor. Second, as a Latter-day Saint, I am happy to acknowledge that because of its explicit rejection of the Nicene Creed, many Christians contend that the Church of Jesus Christ of Latter-day Saints should not be thought of as a Christian denomination. See, e.g., Fr. Luis Landaria, S.J., *The Question of the Validity of Baptism Conferred in the Church of Jesus Christ of Latter-Day Saints*, L’OSSERVATORE ROMANO, WKLY. EDITION IN ENGLISH, Aug. 1, 2001, at 4 (explaining the reasons why the Vatican’s Congregation for the Doctrine of the Faith no longer recognizes Latter-day Saint baptisms as Christian). In light of the argument made in this Essay, I note that as part of our weekly liturgy of the Lord’s Supper—referred to by Latter-day Saints as simply “The Sacrament”—congregants explicitly covenant with God that “they are willing to take upon them the name of thy Son.” Hence, our stubborn insistence on self-identifying as Christians. For a sensitive joint treatment of this debate by a Latter-day Saint theologian and a Protestant theologian, see CRAIG L. BLOMBERG & STEPHEN E. ROBINSON, *HOW WIDE THE DIVIDE?: A MORMON AND AN EVANGELICAL IN CONVERSATION* (1997).

13. The term “holy envy” was coined by Krister Stendahl, a theologian and former bishop of the Swedish Lutheran Church, as a possible basis for interfaith dialogue in which participants retain a commitment to their native faith traditions while acknowledging the spiritual power and attractiveness of their interlocutors’ religions. See Yehezkel Landau, *An Interview with Krister Stendahl*, 35 HARV. DIVINITY BULL., Winter 2007, <https://bulletin.hds.harvard.edu/articles/winter2007/interview-krister-stendahl> [<https://perma.cc/GRH3-SSMG>] (last visited Feb. 7, 2019).

14. In a haunting story, Josephus recounts a mother driven crazed by hunger who killed and ate her own child. See FLAVIUS JOSEPHUS, *THE NEW COMPLETE WORKS OF JOSEPHUS* 893 (William Whiston & Paul L. Maier trans., rev. and expanded ed. 1999) (recounting the story of “a certain woman that dwelt beyond Jordan, her name was Mary” who was caught up in the siege with her infant son).

15. See *id.* at 894–97 (recounting the final assault on the Temple Mount and the burning of the Second Temple).

Today, as you enter the Roman forum from the Coliseum, you will still pass through the Arch of Titus, which depicts legionaries carrying the menorah of the Temple in triumph through the streets of Rome. The destruction of the Temple was a catastrophic event for ancient Judaism. The ritual life of the nation revolved around the ceremonies of the Temple. With its destruction Judaism faced an existential challenge. How was the religious life of the community to be organized in the absence of the national shrine? The Mishnah and the Talmud are at least in part efforts at retrenchment and preservation by a new post-Temple Judaism.<sup>16</sup>

One of the most fascinating aspects of Saiman's book is its account of the continuing vitality of the study of the legal rules governing the service of this long-destroyed Temple.<sup>17</sup> The book invites the reader to ask the question of what is going on with this study. The Second Temple was the last in the line of Jewish temples extending in the Biblical narrative back to the tabernacle that God commanded the Children of Israel to construct according to his plan in the desert before Mount Sinai.<sup>18</sup> The tabernacle and by extension the Temple was to be "the House of the Lord."<sup>19</sup> The French architect Corbusier provided modernism's desiccated definition of a house as "a machine for living in."<sup>20</sup> The house that God ordered Israel to build, however, was saturated with meaning. The Temple was a model of the universe, retelling in its structure the story of God's creation of cosmos from chaos. Its rituals cleansed the people of their sins, refounding their lives. Ultimately, within its holy of holies the high priest came ritually into the presence of God on behalf of Israel. Mircea Eliade argues that "Judaism inherited [the] ancient oriental conception of the temple as the copy of a celestial work of architecture."<sup>21</sup> He goes on to argue that:

[A]s house of the gods, hence holy place above all others, the temple continually resanctifies the world, because it at once represents and contains it. In the last analysis, it is by virtue of the temple that the world is resanctified in every part. However impure it may have become, the world is continually purified by the sanctity of sanctuaries.<sup>22</sup>

16. See MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (reprint ed. 2003).

17. See SAIMAN, *supra* note 1, at 36–39 (discussing the halakhic debates over laws related to the Temple long after the destruction of the Second Temple).

