

## **Introduction to Jewish Law: The Rabbinic Idea of Law**

Prof. Chaim Saiman  
Spring 2017  
Harvard Law School  
Three credit course  
Tues. & Wed 3.20-4.50

### **Course Aims & Description:**

In Judaism, law is ever present. In fact, one of the central features of the tradition is the degree to which questions that other cultures treat as philosophy, ethics, politics, and theology take on a distinctly legal form. In Judaism, “law” or *halakhah* (roughly Jewish law), is thus a far broader concept than “things that happen in court” or “rules imposed by the state.” While *halakha* no doubt legislates the rules and practices incumbent upon Jews, it is simultaneously the primary vehicle through which Rabbinic thinkers have expressed their thoughts on life, love, God, justice, community—basically all of life’s greatest questions.

The goal of this course is to explore the “idea of halakhah,” by showing how the rabbis used regulatory concepts to do the work other societies assign to a host of other disciplines. Thus, while halakhah’s regulatory ideals are realized through observance of its laws, its broader social aims are accessed through its study, or *talmud Torah*. Torah study becomes about more than mastering the rules of law, because by intellectually engaging with Torah, a Jew comes to know God and the world he created.

Given the irreducibly legal nature of halakhah, however, several questions emerge: What happens to law when it is also a foundation for social and theological thought? What does it mean for speculative thinking to be carried out in legal categories? How are legal texts transformed when recited as prayers or read for religious inspiration? And conversely how are aspirational and aphoristic teachings transformed when encoded into law? What happens when a legal system that may be more interested in education than adjudication, or when the study of law takes precedence over its practice? What does it mean for the study of law to connect Man to God? And how does this law-centric discourse fill its broader religious and social roles? And finally, does this form of law have any place in the context of a modern state? This course is devoted to thinking through these questions.

**Course Readings:**

The readings for each session are comprised of primary sources collected and translated by the professor and paired with secondary sources that will be posted online. Students should expect the primary sources to serve as the main locus of class discussion, while the secondary material will provide historical, jurisprudential or philosophical background that will enrich and enhance the analysis of the primary texts. All texts will be in translation and no knowledge of Hebrew or prior study of Jewish law is required.

**Evaluation Requirements:**

The final grade in this course will be based on the following:

- (1) Class participation (25%)
- (2) Weekly response questions (25%)
- (3) Response papers (50%)

**Class Preparation, Presentations and Participation:**

Your evaluation in this course will largely be based upon your engagement with the primary and secondary reading assignments. As part of your engagement with the readings, each student is expected to:

- Attend class fully prepared to discuss the assigned material. Please read the assigned reading before class and be prepared to discuss the reading in class. If we do not complete an assignment in one class period, we will finish it at the beginning of the next class period.
- Submit thought questions for the materials for at least one class each week. These questions should reflect a thoughtful reading of the assignment material as well as provide a starting point for our in-class discussion
- Submit four 2,000-2,500 word response/reflection papers. This is your chance to react to the texts, materials and ideas discussed in class and expand the discussion in a new direction. Further details will be spelled out at the outset of the semester.

## TENTATIVE SYLLABUS\*

### Unit I: Introducing the Idea of Halakhah

General Background Material on Jewish Law (optional)

- Adin Steinsaltz, *THE ESSENTIAL TALMUD* (3-48)
- Menahem Elon, *Mishpat Ivri* from *ENCYCLOPEDIA JUDAICA*
- Elliot Dorff and Arthur Rosett, *A LIVING TREE* 7-15 (1988)

#### Session 1: Introduction

- Bavli Bava Metzia 86a
- Moshe Halbertal, *PEOPLE OF THE BOOK* (Introduction, pp. 1-10)
- Aryeh Klapper, *An Introduction to Halakhah*
- Optional: Chaim Saiman, *THE RABBINIC IDEA OF LAW*, Introduction

