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EMERGING APPLICATIONS OF JEWISH LAW IN AMERICAN LEGAL SCHOLARSHIP: AN INTRODUCTION

*Samuel J. Levine**

In recent years, the field of Jewish law has gained increasing prominence in American law schools and legal scholarship.¹ On a curricular level, a growing number of law schools offer courses examining various aspects of the Jewish legal system, often presented in a comparative context as a means of illuminating and adding depth to American legal education.² Moreover, several law schools have initiated institutes dedicated to the study of Jewish law,³ while at other schools, discussions of Jewish law serve as an important component of broader programs in law and religion.⁴

* Professor of Law, Pepperdine University School of Law, Malibu, California. I thank Marie Failing and Linda Berglin of the Journal of Law and Religion staff for publishing this symposium and, more generally, for their ongoing work producing a forum for scholarship in Jewish law, and I thank Fraida Liba, Yehudah, Aryeh, and Rachel for continued encouragement.

1. See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993). See also sources cited in Samuel J. Levine, *Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion*, 26 Fordham Urb. L.J. 1051 (1999) [hereinafter Levine, *Teaching Jewish Law: An Emerging Development*]; Samuel J. Levine, *Teaching Jewish Law in American Law Schools—Part II: An Annotated Syllabus*, 2 Chi-Kent J. Intl. & Comp. L. 1 (2002) [hereinafter Levine, *Teaching Jewish Law: An Annotated Syllabus*].

2. See Levine, *Teaching Jewish Law: An Annotated Syllabus*, *supra* n. 1, at n. 2, 4. See also Sherman L. Cohn, *Yale Rosenberg: The Scholar and the Teacher of Jewish Law*, 39 Hous. L. Rev. 872 (2002); Edward H. Rabin, *Symposium: The Evolution and Impact of Jewish Law, Foreword*, 1 U.C. Davis J. Intl. L. & Policy 56 (1995); Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 Case W. Res. J. Intl. L. 101 (1996); Alan M. Sokobin, *A Program in Comparative Jewish Law*, 33 U. Tol. L. Rev. 795 (2002).

3. These institutes include the Institute of Jewish Law at Boston University School of Law, the Institute of Jewish Law at Touro College/Jacob D. Fuchsberg Law Center, http://www.tourolaw.edu/academic_programs/institutes/jewish_law_institute.asp, and the Program in Jewish Law & Interdisciplinary Studies at The Yeshiva University Center for Jewish Law and Contemporary Civilization at Cardozo Law School, <http://www.cardozo.yu.edu/cjl/>.

4. These programs include Emory University School of Law, Center for the Study of Law and Religion, <http://www.law.emory.edu/cms/site/index.php?id=1570>; Fordham University School of Law, Institute on Religion, Law and Lawyer's Work, <http://law.fordham.edu/lawreligion.htm>; Pepperdine University School of Law, Institute on Law, Religion and Ethics, <http://law.pepperdine.edu/ilre/>.

At the same time, in the realm of scholarship, a substantial body of literature has developed considering the relevance of Jewish legal thought to a variety of issues in the American legal system.⁵ Indeed, over the last decade alone, scholars and students have published numerous articles on Jewish law in American law journals, addressing a wide range of topics. Notable subjects have included, among others, criminal law and punishment,⁶ legal ethics,⁷ health law and bioethics,⁸ torts,⁹ real property and intellectual property,¹⁰ environmental law,¹¹ jurisprudence,¹² legal interpretation,¹³ law and narrative,¹⁴ and law and economics.¹⁵ As the substance, scope, and volume of this scholarship demonstrate, an analysis of Jewish law may prove helpful in providing comparisons and contrasts to both controversial and seemingly settled areas of American law.

Building on these intellectual currents, at the 2007 Annual Meeting of the Association of American Law Schools, the Section on Jewish Law presented a program exploring emerging applications of Jewish law in American legal scholarship. The program consisted primarily of papers by newer voices in the field of Jewish law, offering innovative approaches to applying Jewish legal theory in the American legal system.¹⁶ The papers were followed by comments from leading figures in the American legal academy, who analyzed the approaches proposed while also providing more general assessments of the role of Jewish law in American law and legal scholarship.¹⁷ Finally, the program

5. See sources cited in Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 *Hastings Const. L.Q.* 441, 442-443, nn. 3-11 (1997); Levine, *Teaching Jewish Law: An Annotated Syllabus*, *supra* n. 1, *passim*; Levine, *Teaching Jewish Law: An Emerging Development*, *supra* n. 1, at 1045-1050.