18. See *Exodus* 25–27 (describing the construction of the Tabernacle according to the pattern revealed to Moses).

19. See *1 Kings* 6 (recounting Solomon's construction of a temple as a house for God).

20. LE CORBUSIER, *TOWARDS A NEW ARCHITECTURE* 4 (Frederick Etchells trans., Dover Publications 1986) (1931).

21. MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 58 (Willard R. Trask trans., Harcourt, Brace & Co. 1959) (1957).

22. *Id.* at 59.

In short, the Temple was the axis mundi, the point where heaven touched earth and from which the earth was redeemed from the meaningless chaos into which it would fall without God's act of creation. Seen in these terms, the destruction wrought by Titus' legionaries wasn't simply an act of vandalism or national humiliation. It destroyed the structure through which God and his world touches ours.

As described by Saiman, the halakhah performs many of the same spiritual functions as the Temple. The study of the law isn't simply a way in which one thinks about God or ethics or cosmology. Rather it becomes a way of coming into the presence of God. Seen in these terms, the continued study of the laws governing the service of the Temple makes good sense. The Temple is transformed from a literal structure into a legal structure, and one can come within the holy of holies through the act of legal study rather than through the rituals of the tabernacle. As the Talmud puts it, "From the day the Temple was destroyed God has had no portion in this world save the 4 cubits of halakhah." Study and Temple are directly related elsewhere in Talmud, where Rabbi Samuel bar Inayya declares, "Greater is study of Torah than offering the daily whole-offering [of the Temple]. . . ."<sup>23</sup>

What then corresponds in Christianity to this? How do Christians come into the presence of God? The answer is not, I would submit, by doing philosophy or theology. Consider Thomas Aquinas, perhaps the most ambitious and comprehensive of Christian theologians. A few months before his death, Aquinas was celebrating the Mass when he had a religious experience that affected him profoundly. He told his secretary, "I can write no more, I have seen things which make all my writings like straw."<sup>24</sup> One cannot imagine the Brisker scholars described by Saiman coming to a similar conclusion regarding their studies of the halakhah.<sup>25</sup> One suspects that even partisans of Hasidism, while criticizing the Brisker for emphasizing the legal within Judaism at the expense of direct mystical experience, would balk at calling the Mishnah and the Talmud "straw." Even for the most devout Catholic, however, the *Summa* is not the Talmud, and while Aquinas' statement is striking and perhaps shocking, it does not represent a rupture with the fundamental structure of Christian spirituality.

It has been said that the proper analogy for the Qua'ran is not the Christian Bible but rather Jesus Christ.<sup>26</sup> This is because the Qua'ran, as a

23. 3 THE BABYLONIAN TALMUD: A TRANSLATION AND COMMENTARY 307 (Jacob Neuser trans., 2011). The quotation is from Erubin 63B.

24. G.K. CHESTERTON, ST. THOMAS AQUINAS 90 (Dover, 2009) (1933).

25. See SAIMAN, *supra* note 1, at 195–213 (describing "Halakhah's Empire: The Yeshiva and the House of Brisk").

26. See, e.g., Dale Tuggy, *Supplement to Trinity: Judaic and Islamic Objections*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 ed. 2016), <https://plato.stanford.edu/entries/trinity/judaic-islamic-trinity.html> [<https://perma.cc/QEC8-FHXN>] ("This Word of God, is supposed to be in some sense what Muslims recite, hear, or read. But how can this eternal, non-physical

direct emanation of the divine mind, represents a kind of incarnation of God's presence in the world. Likewise, for a Christian, in Jesus "the Word was made flesh and dwelt among us, full of grace and truth."<sup>27</sup> The corpus of the halakhah is far too mediated by human debate and analysis to be incarnational. It is not the Qu'ran, and it isn't the Word made flesh. Its study, however, does provide a kind of a primal, almost ritual entrance into the presence of God. The story of Aquinas and the straw gestures towards the proper Christian analogy to the halakhah: Aquinas was celebrating the Mass. Before his crucifixion, Jesus held a Passover feast with his disciples.<sup>28</sup> There he declared that the broken bread was his body<sup>29</sup> and the wine was to be drunk in remembrance of his blood.<sup>30</sup> With a few exceptions, the ritual recapitulation of this meal has been at the center of regular Christian worship from that time to the present. Catholicism, with its doctrine of transubstantiation, provides perhaps the most striking statement of the primacy of the Lord's Supper in Christian spirituality. For a Catholic, the host and the wine literally become the flesh and blood of God incarnate. In the words of the *Catechism of the Catholic Church*:

The Eucharist is the efficacious sign and sublime cause of that communion in the divine life and that unity of the People of God by which the Church is kept in being. It is the culmination both of God's action sanctifying the world in Christ and the worship men offer to Christ and through him to the Father in the Holy Spirit.<sup>31</sup>

This sounds much like the entrance into the Holy of Holies, the direct experience of God's presence that gives meaning to the world and holds together the people of God.

