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REVIEW OF CHAIM SAIMAN'S *THE RABBINIC IDEA OF LAW*

SUZANNE LAST STONE\*

FOR all too brief a time, American legal scholars celebrated law as an integral part of culture: a principal way in which humans fashion a world of meaning. Borrowing from cultural anthropologists such as Clifford Geertz and phenomenologists such as Ernst Cassirer, scholars focused their attention on how we express our values and communal aspirations through law, and how law fashions and organizes the basic categories, such as time and space, through which we experience human existence. Even as rule-focused, positivist orientations toward law, which emphasized law as social control, were increasingly dominating the American legal landscape, these scholars fought to retrieve an older view of law in which law is an inextricable combination of transcendent truth, tradition, and mission.

Robert Cover's breathtaking 1983 article, *Nomos and Narrative*, which runs as a leitmotif through Chaim Saiman's extraordinarily erudite and elegant book, *Halakhah: The Idea of Rabbinic Law*,<sup>1</sup> was emblematic of this turn.<sup>2</sup> Cover juxtaposed two models of law: law as *paidea* versus law as imperial; he was at his most poetic in describing the former. In the paideic model, law is expressive, personal, and centered on communal aspirations. Legal interpretation is not about technique or even authority; it is about the striving of communities toward perfecting themselves and their world. In one of Cover's most enduring images, law is "the faithful other," a body of norms the community develops and then comes to see as a demanding object urging its adherents and especially its interpreters to realize the values embedded in its law as it marches into the future. In *Law as Culture*, Lawrence Rosen pursued similar themes in a delightfully chatty (though far less poetic) style, inviting his readers to consider law's role in creating a sense of an orderly universe, which Rosen termed "law as cosmology."<sup>3</sup>

This turn to law-as-culture sparked the "Jewish moment" in the American legal academy. For one thing, law-as-culture rejected the Christian

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

2. ROBERT M. COVER, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1982).

3. LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* (2006).

split of law and spirit into two different domains. For another, the law-as-culture literature often drew on religious metaphors and ideas as a means to retrieve the more transcendent aspects of law that the rise of a modern, bureaucratic state had buried. More to the point, Cover, Rosen, and others—though none particularly expert in rabbinic law—cited halakhah as their prime example of “law as *paidea*” or “law as cosmology.” The Bible explicitly, and the Talmud implicitly, provided the building blocks of Cover’s paideic conception of law.<sup>4</sup> The Mishnah was Rosen’s example of law as cosmology. The Mishnah “starts from the supposition that it is the human power to create categories that fulfills God’s intended purpose.”<sup>5</sup> In such a culture, Rosen argued, legal reasoning operates by posing examples, assimilating facts to settled categories, because discerning the proper categories into which each example falls enacts the divine purpose of the law: to maintain a world in which things are true to their kind.

Chaim Saiman’s *Halakhah: The Rabbinic Idea of Law*, is the next chapter in this story: the book is a deep and close investigation into the idea of rabbinic law-as-culture written by a master of the field of rabbinics, who combines Cover’s attention to the transcendent aspects of law with Rosen’s attention to styles of legal reasoning. As with Cover’s *Nomos and Narrative*, Saiman explores the paideic as well as imperial aspects of halakhah—i.e., the way rabbinic law is both expressive, a means of spiritual and moral education, and a means of governance and maintaining social order. Part I of the book consists of extraordinarily well-chosen Talmudic *sugyot* illuminating, in turn, law as regulation, education, theology, and moral discourse. Saiman is clearly a master teacher, and he walks his readers through these examples with wit, grace, and analytic acuity. As with Rosen’s *Law as Culture*, Saiman invites us to consider not only how the Talmud both educates and imposes order, but also its specific style of legal reasoning. In the intellectual activity called law, the closest analogue to the Talmudic style is that of the Anglo-American common law tradition. The most noteworthy feature of the common law as an intellectual tradition is its resistance to systematization, its focus on the case at hand, and its hostility to comprehensive, analytical statements of substantive rules and their presuppositions. The halakhic mind, like the “common law mind” of the Anglo-American judge, also is distinctive in its attention to particulars and its preference for inductive and exemplary reasoning over deductive reasoning, on the one hand, and systematic abstractions, on the other.

