FROM DOCTRINE TO DEVOTION: THE JEWISH COMPARATIVE LAW PROJECT


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It seems fair to say that Jewish law has ‘made it’ in the American legal academy. While in the 1980’s schools were reluctant to run, and scholars were reluctant to teach, Jewish law courses, the 1990’s ushered an era where dozens of law schools incorporated Jewish law courses into their catalogs— a number that, from a quick perusal of law school course catalogs, appears to be growing with each passing decade. As Jewish law has become an entrenched feature of American law school curricula and scholarship, approaches to teaching and writing about Jewish law have varied widely—both in terms of their substantive focus and in terms of their methodological frames.

And yet, even as the forms have proliferated, much of the energy surrounding Jewish legal teaching and scholarship is still driven by a fundamentally comparative impulse—what over 25 years ago Suzanne Last Stone described as Jewish law’s “contrast case” function—the way in which Jewish law provided an alternative to the doctrine and function of the American legal tradition. This comparative impulse driving Jewish law scholarship has often had a normative valence, encouraging the American legal tradition towards reforms that tracked insights captured in the ancient rules of Jewish legal doctrine. Thus, leveraging comparative methodology to

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the study of Jewish law held open the promise of identifying legal alternatives to addressing functionally equivalent challenges shared in common across legal systems.5

However, lurking in the Jewish law comparative project—as it does in other comparative projects—was a flattening impulse; in the attempt to fashion Jewish law into useful comparator, especially when the comparison had normative aspirations, courts and scholars often shaved some of the edges off Jewish law and doctrine. And it is therefore not surprising that a new wave of Jewish law scholarship aims to inject a new degree of authenticity into the analysis of Jewish law. Indeed, both Samuel Levine’s new two-volume collection Jewish Law and American Law: A Comparative Law as well as Chaim Saiman’s new work Halakha: The Rabbinic Idea of Law both seek to present a more authentic and accurate depiction of Jewish law.

Yet, even in their shared search for a more authentic comparator, the fundamentally distinct and disparate approaches of Levine and Saiman resurrect the long-standing fundamental debate about the role of Jewish law within the comparative project.6 At bottom, is Jewish law a legal system, with regulatory aspirations, that provides alternatives to functionally parallel challenges encountered by state law? Or, is Jewish law, at its core, a legal system that is more religion than law, aspiring primarily not to regulate, but—in the ethereal phrase of Robert Cover—to “invite new worlds”?7 Put more succinctly, when comparing Jewish and American law, to what extent should we think of Jewish law as law?8

I. LEVINE: JEWISH LAW AS LAW

Levine’s recently published two-volume work, Jewish Law and American Law: A Comparative Study, is primarily a collection of his impressive

5 I here do not take sides in methodological debates over the primary purpose of comparative law, whether it be functional, normative, or otherwise. For an excellent analytical assessment, and critique, of the functional approach to comparative law, see Ralf Michaels, The Functional Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (2006).

6 See, e.g., Stone supra note 4, at 893-94 (“[I]n the final analysis, Jewish law is not only a legal system; it is the life work of a religious community.”); see also Amihai Radzyner, Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field, 23 J. L. & RELIGION 189 (2007).


8 The extent to which the state should view religious law as law is an analogous, but ultimately different question, which I have explored elsewhere. Michael A. Helfand, Between Law and Religion: Procedural Challenges to Religious Arbitration Awards, 90 CHI.-KENT L. REV. 141 (2015).
contributions to the Jewish comparative project over the past three decades. A quick perusal of the two volumes serves as a ready reminder of why Levine has long been one of the academics central to Jewish law’s rise in the American legal academy. Covering his wide-range of Jewish law writings, the two volumes traverse significant legal terrain, focusing on the areas of Levine’s primary scholarly emphasis. Thus, the first section of volume one begins with chapters addressing overarching themes within the Jewish and American comparative law project, focusing both on the teaching of Jewish law in the American academy as well as some methodological comparisons between the Jewish and American legal systems. Volume one then turns to comparative questions in numerous substantive areas of American law which are particularly ripe for comparative inquiry: capital punishment, self-incrimination, constitutional theory and legal ethics.

Volume two takes on broader themes in Jewish law and Jewish legal theory, exploring their relevance and impact within a range of American law debates and discussions. Thus, Levine considers the role of Jewish law within broader conversations of law and narrative, most notably through interpretation of Robert Cover’s categories of analysis in his seminal work *Nomos and Narrative*. Levine then moves on to exploring the impact of Jewish law and Jewish lawyers and then shifting to important themes of legal history and broad questions of public policy. Together, the two volumes engage the overall comparative project both with respect to substantive areas of American law as well more direct engagement with internal questions of Jewish law, including methodologies surrounding interpretation, legislation and narrative with the Jewish legal tradition.