To be sure, Judaism has its own rich liturgy. One might object that the proper analogy for the Christian ritual of the Lord's Supper within Judaism is not the study of the law but rather the rituals of the Sabbath or the Day of Atonement or the other ordinances of Jewish life. This is a fair point. No analogy is perfect. However, if the halakhic authorities are to be believed, the current ritual life of Judaism is incomplete. For its ritual completion, Jewish law requires the Temple. There is thus a sense in which it is only within the legal categories of the halakhah that the com-

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reality be present in an earthly book, or in an episode of Arabic speech? Wolfson discusses this as the problem of 'inlibration', parallel to the Christian doctrine of the incarnation of the Word, also, in *some sense* (in the pro-Nicene and Latin traditions) a divine attribute." (emphasis in original).

27. *John* 1:14.

28. See, e.g., *Luke* 22 (recounting the story of the last supper).

29. *Luke* 22:19 ("This is my body which is given for you: this do in remembrance of me.").

30. *Luke* 22:20 ("This cup is the new testament in my blood, which is shed for you.").

31. CATECHISM OF THE CATHOLIC CHURCH §1325 (2d ed. 2003).



plete life of Judaism is possible after Titus' sack of Jerusalem. It is only in the study of the halakhah that the process of legal analysis and dispute brings one fully into the Temple, the axis mundi of creation. For a Christian, however, this happens when one comes into the presence—literal or figurative, depending on one's sacramental theology—of the blood and body of Jesus, the son of God.

### III. WHAT DOES LAW DO AND WHAT DOES HALAKHAH TEACH US ABOUT THAT

What can we learn about the idea of law more generally from the halakhic insight that we can come into the presence of God through the study of his law? This is something like the question that Robert Cover purported to answer in his famous 1982 essay *Nomos and Narrative*.<sup>32</sup> For Cover the attraction of the halakhic tradition was what he saw as its openness to a never-ending process of interpretive play and meaning making, what he called jurisgenesis.<sup>33</sup> The result was the normative world that we inhabit and which gives meaning to our social arrangements, what Cover called *nomos*.<sup>34</sup> Given the story that Saiman tells about the role of argument over non-applied law in the halakhah, there is a kind of plausibility to Cover's reading of the tradition. The centuries of rabbinic arguments over the service of the Temple were not about regulating ritual practice. Rather they were an exercise in communal meaning making. For Cover, "bad" law is law that tries to foreclose interpretation and impose a correct answer based on authority. This was what he called jurispatic law, in contrast to the more hopeful process of jurisgenesis.<sup>35</sup> He aphoristically insisted, "We ought to stop circumscribing the *nomos*; we ought to invite new worlds."<sup>36</sup> We can think of the exchange in the Babylonian Talmud over the Oven of Akhnai, in which God himself seems to disclaim authority over his law, as the ur-text for Cover's stance.<sup>37</sup> In his imagination, Jewish law became a post-modern hermeneutic utopia in which the never-ending play of interpretation finally escapes the heavy and coercive hand of authority.

Cover, however, missed something important about Jewish law, namely the role that authority plays in its meaning-making power.<sup>38</sup> Fur-

32. See Robert M. Cover, *supra* note 2.

33. See *id.* at 11–19 (setting out the idea of jurisgenesis).

34. See *id.* at 4 ("We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void." (footnote omitted)).

35. See *id.* at 40–44 (discussing the role of courts as jurispatic institutions).

36. *Id.* at 68.

37. See THE TALMUD: A SELECTION 470 (Norman Solomon trans. 2009) ("[A] heavenly voice proclaimed, Why do you challenge Rabbi Eliezer, for the halakha accords with him in all matters! Rabbi Joshua arose to his feet, and declared, It is not in heaven."). The story is given in *Bava Metzia* 59a-b.