But Saiman does far more than invite the novice into the world of rabbinic law-as-culture. Saiman also considerably raises the stakes for academics in the field by asking uncomfortable questions that we academics tend to set aside as too obvious to be deserving of extended consideration. In one of the best chapters of the book, “Thinking Legally,”<sup>6</sup> Saiman asks

4. See Suzanne Last Stone, *In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

5. ROSEN, *supra* note 3, at 176.

6. SAIMAN, *supra* note 1, at 124–40.

what precisely does it mean when the sorts of questions we are used to labeling moral, theological, ethical, political, and the like, are all subsumed under one project—the halakhah—and approached through the distinctive lens of Talmudic legal reasoning? In short, as Saiman puts it, what do we make of the fact that law is almost the entirety of the culture and “does the work other societies assign to art, literature, writing history, as well as theology and ethics?”<sup>7</sup>

Well, what do we make of it? We could simply concede that this near-exclusive focus on law and legal reasoning as a means to create meaning is impoverished. In one form or another, this has been a standard approach without—and even within—rabbinic circles, evidenced by attempts to strip the halakhah down into a set of rules and locate meaning, instead, in the explanatory systems that accompanied the halakhah, such as medieval philosophy, and Kabbalah, and the Jewish Enlightenment critique of the Talmud that echoed the Christian critique. An alternative approach is to try to more deeply understand how well the Talmud works as an art form and as theology. This is the phenomenological approach with which Saiman allies himself, and it bears considerable fruit. As Saiman points out, Talmudic discourse is a self-perpetuating mode of cultural discourse. Its genesis may remain shrouded in academic controversy, but, once launched, it engendered enormous commitment and has proved impossible to entirely dislodge. Accordingly, our task is to more fully understand how the Talmud was and still is experienced as both spiritually and aesthetically satisfying. Moreover, once we accept rabbinic commitment to maintaining this form of discourse, we also can ask what challenges this preferred style of legal discourse poses to the maintenance of an ongoing legal system. How precisely do religious meaning and attention to legal detail conjoin and also war with one another?

The chapter “Thinking Legally” is a thoughtful exploration of both the benefits and perils of combining religious meaning with the demands of law. On the one hand, Saiman draws our attention to how elaborating the details of the law actually enhances the law’s expressive quality. If we focus on the way part and whole are related, we can appreciate how precise performance of legal details becomes “a ritualistic affirmation of the larger conception of justice which the norms reflect.”<sup>8</sup> On the other hand, as Saiman points out, the agadic elaboration of values and larger themes that provide deeper meaning for the legal details creates dilemmas for post-Talmudic jurists seeking to carve out rules of practice from the Talmud. The agadic discussion is not only fluid and open-ended, it often evinces a commitment to explore two opposing concepts, such as justice and mercy, without ordering between them. How does one maintain this characteristically rabbinic stance about larger themes and also “create a rule when the ideas and the rule are intertwined?” Similarly, the line be-

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7. *Id.* at 27.

8. *Id.* at 102.

tween the supererogatory and the obligatory becomes increasingly blurred when ethics and moral philosophy are entwined within a legal discussion.

It should be clear by now that, although the book is entitled *Halakhah: The Rabbinic Idea of Law*, it is the Talmud and its distinctive discourse that Saiman singles out as the paradigm of the “rabbinic” idea of law. The genres characteristic of later rabbinic intellectual legal activity, especially the Codes, do not share the Talmud’s abhorrence of systematization of legal rules and generally avoid the agadic reflection that accompanied the Talmudic legal discussion. The Codes, in differing degrees, are more concerned with centralizing practice. They seem to veer, to borrow Cover’s terminology, toward the “imperial” model of law as an intellectual activity concerned with rules of governance. What then becomes of the Talmudic project of law as *paideia*, of law as a form of divine worship full of religious meaning? Saiman argues that Talmudic discourse is never fully overcome and that even the most dry and detailed occasionally “drift from governing regulations toward a body of knowledge to be studied.”<sup>9</sup> Thus, the legal culture continues to be shaped by the Talmudic idea of law. Interestingly, we can see the same process at work in the American legal setting. From the perspective of genre, the Constitution is a text that superficially resembles a code. But in a legal culture that grew out of and is still educated in an older common law tradition, the Constitution is just as often read as a set of principles or body of knowledge and not as a body of regulations. Indeed, the argument over how to read the Constitution continues to divide the judiciary and prompted Cover’s appeal to retrieve the *paideic* understanding of American constitutional law.