Taking a step back, although the two volumes are a collection of essays without direct conceptual links, a number of themes recur throughout this broad collection. The first is Levine’s multiple contributions to translating the rudimentary elements of the Jewish legal system for American lawyers. This is no trivial feat as Levine regularly takes on broad and central topics to the Jewish legal system, translating them in the terminology of the American legal system and thereby making them comprehensible to the American legal academy. Maybe some of the best examples of this element of his work are the two chapters providing introductions to interpretation and legislation in Jewish law, which cover wide swaths of legal terrain and provide an extremely helpful overview that has great utility both to American legal academics as well as students of Jewish law in American law schools.

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Second is Levine’s conceptual methodology in deploying Jewish law and legal theory in debates over American law and policy. In this methodological frame, Levine explores conceptual alternatives within the Jewish legal tradition to functional problems that persist across both the American and Jewish legal systems. He then assesses the extent to which those conceptual doctrinal alternatives within Jewish law might improve how the American legal system addresses those challenges and thereby lead to new paths of legal reform. For example, in Chapter 24, Levine explores conceptual paradigms within the Jewish biblical tradition for how religion ought to impact the public square with the hope of leveraging those paradigms in those same debates within the American political tradition. Similarly, in Chapter 8, he uses modes of reasoning within Jewish law to respond to scholarly criticism of the Supreme Court’s *Miranda* decision, providing conceptual support for the Court’s use of both judicial as well as quasi-legislative methods of constitutional analysis. And, in Chapter 13, he uses the conceptual categories of Jewish law and ethics to articulate an improved view of lawyering ethics that, in his view, “can help inform understanding of—and possibly help improve attitudes toward—the work of American lawyers.”

In each of these examples, Levine uses comparative methodology to present conceptual alternatives from the Jewish legal tradition—even as the precise doctrines might vary in terms of their substantive orientation—so as to provide what he takes to be improved solutions to concrete societal problems within the American legal order.

Third, and finally, Levine’s work is typified by an attempt to provide a more authentic—and accurate view—of the content of Jewish law, especially where it provides a better view as to the conceptual alternatives within the Jewish legal tradition. Maybe the best example is Levine’s analysis of the Supreme Court’s invocation of Jewish law in the self-incrimination context. As Levine highlights, the Supreme Court, in *Miranda v. Arizona*, cited Jewish law to demonstrate that the “roots” of the “privilege against self-incrimination . . . go back to ancient times.” Yet, as Levine notes, Jewish law—in contrast to the rule against coerced confessions adopted in *Miranda*—has a far more expansive exclusionary rule that adopts “an absolute ban on the admissibility of a criminal defendant’s self-incriminating statements.” Accordingly, in criticizing the Court’s elision of the two rules, Levine attempts to recover the conceptual, theological and legal features of Jewish law’s exclusionary rule from the *Miranda* decision which, in his words, relies on Jewish law in a manner that is “substantively, conceptually,

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10 Volume I, at 244.
and historically and misplaced.”\textsuperscript{13} Levine pursues this corrective in a subsequent chapter as well, exploring the psychological and philosophical origins of Jewish law’s exclusionary rule in order to present a more accurate view of its relevance for the American legal system.\textsuperscript{14}

In this way, Levine’s translation project captures his most basic assumption about Jewish law—that it is, at bottom, law. And as a legal system, capable of translation to other legal systems, Levine articulates a vision for Jewish law as primarily concerned with regulation. It is precisely for this reason that Jewish law’s attempts to address functionally equivalent challenges encountered by other legal systems is, in Levine’s view, normatively useful. Jewish law, ultimately, is a legal system that aspires to regulate in the same manner as state law. And if the American legal tradition expanded its horizons and considered conceptual alternatives from the Jewish legal tradition, the resulting doctrine might improve in its ability to resoled shared functional challenges.

III. SAIMAN: JEWISH LAW AS HALAKHA

Saiman’s project, like Levine’s, is, at its core, a translation project—and a groundbreaking one at that. His hope is to convey to a broad audience the experience of participating in the Jewish legal tradition from the inside. But this drive to capture the essence of Jewish law from the internal point of view leads Saiman to highlight not Jewish legal doctrine, but what he often describes as the devotional aspect of Jewish law\textsuperscript{15}—the ways in which Jewish law provides the faith’s adherents with a way of “thinking, being, knowing.”\textsuperscript{16} Accordingly, Jewish law, in Saiman’s view, is not primarily focused on how its rules regulate conduct, but on how its lessons are studied.