#### Session 2: How to study Jewish Law

- Bavli Sanhedrin 19b
- Bavli Menaḥot 29b
- F.W. Maitland, *Why the History of English Law is not Written*
- Ronald Dworkin, *LAW'S EMPIRE* (45-62; 76-86)

#### Session 3: Jewish & Christian Conceptions of Law

- Mishnah: Ma'aserot 3:9; Berakhot 4:1, 8:1; Kelim 25:6; Shabbat 7:2; 12:3-5; Mikvaot 2:1-3.
- Bavli: Nedarim 10b-11a; Eruvin 21b; Yoma 85a; Berakhot 24a-b; Bava Metzia 58b.
- New Testament: Matt. 5, 6, 12, 23; Mark 2; Luke 11; Galatians 3; 2 Corinth. 3
- Didache: §§ 7-8
- Shulḥan Arukh, O.Ḥ. § 328
- Igrot Moshe O.Ḥ. Vol 1 §128-130

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\* The syllabus represents the overall conceptual plan for the semester. It includes a number of readings that will be designated as optional. For the exact assignments for each session, as well as information to guide your preparation, please see Canvas. **In any case of conflict between what is listed below and what I post on Canvas, please follow Canvas.**

- Justin Martyr, *Dialogue with Trypho*, Chapters 14-23
- Goldwin Smith, *The Jewish Question*
- Optional: Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J. LAW AND RELIGION 97 (2007-08)

## Unit II: The Idea of Halakhah in the Talmud

### Session 4: Non-Applied law

- Beth Berkowitz, EXECUTION & INVENTION (6-19; 65-79) (2006)
- Mishnah: Sanhedrin Ch. 6, Makkot 1:10, Zavim 2:2, Sotah 9:4
- Tosefta: Sanhedrin 11:2, 14:1, Negaim 6:1
- Bavli Sotah 45a
- Yerushalmi Sotah 9:5
- Maimonides, Laws of Sanhedrin 12:2
- Optional: Chaim Saiman, THE RABBINIC IDEA OF LAW, Chapter 2

### Session 5: Governing in the Shadow of the Law-I

- Ralf Michaels, *What is Non-State Law? A Primer*, in NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGES OF GLOBAL AND LOCAL LEGAL PLURALISM 41-58.
- Mishnah: Berakhot 1:1, Sanhedrin 9:5
- Bavli: Sanhedrin 46a; 58b
- Responsa Sherira Gaon, *Sh'arei Tzedek* Vol. 4. 1:19
- Responsa Rashba 3:393; 4:311
- Optional: Chaim Saiman, THE RABBINIC IDEA OF LAW, Chapter 3

### Session 6: Governing in the Shadow of the Law-II

- *Derashot HaRan*, The King's Law, THE JEWISH POLITICAL TRADITION, Vol 1 pp. 156-165.
- Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law*, 9 JEWISH LAW ANNUAL 123-43 (1991).
- Menahem Lorberbaum, POLITICS AND THE LIMITS OF LAW (2001) pp. 124-149

### Session 7: The Study of Law as Religious Devotion

- Mishnah and Talmud Menaḥot 99b
- Rema Y.D. § 246:4

- James B. White, HERACLES BOW, 28-48 (1985)
- Aharon Lichtenstein, *Study in 20<sup>TH</sup> CENTURY JEWISH RELIGIOUS THOUGHT*, Cohen & Mendes-Flohr eds. (932-937)

*Optional Reading*

- Norman Lamm, THE RELIGIOUS THOUGHT OF HASIDISM (pp. 219-25: Intro and ¶ 1, 4,6, 7, 9, 11, 16, 19).
- Emmanuel Levinas, *Model of the West* in BEYOND THE VERSE: TALMUDIC READINGS AND LECTURES. (1994) at 13-33.