6. See bibliog., "Criminal Law and Punishment," *infra* p. 46.

7. See bibliog., "Legal Ethics," *infra* p. 48.

8. See bibliog., "Health Law and Bioethics," *infra* p. 47.

9. See bibliog., "Torts," *infra* p. 50.

10. See bibliog., "Real and Intellectual Property," *infra* p. 50.

11. See bibliog., "Environmental Law," *infra* p. 46.

12. See e.g. bibliog., "Jurisprudence," *infra* p. 47.

13. See e.g. bibliog., "Legal Interpretation," *infra* p. 49.

14. See e.g. bibliog., "Law and Narrative," *infra* p. 48.

15. See e.g. bibliog., "Law and Economics," *infra* p. 48.

16. The principal papers were presented by Professors Adam S. Chodorow of Arizona State University College of Law, Charlotte K. Goldberg of Loyola of Los Angeles Law School, and Chaim Saiman, of Villanova University School of Law. Papers by Professors Chodorow and Saiman are included in the present volume.

17. Comments at the program were provided by Dean Saul Levmore of the University of Chicago Law School, and Professor Suzanne Last Stone of Yeshiva University, Benjamin N. Cardozo School of Law. In addition, although they were unable to attend the program, Professor Kent Greenawalt of Columbia University School of Law and Professor David Skeel of the University of Pennsylvania Law School have contributed comments to the present volume.

concluded with thoughtful and lively exchanges between the panelists and members of the audience.¹⁸

The articles included in this Symposium of the Journal of Law and Religion represent important developments in the field of Jewish law in the American legal academy. Adam Chodorow's article, *Biblical Tax Systems and the Argument for Progressive Taxation*, considers the relevance of Jewish law to debates in the United States regarding taxation and distributive justice. Chodorow's contribution, comprising part three of his larger project aimed at demonstrating the applicability of Jewish laws of tithing to issues of American tax law,¹⁹ offers new perspectives on an important substantive area of American law, presented through the lens of Jewish law. Complementing Chodorow's doctrinal approach, Chaim Saiman's article, *Jesus' Legal Theory—A Rabbinic Reading*, moves in a more conceptual direction. Saiman's work explores Jewish law in the context of contemporary discussions of law and religion, looking at Jewish legal theory to analyze a growing movement among American scholars discussing the relationship between Christianity and law.²⁰

Significantly, the symposium also includes comments by Kent Greenawalt, one of the most eminent American scholars of both law and religion and legal interpretation. In the process of responding to Saiman's article, Greenawalt raises important questions about the compatibility of Jewish legal thought with methods of legal interpretation in a liberal democracy. Finally, David Skeel considers the implications of Saiman's theories for scholars exploring American law through a perspective of Christian thought. Fittingly, Skeel stands as one of the central figures in this emerging field of study, and thus the lessons he derives from Saiman's work may serve as a particularly poignant illustration of the increasing and wide-ranging applications of Jewish law in American legal scholarship.

18. For a podcast of the program, see <http://www3.cali.org/aals07/mp3/AALS%202007%20Emerging%20Applications%20of%20Jewish%20Law%20in%20American%20Legal%20Scholarship%2020070104.mp3>

19. See also Adam S. Chodorow, *Maaser Kesafim and The Development of Tax Law*, 8 Fla. Tax. Rev. 153 (2007); Adam S. Chodorow, *Tithing, Taxes, and Complexity*, 62 Pitt. L. Rev. (forthcoming 2007).

20. See e.g. *Christian Perspectives on Legal Thought* (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., Yale U. Press 2001); *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law* (Robert Cochran ed., N.Y. U. Press 2007); *The Teachings of Modern Christianity On Law, Politics & Human Nature: Volume One* (John Witte Jr. & Frank S. Alexander eds., Colum. U. Press 2006).

BIBLIOGRAPHY

CRIMINAL LAW AND PUNISHMENT

Chad Baruch, 2000 McElroy Lectures: *In the Name of the Father: A Critique of Reliance Upon Jewish Law to Support Capital Punishment in the United States*, 78 U. Det. Mercy L. Rev. 41 (2002).

Clifford Fishman, *The Mirror of Justice Lecture: Old Testament Justice*, 51 Cath. U. L. Rev. 405 (2002).

Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview*, 29 St. Mary's L.J. 1037 (1998).