For this reason, Saiman avoids using the term ‘Jewish law’; to do would undermine one of the central elements of his translation project.\textsuperscript{17} Jewish law, as a term, orients inquiry towards law as regulation. By contrast, Saiman focuses on the traditional term halakhab—literally translated as the path—which he intends to capture both the admixture of the regulatory and devotional impulses of Jewish law as well as the wide-ranging substantive disciplines subsumed within Jewish legal texts—everything from “philosophy, political theory, and ethics” to “art, drama and literature” and

\textsuperscript{13} Id.
\textsuperscript{14} Vol. 1, at 133-145.
\textsuperscript{15} HALAKHAB, at 145.
\textsuperscript{16} Id. at 8.
\textsuperscript{17} Id. at 7 (“It should be clear now why the term ‘Jewish law’ fails to do justice to halakhab”).
everything in between. 18 And it is the study of halakhah, broadly construed, that captures how the enterprise of Jewish law translates legal language into an experience that provides its students with a mode of thinking about the human condition, writ large.19

Saiman proceeds to translate this mode of law and legal study to those outside the system in three parts. The first part of his book presents the manner in which Jewish law as halakhah operates in modes contrary to the standard law-as-regulation paradigm. To do so, Saiman highlights various categories of Talmudic discussion and analysis that, as a basic assumption, occur at times and in contexts where legal regulation was understood as impossible. This phenomenon, which Saiman explores most extensively in Chapters 2 and 3, provides the most direct demonstration for how Jewish law cannot be fully expressed in terms of the primary regulatory impulse animating state law. Accordingly, “the different types of halakhah exist along a continuum” that runs from the “non-applied pole” on one end and the “applied pole” on the other.20

In Part II of the book, Saiman builds on this framework by providing examples of how halakhah does, at times, play roles beyond mere regulation—such as theological exploration (chapter 5); inculcation of pedagogical lessons (chapter 6); and philosophical investigation through the weaving together of legal and narrative text (chapter 7). Chapter 8 then serves as an important capstone on Part II. Addressing some of the underlying questions that emerge from his argument—that halakhah, particularly in the legal texts of the Talmud, is also operating in parallel modalities of theology, education and philosophy—Saiman asks why law serves as the medium for Judaism to engage in such non-legal inquiries. Providing an answer to this question is, of course, vital to Saiman’s project; if the Jewish tradition seeks to explore such wide-ranging topics as politics, science, philosophy and economics, then why not do so directly and avoid some of the reductive and legalizing features of the Talmud’s law-based mode of debate.21 Saiman answers by asking the reader to consider the legal mode of writing and reasoning as a form of literature that leverages the experience of legal obligation with the Jewish tradition to draw readers into broader discussions of philosophy and theology. In Saiman’s words, “Effective literature conveys its ideas by creating an emotional connection with the audience through compelling plots, characters and descriptions. The

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18 Id. at 8.
19 Id. at 1-8.
20 Id. at 55.
21 See id. at 130-137.
Talmud benefits from yet another connection; the reader is assumed bound by its laws.\textsuperscript{22}

Of course, this raises predicate questions as to \textit{how} legal obligation became so foundational to the Jewish experience, and thereby a worthy tool for non-legal discussion; it seems somewhat circular to explain the use of legal texts for non-legal inquiry by arguing that readers’ primary experience is through the medium of law—is that experience the \textit{reason for} or is it the \textit{result of} the primacy of legal texts in the Jewish tradition? Ultimately, disentangling this circularity requires a historical inquiry beyond the scope of Saiman’s project, which—like Levine’s project—is fundamentally conceptual, seeking to unpack the nature of halakhah and its modes of operation—not its historical origins or evolution.\textsuperscript{23}

In Part III, Saiman continues this conceptual approach, by exploring the three primary categories of Jewish legal texts in the post-Talmud age: commentaries that provide glosses on the text of the Talmud (chapter 9); codes that serve as restatements of Jewish law (chapter 10); and responsa literature where authors provide answers to concrete questions of Jewish law (chapter 11). In so doing, Saiman highlights how, notwithstanding developments that might auger the dominance of more functional—and thereby regulatory—approaches to halakhah, the devotional view of halakhah—one that sees the study of Jewish law as having theological primacy over the application of Jewish law—ultimately became ascendant, even infiltrating some of the very texts that the reader might have assumed would fit more naturally in a functionalist mode. This leads Saiman to explore the convergence of the conceptual and devotional in the transformational \textit{Brisker} methodology, named for the town in Belarus where the methodology in large part originated.