Session 8: Talmud Torah as a Mode of Regulation-I

- Mishnah Shabbat 6:4
- Bavli Shabbat 63a
- Mishnah Bava Metzia 7:1
- Robert Cover, *Nomos & Narrative*, 97 HARV. L. REV. 4-25 (1983).
- Optional: Chaim Saiman, THE RABBINIC IDEA OF LAW, Chapters 5-6

Sessions 9 & 10 Talmud Torah as a Mode of Regulation-II

- Bavli Kiddushin 30-32 (abstracted)
- Yechiel Biberfeld, THE LAWS OF HONORING AND REVERING PARENTS (1995).
- Cass Sunstein, *On the Expressive Function of Law* 144 U. PA. L. REV. 2021-2044 (1996).
- Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. OF LAW AND RELIGION 65-74 (1987)
- Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 California Western Law Review: No. 2, Article 5 (1990).
- Charlotte Goldberg, *The Normative Influence of the Fifth Commandment on Filial Responsibility*, 10 Marquette Elder's Advisor Iss. 2, Article 3(2009)

Optional

- Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 Elder L.J. 269 (2013).

Session 11: Halakhah and Aggadah/ Halakhah as Aggadah

- Mishnah Berakhot 1:1; 1:3
- Bavli Berakhot 2a-3b; & Tosafot to 2a

- Ra'avan Berakhot § 124
- SA & Rema O.H. §235
- H.N. Bialik, *Halakhah and Aggadah in REVELMENT AND CONCEALMENT* 45-87 (2000).
- Optional: Chaim Saiman, *THE RABBINIC IDEA OF LAW*, Chapter 7

#### Session 12: From Aggadah to Law

- Mishnah Sanhedrin 8:1; 8:5
- Bavli Sanhedrin 74b-75a
- MT, Foundations of the Torah 5:9
- Nimukei Yosef to Sanhedrin 75
- Shulkhan Arukh Y.D. §157
- Shakh to Y.D. §157
- Barry Wimpfheimer, *NARRATING THE LAW* 9-30 (2011)
- Optional: Chaim Saiman, *THE RABBINIC IDEA OF LAW*, Chapter 8

### **Unit III: The Idea of Halakah in the Post-Talmudic Era**

#### Sessions 13 & 14: Creating Law from the Talmud

- Maimonides' *Introduction to the Mishne Torah*
- MT: Shabbat 19:1; Kings 12:2; Hires 9:1-2; Murder 9:9;
- SA & Rema O.H. §235 and Y.D. §157
- Moshe Halbertal, *MAIMONIDES: LIFE AND THOUGHT* (Chapter 4: 164-94)
- Hanina ben Menachem, *The Second Canonization of the Talmud*, 28 *CARDOZO L. REV.* (2006).
- Isidore Twersky, *Shulkhan Arukh: The Enduring Code of Jewish law*
- Talya Fishman, *BECOMING THE PEOPLE OF THE TALMUD* (2011) 1-19
- Optional: Aryeh Leibowitz, *The Emergence and Development of Tosafot on the Talmud*, 15 *ḤAKIRAH* 143-159
- Optional: Chaim Saiman, *THE RABBINIC IDEA OF LAW*, Chapters 9 & 10

#### Session 15: Case Study in the Law Codes: Verbal Bribes

- Bavli: Sanhedrin 7b-8a; Ketubot 105
- Tosfot to Sanhedrin 8a
- MT, Laws of Sanhedrin, Chapter 23 § 3

- Tur. ḤM §9 & Bayit Ḥadash
- Resp. Mahari b. Lev, 3:97
- Igrot Moshe, 2 HM 2: 26:3
- Recommended: *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885 (2009).