38. I am not, of course, the first to make this criticism. See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary*

thermore, in the project of jurisgenesis, claims to authority are a feature not a bug. To see why, consider what it is about the experience of the halakhah that can bring a pious Jew into the presence of God. One way of understanding how the divinity of the law argued over by the rabbis works is to point out that the law was authored by God and thus to study that law is to study a divine artifact and by inference the divine mind that created the artifact. Notice, however, that if this is all that is meant by the idea that one comes into the presence of God through the study of the divine law, then one could just as easily find God by studying any other artifact of his creation. The believing scientist who studies the behavior of proteins, pulsars, or protons would be experiencing the divine mind in the same way as the halakhist. This, however, doesn't seem quite right. There is something different about the phenomenology of the study of law and the phenomenology of the study of nature.

One of the chief differences is that law is a structure of authority. All law, human or divine, makes claims that, in Joseph Raz's formulation, purport to exclude other reasons for action.<sup>39</sup> This is part of what separates law from other kinds of practices like homilies or predictions. With all due respect to Justice Holmes, the law doesn't suggest behavior or merely predict official actions. It demands.<sup>40</sup> Contra Cover's image of jurisgenesis, lawyers are more often than not engaged in a kind of practical reasoning. They are trying to figure out what one ought to do. However, their reasoning is always limited by the demands of the law. There are certain things that one ought to do or ought not to do. Why? Because the law says so. What if a lawyer's own, all-things-considered judgments are different? As a matter of legal reasoning it doesn't matter. The law simply replaces a lawyer's all-things-considered judgments with its authority. This is what makes legal reasoning different from other forms of practical reasoning.

Traditionally, lawyers who have thought about legal authority have assumed, naturally enough, the most important question one can ask about that authority is whether it is justified. For legal positivism, the problem is solved by banishing the question from jurisprudence. The job of justifying the law's authority is to be outsourced to political morality (or abandoned

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*American Legal Theory*, 106 HARV. L. REV. 813, 894 (1993) ("For, in the final analysis, Jewish law is not only a legal system; it is life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a *nomos*, in the Maimonidean sense of the term. But it will not be Torah." (footnote omitted)).

39. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 21–25 (2d ed. 2009) (setting out the theory of authority as a matter of giving exclusive reasons).

40. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (arguing that law is a merely a matter of predicting how government officials will act in particular cases).

as a fool's errand).<sup>41</sup> The natural law position insists that one cannot answer the question of what is law without first answering the question of its authority. If law necessarily claims authority, it cannot truly be law if the claim to authority is false.<sup>42</sup> The *lex iniusta non est lex* of the natural lawyers thus teeters between a deep insight about law as a functional kind and the "no true Scotsman" fallacy.

Claims of authority do more than simply demand justification. They also orient us toward something beyond ourselves. In other words, the law's authority creates a certain kind of intellectual and spiritual experience. To engage in practical reasoning in the presence of authority is to be constantly aware that there is something greater than yourself that demands abnegation of some sort. We can think of this as the phenomenology of law's authority. This is, of course, also the stance of the faithful believer before God. It thus makes sense that the experience of legal analysis lends itself easily to the experience of religious worship. For Christians, this experience of being in the presence of the transcendent comes through the ritual presence of the incarnation of God in Jesus Christ. For the student of the halakhah, I suspect, the presence of the transcendent comes through the experience of the law's authority rather than through the endless process of interpretation valorized by Cover. The spiritual attraction of the endless interpretative arguments is precisely that they continually throw the interlocutors against the claims of the law's authority, against that transcendent presence.

In his book *Law's Quandary*, Steven D. Smith argues that lawyers are like ministers who have been ordained into a priesthood that serves a god in which they no longer believe.<sup>43</sup> Judges, advocates, and lawyers all make appeals to some authoritative abstraction—"the law"—that seems to have a number of surprising characteristics. It is something that exists. It is something about which one might be mistaken. It speaks with an authorial voice that purports to be coherent. Legal actors, despite a century of shaming by legal intellectuals,<sup>44</sup> cannot seem to help themselves in believing or at least experiencing these things. They talk as though the law were real, despite the nagging fear that it is just words, meaningless verbiage

41. See generally M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973) (arguing that there is no prima facie obligation to obey the law); Leslie Green, *Law and Obligations*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514 (Jules Coleman & Scott Shapiro eds., 2002) (summarizing subsequent philosophical debates reaching a similar conclusion); Matthew H. Kramer, *Legal and Moral Obligation*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 179 (Martin P. Golding & William A. Edmundson eds., 2005) (same).

42. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 363–66 (1980) (discussing the meaning of the maxim *lex iniusta non est lex*).

43. See STEVEN D. SMITH, LAW'S QUANDARY (2004). The metaphor is mine but is not, I think, an unfair summary of Smith's insight.

44. Beginning with Oliver Wendell Holmes, Jr. See Holmes, *supra* note 40. For an updated version of Holmes' finger wagging, see RICHARD POSNER, OVERCOMING LAW (1996).

famously dismissed by Felix Cohen as “transcendental nonsense.”<sup>45</sup> Smith then spends the book canvassing the places where this anxiety manifests itself and the difficulty of doing law in such a way as not to irritate it. His final conclusion is both optimistic and pessimistic. It is optimistic because Smith believes that law’s quandary “need not be debilitating.”<sup>46</sup> Law and life can continue to function pretty well without laying to rest the ontological status of law. It is pessimistic because Smith doesn’t think that the disjunction between what we do with law and what we say about law can be bridged given our current menu of ontological options. His conclusion is thus aporetic: “[W]e would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.”<sup>47</sup>

It’s not hard to see the question of god lurking behind Smith’s invocation of “richer realities and greater powers.”<sup>48</sup> His intervention was unwelcome in surprisingly disparate corners of the legal world. For example, Brian Leiter has criticized the idea that religion is entitled to any special toleration and argued for a fully naturalized jurisprudence.<sup>49</sup> Unsurprisingly, he took an intense dislike to Smith’s argument. Vying for the position of Darwin’s legal bulldog, Leiter labeled a short essay where Smith summarized his position as “The Worst Jurisprudential Article of the Year.”<sup>50</sup> He wrote, “Smith’s view . . . depend[s] on misrepresentations of legal philosophy and . . . religious dogmatism.”<sup>51</sup> Where Leiter saw “dogmatism,” however, the late Justice Antonin Scalia saw academic pusillanimity. He wrote:

As one reaches the end of the book . . . he (she?) is sorely tempted to leap up and cry out, “Say it, man! Say it! Say the G-word! G-G-G-God!” Surely even academics can accept, as a hypothetical author, a *hypothetical* God! Textualists, being content with a “modest” judicial role, do not have to call in the Almighty

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45. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); see also SMITH, *supra* note 43, at 5–8 (cataloging legal commentators expressing the belief that legal discourse is largely vacuous).

46. SMITH, *supra* note 43, at 178.

47. *Id.* at 179.

48. *Id.*

49. See BRIAN LEITER, *AMERICAN LEGAL REALISM AND NATURALIZED JURISPRUDENCE* (2004) (arguing that legal philosophy should be placed on a naturalistic foundation); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013) (arguing that religion as an irrational form of belief is entitled to no special protection qua religion).

50. See Brian Leiter, *The Worst Jurisprudential Article of the Year?*, BRIAN LEITER’S LEGAL PHIL. BLOG (Sept. 27, 2007), <https://leiterlegalphilosophy.typepad.com/leiter/2007/09/the-worst-purpo.html> [<https://perma.cc/RZR6-NNAZ>]. The essay in question was Steven Douglas Smith, *Jurisprudence: Beyond Extinction?* (Aug. 2007), <https://papers.ssrn.com/abstract=1009249> [<https://perma.cc/UL3T-YDVA>]. Darwin’s original bulldog was Thomas Henry Huxley, who famously championed the theory of evolution against all comers but particularly against Darwin’s religious critics.

51. LEITER, *supra* note 49.

to eliminate their philosophical confusion. But Smith may be right that a more ambitious judicial approach demands what might be called a *deus ex hypothesi*.<sup>52</sup>

The testiness of these reactions points toward something more than academic disagreement. Whatever the merits of the arguments that Smith advances, in suggesting a link between faith in law and faith in some more transcendent reality, he seems to have touched a nerve.