While I fully agree with Saiman that the Talmudic idea of *halakhah* as a body of knowledge is maintained in later *halakhic* endeavors, including the Codes, an interesting question remains whether there has been a change in the underlying religious sensibility from the Talmud through the Codes to the modern *halakhic* setting that also fundamentally altered the idea of *halakhah*. Saiman hints at such transformations when he notes the risks entailed by the lack of clear separation between moral and legal discourse in the Talmud. The “legal framing can push interpretation away from the Talmud’s literary, moral, and conceptual possibilities and towards specific and exacting regulation.”<sup>10</sup> That legal framing also may give rise to new forms of religiosity and new ideas of *halakhah* in which rules play a crucial part. It is worth fleshing this out.

We can distinguish, for the sake of example, between two religious and, with it, legal sensibilities, the one emphasizing the connection between the Torah’s commandments and human needs, values, and social organization and the other, focused almost exclusively on obedience to the divine will. Maimonides is a prime example of the first sensibility. The Torah’s commandments, Maimonides writes in the *Guide of the Perplexed*,

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9. *Id.* at 184.

10. *Id.* at 130.

aims at human political, spiritual, and intellectual perfection. Thus, Torah is concerned with shaping human character and social affairs. Yeshayahu Leibowitz's writings, in contrast, offer one contemporary example of the second religious sensibility. For Leibowitz, the Torah's laws are disconnected from human needs, values, and worldly affairs and are exclusively a form of service. We can see a similar distinction drawn even in debates about non-religious law. Is law primarily about will and following the commands of the sovereign or is law primarily about promoting human values?

Saiman allies himself with the first sensibility. He offers a deeply humanist reading of the Talmudic project, in which, as he writes, "human exploration and self-actualization"<sup>11</sup> is achieved through studying and doing the law. To be sure, Torah study in the Talmud is a form of divine service, as Saiman writes, and performance of the mitzvot serves God's will, but the Talmudic idea of halakhah, in Saiman's description, is far less about pinning down rules to obey and far more about educating people about values, shaping character and virtue, and addressing human needs. That religious sensibility and hence idea of halakhah was not necessarily carried over throughout the later halakhic world, however.

In a series of important studies, Yair Lorberbaum traces the increased interest with rules in the medieval period, accompanied with an insistence that the purpose of the halakhic rules is largely unknowable. As Lorberbaum details, the turn away from the Maimonidean project of ascribing reasons for the commandments gave rise to new conceptions of halakhah and new forms of religiosity. As halakhah came to be seen as increasingly mysterious and halakhic rules were divorced from reasons, a "halakhic religiosity of mystery and transcendence" or, in another version, "a halakhic religiosity of obedience and servitude" emerged.<sup>12</sup> In short, the legal framing of the Talmud eventually gave rise to new forms of religiosity and new conceptions of law—only hints of which are occasionally seen in the Talmud itself. And the Codes, rather than Talmudic discourse, would seem to be the more natural expression of these new forms of religiosity and new ideas of halakhah.

In the final chapter of the book, Saiman looks with a critical eye at attempts to introduce rabbinic law into the public legal sphere of the modern state of Israel. While I sympathize with his critique of the original *Mishpat Ivri* movement, which claimed it was possible to separate out the religious elements of halakhah from the purely legal elements and sought to strip the latter into doctrines easily taken up by modern secular codes and courts, I think he prematurely dismisses the role the Talmudic **idea** of law might in fact play in a modern Jewish state. As Saiman himself care-

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11. *Id.* at 140.

12. See Yair Lorberbaum, *Halakhic Religiosity of Mystery and Transcendence, Halakhic Religiosity of Obedience and Servitude, and Other Forms of Rejecting Reasons for the Commandments*, 32 DINE ISRAEL 69 (2018).

fully acknowledges, Talmudic discourse is an extreme version of law but not unique.<sup>13</sup> Cover may have used the rabbinic example to criticize and reconstruct modern state law, but Cover's predecessors and contemporaries write in much the same vein, calling for a revival of the Anglo-American common law spirit or the older Western idea of law that combined a search for transcendent truths and a sense of destiny and mission, with rules for dispute resolution. The fascinating debates in Israeli society today about the relevance of the Talmud as a cultural resource for the Israeli judiciary are not about incorporating the specific rules of halakhah but about recapturing a certain humanistic idea of law that takes the culturally specific form of the Talmudic discourse Saiman so beautifully describes.<sup>14</sup>

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13. SAIMAN, *supra* note 1, at 231.

14. See *The Talmud: Only for The Learned?*, 11 ZEHUYOT: J. JEWISH CULTURE & IDENTITY (2014).