_____, *An Introduction to Self-Incrimination in Jewish Law, With Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 Loy. L.A. Intl. & Comp. L. Rev. 257 (2006).

_____, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. Rev. 277 (2001).

Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 Cardozo L. Rev. 715 (2006).

Irene M. Rosenberg & Yale L. Rosenberg, *"Cain Rose Up Against His Brother Abel and Killed Him": Murder or Manslaughter?*, 30 Ga. J. Intl. & Comp. L. 37 (2001).

Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 Tul. L. Rev. 1169 (2004).

Irene Merker Rosenberg et al., *Murder by Gruma: Causation in Homicide Cases Under Jewish Law*, 80 B.U. L. Rev. 1017 (2000).

_____, *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 Brandeis L.J. 511 (1998-99).

ENVIRONMENTAL LAW

Michael Lewyn, *Suburban Sprawl, Jewish Law, and Jewish Values*, 13 S.E. Env'tl. L.J. 1 (2004).

David Nir, Note, *A Critical Examination of the Jewish Environmental Law of Bal Tashchit "Do Not Destroy,"* 18 Geo. Intl. Env'tl. L. Rev. 335 (2006).

HEALTH LAW AND BIOETHICS

Michael Broyde, *Cloning People: A Jewish Analysis of the Issues*, 30 Conn. L. Rev. 503 (1998).

_____, *Genetically Engineering People: A Jewish Law Analysis of Personhood*, 13 St. Thomas L. Rev. 877 (2001).

Elliot N. Dorff, *Human Cloning: A Jewish Perspective*, 8 S. Cal. Interdisciplinary L.J. 117 (1998).

Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. Tol. L. Rev. 409 (1998).

Steven H. Resnicoff, *Jewish Law Perspectives on Suicide and Physician-Assisted Dying*, 13 J.L. & Religion 289 (1998-99).

_____, *Supplying Human Body Parts: A Jewish Perspective*, 55 DePaul L. Rev. 851 (2006).

Daniel Sinclair, *The Obligation to Heal and Patient Autonomy in Jewish Law*, 13 J.L. & Religion 351 (1998-99).

Daniel B. Sinclair, *Assisted Reproduction In Jewish Law*, 30 Fordham Urb. L.J. 71 (2002).

Alan Mayer Sokobin, *Shaken Baby Syndrome: a Comparative Study: Anglo-American Law and Jewish Law—Legal, Moral and Ethical Issues*, 29 U. Tol. L. Rev. 513 (1998).

Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law*, 9 J. Gender Race & Just. 109 (2005).

JURISPRUDENCE

Yitzchok Adlerstein, *Lawyers, Faith, and Peacemaking: Jewish Perspectives on Peace*, 7 Pepp. Dispute Res. L.J. 177 (2007).

J. David Bleich, *Was Spinoza a Jewish Philosopher?*, 25 Cardozo L. Rev. 571 (2003).

Michael J. Broyde, *A Jewish Law View of the World*, 54 Emory L.J. 79 (2005).

Robert A. Baruch Bush, *Mediation and ADR: Insights from the Jewish Tradition*, 28 Fordham Urb. L.J. 1007 (2001).

David C. Flatto, *The Historical Origins of Judicial Independence and Their Modern Resonances*, 117 Yale L.J. Pocket Part 9 (2007).

Donna Litman, *Jewish Law: Deciphering the Code by Global Process and Analogy*, 82 U. Det. Mercy L. Rev. 563 (2005).

Timothy D. Lytton, *"Shall Not the Judge of the Earth Deal Justly?": Accountability, Compassion, and Judicial Authority in the Biblical Story of Sodom and Gomorrah*, 18 J.L. & Religion 31 (2002).

Chaim Saiman, *Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law*, 21 J.L. & Religion 39 (2005-06).

LAW AND ECONOMICS

Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education*, 30 J. Leg. Stud. 253 (2001).

Samuel J. Levine, *Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements*, 8 San Diego Intl. L.J. 95 (2006).

Keith Sharfman, *The Law and Economics of Hoarding*, 19 Loy. Consumer L. Rev. 179 (2007).

Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 Fla. St. U. L. Rev. 509 (2004).

LAW AND NARRATIVE

George Dargo, *Deriving Law from the Biblical Narrative: The Book of Ruth*, 40 New Eng. L. Rev. 351 (2006).

Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 Utah L. Rev. 465.

Jennifer Nadler, *Mar Ukba in the Fiery Furnace*, 19 L. & Lit. 1 (2007).