Writing more than a century ago, Max Weber famously argued that one of the dominant historical trends in Western societies has been the gradual “disenchantment” of the world.<sup>53</sup> What he meant by this was the process through which all aspects of life—the experience of the natural world, human relations, government, law, and even religion—become stripped of any inherent transcendent or magical meaning. He predicted the triumph of the “iron cage of modernity,” an end of history in which life would become wholly rationalized, routinized, and bureaucratized, except perhaps a few marginal pockets of private space.<sup>54</sup> While some may have hoped for such an outcome, Weber’s predictions have failed to be fully vindicated.<sup>55</sup> Rather, sociologists have noted the ways in which the hankering for the transcendent won’t die and various aspects of life become “re-enchanted.”<sup>56</sup> In the legal context, Yishai Blank has argued that various post-functional strands of legal theory can be seen as an effort to re-enchant the law in the face of the process Weber identified.<sup>57</sup> Ernest

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52. Antonin Scalia, *Review of Steven D. Smith’s Law’s Quandary*, 55 CATH. U. L. REV. 687, 694 (2006).

53. See MAX WEBER, THE VOCATION LECTURES 13 (David Owen ed., Rodney Livingstone trans., 2004).

54. See MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 123 (Talcott Parsons trans., Routledge 2005) (1930) (describing modernity as an “iron cage”).

55. Brian Leiter, for example, seems to be a happy denizen of the iron cage, provided that it is thoroughly secularized. In castigating Smith’s expression of some sense of loss in the onward march of formal rationalization, he wrote:

[I]t is really weird at the dawn of the 21st century, several hundred years after the scientific Enlightenment, to find a professional scholar seriously suggesting that it constitutes a “drastic narrowing” of argument to not take seriously dogmatic invocations of the deity in intellectual inquiry . . . . Of course, we know what intellectual discourse looked like when dogmatic invocations of the deity were thought to constitute an argument. And there is a reason those cultures and eras were not ones notable for their great number of intellectual insights and advances.

LEITER, *supra* note 49. While there is more in heaven, hell, and the modern legal academy than is dreamed of in Leiter’s philosophy, his stance is hardly uncommon.

56. See generally Richard Jenkins, *Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium*, 1 MAX WEBER STUD. 11 (2000) (arguing that the process of re-enchantment is a pervasive impulse in modern life).

57. See generally Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633 (2011) (arguing that various kinds of legal discourse are an effort to reenchant the law).

Weinrib, for example, in defending the imminent rationality of private law, compared it to love:

Explaining love in terms of extrinsic ends is necessarily a mistake, because love does not shine in our lives with the borrowed light of an extrinsic end. Love is its own end. My contention is that, in this respect, private law is just like love.<sup>58</sup>

As Blank observes, “To turn law into love is indeed to reenchant it, to reinscribe the magical, the mystical, and the prophetic into a domain that has become rationalized, bureaucratized, and instrumentalized to its core.”<sup>59</sup>

Opining on the ultimate prospects or desirability of a full-blown reenchantment of the law is beyond the scope of this essay. However, hankering after transcendence in the law raises an interesting question: Why here? What is it about law that makes it a potent site of the reenchanting impulse? The answer lies in the spiritual phenomenology of law, something to which halakhah with its link to the Temple points. The Temple provided a point of contact between heaven and earth, the place where God might dwell among us. In that sense, it was something that came from beyond our world, from outside of it, from heaven. Yet, ironically perhaps, it is this alien invasion that makes our world comprehensible. Before the interruption of God from the outside our “earth was without form and void and darkness was upon the face of the deep.”<sup>60</sup> In Eliade’s words:

[W]e could say that the experience of sacred space makes possible the “founding of the world”: where the sacred manifests itself in space, the real unveils itself, the world comes into existence. But the interruption of the sacred does not only project a fixed point into the formless fluidity of profane space, a center into chaos; it also effects a break in plane, that is, it opens communication between the cosmic planes (between earth and heaven) and makes possible ontological passage from one mode of being to another. It is a break in the heterogeneity of profane space that creates the center through which communication with the transmundane is established, that, consequently, founds the world, for the center renders orientation possible.<sup>61</sup>

Law provides a kind of sacred space for secular societies. It guides and controls actions. It coerces. It may be justified or not justified. But it does more than this. It maintains the constant experience of something

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58. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (1995). I confess that I fantasize about having this last sentence printed on a t-shirt and wearing it to academic symposia on torts or contracts.

59. Blank, *supra* note 57, at 649.

60. *Genesis* 1:1.

61. ELIADE, *supra* note 21, at 63.

pressing in on us from beyond, a claim to authority that displaces our individual judgments. It creates order, a *nomos* in Cover's terms, but not because it opens up a place for our constant self-creation (although it may do this). Rather in claiming authority it points us back to the experience of transcendence, which seems to be a hunger that cannot be satiated even when we vociferously insist that our laws are not Torah and do not come from God.