#### Sessions 16 & 17: The *Responsa* Literature

- Resp. Binyan Tzion, § 23 (non-traditional Jew)
- Resp. Binyan Tzion, § 172 (aggadic death penalty)
- Resp. Nodeh BeYehuda YD 2:10 (hunting)
- Resp. Matteh Levi 19 (subway on Shabbat)
- Samuel Morell, *The Halakhic Status of Non-Halakhic Jews*, JUDAISM 19 no. 4 (1969).
- Adam Fertziger, EXCLUSION & HIERARCHY 97-109

#### Background Reading on *Responsa* (optional)

- Menahem Elon, JEWISH LAW Vol 3. 1454-68.
- Israel. Ta-Shma, *Responsa* in ENCYCLOPEDIA JUDAICA
- Haym Soloveitchik, Review Essay: *Responsa: Literary History and Basic Literacy*

#### Session 18. Halakhah's Empire: Yeshiva Movement & the *Brisker* School

- Thomas Grey, *Langdell's Orthodoxy* 45 U. PITT L. REV. 1-20 (1983)
- Saiman, *Legal Theology*, 21 J. OF LAW AND RELIGION, 39-42; 50-89 (2005-06)

### **Unit IV: The Idea of Halakhah in Modernity**

#### Session 19: Halakhah and the Emancipated Jew

- *The Assembly of Jewish Notables: Answers to Napoleon*
- Jay Berkovitz, *The Napoleonic Sanhedrin: Halakhic Foundations and Rabbinic Legacy*, 54 CCAR JOURNAL 11-34 (Winter 2007).
- Leora Batnisky: HOW JUDAISM BECAME A RELIGION (pp. 1-31)
- E. Quint, §369 *Dina DeMalchuta Dina* in A RESTATEMENT OF JEWISH CIVIL LAW (Vol. 9, 301-317)

#### Sessions 20 & 21: The Idea of Halakhah in the Contemporary American Context

### Case study 1: The practice of medicine on Shabbat

- Shlomo Brody, *A GUIDE TO THE COMPLEX*, 57-60 (2014)
- Mishnah AZ 2:1
- Bavli AZ 26a & Tosfot
- Shulḥan Arukh YD § 154
- Responsa Ḥatam Sofer 5:194
- Mishneh Berura OH 330:8
- Igrot Moshe OH 79
- The “Woodruff Manifesto” of 1890

### Case Study 2: American courts as a halakhic enforcement mechanism

- The Beth Din of America’s Prenuptial Agreement
- The Beth Din of America’s Arbitration Agreement
- Michael Helfand, *Arbitration’s Counter Narrative*, 124 Y.L.J. 2996-3000; 3010-3030; 3042-3050 (2015).
- Michael Brody, *MARRIAGE DIVORCE AND THE ABANDONED WIFE IN JEWISH LAW* 1-14
- *Light v. Light*, 2012 WL 6743605 (Conn. Super.)

### Sessions 22 & 23: The Idea of Halakha & Jewish Statehood

- Numbers Ch. 31
- Sifre Numbers § 157
- Maimonides, *The Law of Kings and their Wars*, 6:7
- Nachmanides, *Comments to Sefer HaMitzvot #5*
- *Meshekh Ḥokhma* to Numbers 31:7
- SA ḤM §2 & commentaries
- Deuteronomy 21: 10-15
- Bavli Kiddushin 21b
- Statements of Rabbi Karim on captive women in wartime
- Yishayahu Leibowitz, *The Crises of Religion and State in Israel in JUDAISM, HUMAN VALUES, AND THE JEWISH STATE* (Chapter 15)
- Aviezer Ravitsky *Is a Halakhic State Possible? The Paradox of Jewish Theocracy*, 11 ISRAEL AFFAIRS 137-164 (2005).
- Arye Edrei, *Divine Spirit and Physical Power: Rabbi Shlomo Goren and the Military Ethic of the Israel Defense Forces*, 7 THEORETICAL INQUIRIES IN LAW 255-260; 282-292 (2006).

### Background Readings

- Daniel Sinclair, *Jewish Law in the State of Israel*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW (1996) pp. 397-419
- Haim H. Cohen, *Jewish Law in Israel*, in THE JEWISH LAW ANNUAL: JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD (1980) pp. 124-144

Session 24: Conclusion (reserved)