Symposium, *Rethinking Robert Cover's Nomos and Narrative*, 17 Yale J.L. & Humanities 1 (2005).

LEGAL ETHICS

Michael J. Broyde, *Practicing Criminal Law: A Jewish Analysis of Being a Prosecutor or Defense Attorney*, 66 Fordham L. Rev. 1141 (1998).

Israel Greisman, Note, *The Jewish Criminal Lawyer's Dilemma*, 29 Fordham Urb. L.J. 2419 (2002).

Samuel J. Levine, *A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics, and Tradition: A Conceptual Overview*, 20 Notre Dame J.L. Ethics & Pub. Policy 11 (2006).

_____, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 Fordham L. Rev. 1339 (2003).

_____, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative*

Hermeneutic Framework, 77 *Tulane L. Rev.* 527 (2003).

_____, *The Yale L. Rosenberg Memorial Lecture: Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 *Hous. L. Rev.* 1337 (2004).

Russell G. Pearce, *Reflections on the American Jewish Lawyer*, 17 *J.L. & Religion* 179 (2002).

Russell G. Pearce & Amelia G. Uelmen, *William A. Brahm's Lecture on Law and Religion: Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 *Case W. Res. L. Rev.* 127 (2004).

Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 *Temp. Pol. & Civ. Rights L. Rev.* 143 (2004).

Nancy B. Rapoport, *Living "Top-Down" in a "Bottom-Up" World: Musings on the Relationship Between Jewish Ethics and Legal Ethics*, 78 *Neb. L. Rev.* 18 (1999).

Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics: A Preliminary Essay*, 15 *Touro L. Rev.* 73 (1998).

_____, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 *Notre Dame J. L. Ethics & Pub. Policy* 349 (2000).

_____, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 *Notre Dame L. Rev.* 937 (2002).

Daniel B. Sinclair, *Advocacy and Compassion in The Jewish Tradition*, 31 *Fordham Urb. L.J.* 99 (2003).

Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 *Mercer L. Rev.* 443 (1999).

LEGAL INTERPRETATION

Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 *Yale L.J.* 121 (2000).

Samuel J. Levine, *An Introduction to Legislation in Jewish Law, With References to the American Legal System*, 29 *Seton Hall L. Rev.* 916 (1999).

Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 *Const. Commentary* 511 (1998).

Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, *Utah L. Rev.* 505 (1998).

Note, *Looking To Statutory Intertext: Toward the Use of the Rabbinic Biblical Interpretive Stance In American Statutory Interpretation*, 115 Harv. L. Rev. 1456 (2002).

Symposium, *Text, Tradition, and Reason in Comparative Perspective*, 28 Cardozo L. Rev. 1 (2006).

REAL AND INTELLECTUAL PROPERTY

Jack Achiezer Guggenheim, *KOA is A.O.K.: The Second Circuit's Recent Kosher Trademark Decision Further Illustrates That the Patent and Trademark Office Must Answer to a Higher Authority*, 22 Colum. J.L. & Arts 203 (1998).

Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension Of the Artistic Soul*, 81 Notre Dame L. Rev. 1945 (2006).

Joshua A. Klarfeld, Note, *Chazakah: Judaic Law's Non-Adverse Possession*, 52 Clev. St. L. Rev. 623 (2004-05).

David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 S. Cal. L. Rev. 219 (1998).

Ora R. Sheinson, Note, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 Colum. J. Envtl. L. 483 (2001).

TORTS

Steven F. Friedell, *Medical Malpractice in Jewish Law: Some Parallels to External Norms and Practices*, 6 Chi.-Kent J. Intl. & Comp. L. 1 (2006).

_____, *Nobody's Perfect: Proximate Cause in American and Jewish Law*, 25 Hastings Intl. & Comp. L. Rev. 111 (2002).

Elie Mischel, Note, *"Thou Shalt Not Go About as a Talebearer Among Thy People": Jewish Law and the Private Facts Tort*, 24 Cardozo Arts & Ent. L.J. 811 (2006).

Sheldon Nahmod, *The Duty to Rescue and the Exodus Meta-narrative of Jewish Law*, 16 Ariz. J. Intl. & Comp. L. 751 (1999).

Shaya Rochester, Note, *What Would Have Seinfeld Done Had he Lived in a Jewish State? Comparing the Halakhic and Statutory Duties to Aid*, 70 Wash. U. L.Q. 1185 (2001).