The book closes by considering the conceptual possibility that halakhah \textit{could} serve as the law of a functioning nation-state. Not surprisingly, Saiman is deeply skeptical, for a number of reasons, that halakhah could do so. Among those reasons is his concern that halakhah too often fails to categorize conduct into the neat legal/illegal or guilty/not guilty dichotomies necessary to regulate. Instead, Saiman argues, too much of halakhah provides less concrete guidance—differentiating between shades of approval that incorporate both hard legal rules that capture the law’s demands as well as soft norms intended to provide an aspirational target beyond the strict dictates of the rule. This combination of ever-modulated categories of intertwined

\textsuperscript{22} Id. at 140.
\textsuperscript{23} Id. at 10-14.
ethical and legal expectations—categories that chafe at the simplistic dichotomies typical of legal regulation—may work well for pedagogy, but fit poorly within a regulatory scheme.

Somewhat paradoxically, Saiman also worries—even as halakhah has myriad categories of approval in assessing conduct—that it lacks sufficient legal content to truly play a regulatory role. Halakhah, according to Saiman, is reactive, providing rules for how to respond to various situations, but failing to provide sufficient pro-active rules to allocate resources or organize infrastructure. Indeed, Saiman points to the various points in history where Jewish communal leaders and halakhic authorities invoked extra-legal powers to govern; this, argues Saiman, demonstrates the need to employ gap-fillers, so to speak, in order to provide Jewish law with the content necessary to regulate—content it does not have in and of itself.

In these pages, Saiman does at times appear to press a bit hard on the uniqueness of halakhah. True, he does note that he sees halakhah not as fundamentally distinct from other forms of law in these regards. Other forms of law, he concedes, play an expressive role in addition to purely formal and regulatory roles; moreover, many bodies of law require supplementation in order to respond to the growing challenges of governance and regulation. Still, Saiman’s claim that halakhah is extreme—even if not unique—in these regards may have less to do with identifying some conceptually distinct feature of Jewish law and more to do with halakhah’s having served as the law of a diaspora people without sovereignty for well over a millennium. Saiman does seem open to this possibility—describing his analysis as applying to “halakhah as it presently stands”24; indeed, even his exploration of whether halakhah could serve as the law of the modern state of Israel, Saiman’s ultimate conclusion appears to express his preference for a pluralistic state that uses Jewish law to provide a civic culture over the use of Jewish law to animate a theocracy.25 That preference—while certainly understandable—belies the possibility that Jewish law could morph in time into something far more regulatory in function within the state of Israel. And this possibility—that Jewish law could increasingly play a regulatory role—exists in liberal democracies outside the state of Israel as well where parties have the option to contract for religious forms of arbitration where decisional law incorporating Jewish law can be enforced as well to ultimately—with an assist from the state—regulate the conduct of the respective parties.26

24 Id. at 234.
25 Id. at 237-41.
26 I have explored these trends and themes at length. See, e.g., Michael A. Helfand, The
Ultimately, Saiman’s significant contribution to the comparative study of Jewish law is his ability to provide an authentic window into the devotional role of halakhah. Thus, Jewish law—maybe in its primary mode—is not a regulatory system to be applied, but a studied system of halakhah that provides its adherents with a mode of reasoning about legal and non-legal topics alike. This vision of a devotional law highlights an alternative way in which law can, to again use Stone’s phrasing, serve as a contrast case—not in terms of providing state law with conceptual doctrinal alternatives to functionally equivalent challenges, but by demonstrating that law can serve a wholly different conceptual purpose. It is by translating this Jewish-law-as-halakhah project that Saiman’s work stands out as truly groundbreaking.

IV. CONCLUSION

For those interested in both Jewish law in particular, and religious law in general, the works of Levine and Saiman serve as extraordinary explorations within the Jewish comparative law project. Notwithstanding their divergent orientations, they share a number of similarities: they both adopt conceptual, as opposed to historical, approaches to Jewish law in order to unpack how Jewish law can be deployed as the contrast case; they provide a corrective to some of the depictions of Jewish law by judges and scholars, giving the reader an authentic glimpse into the Jewish legal tradition; and they translate the content and experience of Jewish law in a manner that makes Jewish law accessible to those engaged in the overall comparative project. But maybe even more importantly than these features, the coincidence of these published works so close in time to one another provides readers with an opportunity to assess, side by side, the two divergent, but complimentary, visions of the Jewish law project—Jewish law as law and Jewish law as halakhah. It is worth noting that it is unlikely that Levine and Saiman would take issue with the framing of each other’s projects; in their caveats and asides, each recognizes that Jewish law is an admixture of both regulatory and expressive aspirations—both doctrine and devotion. And yet in their chosen modes of reasoning and emphasis, the two together provide a complete vision for the future of Jewish law within the American legal academy.