



# Elana Stein Hain, *Circumventing the Law: Rabbinic Perspectives on Loopholes and Legal Integrity*

University of Pennsylvania Press, 2024, 240 pp.

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All legal systems employ or allow for “loopholes” (or “legal fictions”), that is, ways of circumventing the law while remaining true to its spirit (or “values”) if not its letter. Is it possible to fill gaps or resolve ambiguities within the law to achieve otherwise illegal outcomes? The extent of such circumventions, and how they are justified and/or curtailed, varies significantly within different types of legal systems, across time and place. At issue, whether explicitly acknowledged or not, is whether such practices strengthen the legal system by facilitating its being venerated or weaken the legal system by undercutting its veneration. Stated more boldly, do such circumventions suggest, implicitly at least, that the legal system itself is, in a manner of speaking, a “fiction?” Is the “integrity” of the law thereby buttressed or undermined?

The Jewish legal system—i.e., that of the Talmudic rabbis—has survived and developed over millennia and across continents, with limited centralization. Rabbinic law is assumed to be both divine in its ultimate authority, yet interpreted, adjudicated, and practiced by humans in their particular societies. This is the focus of *Circumventing the Law*, which is sprightly argued and clearly written, aimed at an audience of Judaic specialists, legal generalists, historians, and theorists. The Hebrew/Aramaic word for “circumvention” employed here is *ha’aramah*, which, depending on context, can have either positive or negative connotations, with suggestions, as Elana Stein Hain puts it, of Solomonic/prudent versus serpentine/cunning. Examples include the transfer of loans at the end of a seven-year cycle to avoid their termination (*prozbul*); the merging or combining of foods or courtyards to permit otherwise prohibited Sabbath or Festival activities (*eruv*); and the selling of leavened grains (*hametz*) to a non-Jew for the duration of Passover to remove them from one’s legal possession.

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Elana Stein Hain surveys the Jewish legal literature in roughly chronological order from the late Second Temple through Talmudic periods, with extensions into modern times and a concluding foray into modern legal theory. “Surveys” is a mischaracterization, as the argument is advanced by close readings of discrete rabbinic passages, for each of which a critical Hebrew and/or Aramaic text is presented in its original language, followed by a clear and accessible English translation and explanation. Text-critical insights and a balanced engagement with methodologically sensitive scholarship fill 50 pages of endnotes, supplemented by a cumulative bibliography and a subject index. Unfortunately, an index of the primary sources covered is lacking.

Following an introduction which lays out the significance of the topic and the approach to be taken, Chapter 1 presents the earliest rabbinic texts, from the Tannaitic period (Palestine, first two to three centuries C.E.), mainly the *Mishnah* and *Tosefta*. In these texts a distinction is made between using *ha'aramah* for the purpose of alleviating financial or property needs (allowed) and when it is used for material advantage (forbidden). In other words, a distinction is drawn between “avoidance” (permitted), “evasion” (prohibited), or “avoidance” (contested).

Chapter 2 proceeds to the Jerusalem (or Palestinian) Talmud (third to fifth centuries C.E.), which is shown to be more explicit in its reasoning, but more anxious regarding the negative consequences of *ha'aramah* for undercutting legal authority and integrity. This is expressed, perhaps, by a greater resort to biblical warrants. The Jerusalem Talmud is also more explicit in determining whether the value system of the law is being undermined, e.g., for purposes of financial exploitation or by fraud.

While previously adduced, Chapter 3 takes up more fully the surrounding cultural context of ancient Roman law. A similar tension as found in early rabbinic law is between the letter of the law and its intention, *scriptum* and *voluntas*. The concept of *ha'aramah* in rabbinic law is like *fraus legi*, legal fraud in Roman law. Like Roman law, rabbinic law reflects a tension between conservative and subversive tendencies.

Chapter 4 deals more directly with the relation between *ha'aramah* and intention. Does the former presume, on behalf of the law or its legal actor, an intention to subvert the law or to fulfill it in terms of the para-legal values of the larger legal system? When is *ha'aramah* a clever legal subterfuge? This is also related to the presumed dichotomy between legal realism and nominalism, with any such typology running up against rabbinic ad hoc inconsistency. Stein Hain correctly suggests that rabbinic law seeks to integrate these polarities rather than to dichotomize them.

Chapter 5 moves on to the Babylonian Talmud (*Bavli*) against the backdrop of the preceding rabbinic sources. The question of the impact of surrounding Zoroastrian or Christian (Syriac) legal cultures is raised, but not addressed as directly as is the Roman legal context of Palestinian rabbinic law. External propellants may still be there, but only among a complex combination of propellants, both external and internal. The *Bavli* evidences greater reluctance to encourage *ha'aramah* for its feared effect on the observance of the law, especially among the broader Jewish population. This is reflected (perhaps) in rarer use of the terminology of *ha'aramah*. Similarly, the author finds in the *Bavli* the criterion of intention to be less reliable and identifiable to narrow the gap between internal subjective intentions and external actions.

Chapter 6 situates the rabbinic concept and practice of *ha'aramah* within modern theories of law. The author associates *ha'aramah* with legal “loopholes” rather than legal “fictions,” although the boundary between the two is porous. She compares the rabbis to lawyers with respect to their self-understanding and their “internal” points of view regarding discrete cases and the overarching values and principles of the legal system. Furthermore, the author suggests that the distinction between formalistic and realistic approaches cannot be applied too inflexibly to rabbinic law, given its ad hoc nature. In this respect she sides with Ronald Dworkin’s (1985) constructive-subjective approach and suggests that the flexibility of rabbinic midrash *aggadah* (narrative interpretation) tempers the potential rigidity of rabbinic *midrash halakhah* (legal interpretation).

In an Epilogue, the author traces the development of rabbinic *taqqanot* (edicts) as the rabbis acquire greater legal authority to legislate laws without necessarily having recourse to biblical and logical warrants, so long as the laws were perceived as being in consonance with Torah and Jewish values.

In sum, Stein Hain demonstrates that Jewish law with respect to legal loopholes is neither static nor uniform over time. It is dynamic and dialectical, continually changing, and embroiled in internal debate with evolving challenges to legal integrity. Stein Hain’s method of presentation models well the case-by-case approach of rabbinic law itself. I would have appreciated a concluding chapter that explicitly and broadly put forth the important implications of the book’s argument for Jewish and comparative legal studies. Notwithstanding, this is an important, original, and penetrating study that warrants wide dissemination and discussion in a broad range of Jewish and legal fields.

**Funding** Not applicable.

## Declarations

**Conflict of interest** Not applicable.

## Reference

Dworkin, Ronald. 1985. *Law’s empire*. Cambridge, MA: Belnap Press.

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